

THE HIGH COURT OF MADHYA PRADESH

W.P. No.20821/2018

Smt. Rekha Singhal Agrawal Vs. State of M.P. and another

Gwalior, Dated :31/01/2019

Shri Prashant Sharma, Advocate for petitioner.

Shri Harish Dixit, Government Advocate for State.

This petition under Article 226 of the Constitution of India has been filed challenging the note-sheet dated 28/5/2018, thereby rejecting the claim of petitioner for reconsideration of her case for promotion from the post of Deputy Director to the post of Joint Director on the ground that although the adverse confidential remarks have been upgraded, but up-gradation of adverse confidential remarks will have the prospective effect and, therefore, all the departmental actions taken prior to that will not be affected.

The necessary facts for disposal of the present petition in short are that the petitioner was working on the post of Deputy Director. A DPC was convened for promotion to the post of Joint Director on 26/12/2014 and the petitioner was within the zone of consideration. The candidature of the candidates was considered on the basis of merit-cum-seniority basis and the ACRs of preceding five years were considered. Because of downgraded ACRs of the petitioner, the petitioner was found not fit for promotion. Later on, considering the representation made by the petitioner, the ACRs of 2011, 2012 and 2013 were upgraded by order dated 9/10/2017. Accordingly, the petitioner prayed for reconsideration of her case for promotion, as the

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adverse confidential remarks, on the basis of which she was denied promotion, have been upgraded and, therefore, it was submitted that for all practical purposes, the upgraded remarks should be treated to be in existence from very inception. However, the representation made by the petitioner was rejected on the ground that as per the circular dated 10/11/2015, up-gradation of the ACRs would be effective prospectively and not retrospectively.

Per contra, it is submitted by the counsel for the State that the GAD has issued circular dated 10/11/2015, which provides that in case of up-gradation of adverse confidential remarks, the same would have prospective effect and the previous departmental actions would not be affected.

Heard learned counsel for the parties.

The Supreme Court in the case of **Dev Dutt Vs. Union of India and Others** reported in **(2008) 8 SCC 725** has held as under:-

“34. Originally there were said to be only two principles of natural justice: (1) the rule against bias and (2) the right to be heard (*audi alteram partem*). However, subsequently, as noted in *A.K. Kraipak case* and *K.I. Shephard case*, some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide *S.N. Mukherjee v. Union of India*. In *Maneka Gandhi v. Union of India* (vide paras 56 to 61) it

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was held that natural justice is part of Article 14 of the Constitution.

35. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the court to develop new principles of natural justice in appropriate cases.

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation

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must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in *Union of India v. Major Bahadur Singh*. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to government servants).

39. In *Canara Bank v. V.K. Awasthy* this Court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in para 8 of the said judgment: (SCC p. 329)

“8. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values.”

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In para 12 of the said judgment it was observed: (SCC p. 330)

“12. What is meant by the term ‘principles of natural justice’ is not easy to determine. Lord Summer (then Hamilton, L.J.) in *R. v. Loc. Govt. Board* described the phrase as sadly lacking in precision. In *General Medical Council v. Spackman*, Lord Wright observed that it was not desirable to attempt ‘to force it into any Procrustean bed’.”

40. In *State of Maharashtra v. Public Concern for Governance Trust* it was observed (vide para 39): (SCC p. 606)

“39. ... In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play.”

41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.

42. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned

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Division Bench erred in law. Hence, we set aside the judgment of the learned Single Judge as well as the impugned judgment of the learned Division Bench.

43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the “good” entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the “good” entry of 1993-1994 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

44. We, therefore, direct that the “good” entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum

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till the date of payment.”

The Supreme Court in the case of **Sukhdev Singh vs. Union of India and others** reported in **(2013) 9 SCC 566** has held as under:-

“6. We are in complete agreement with the view in *Dev Dutt* particularly paras 17, 18, 22, 37 and 41 as quoted above. We approve the same.

7. A three-Judge Bench of this Court in *Abhijit Ghosh Dastidar v. Union of India* followed *Dev Dutt*. In para 8 of the Report this Court with reference to the case under consideration held as under: (*Abhijit Ghosh Dastidar case*, SCC p. 148)

“8. Coming to the second aspect, that though the benchmark ‘very good’ is required for being considered for promotion, admittedly the entry of ‘good’ was not communicated to the appellant. The entry of ‘good’ should have been communicated to him as he was having ‘very good’ in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been

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reiterated in the abovereferred decision (*Dev Dutt case*, SCC p. 738, para 41) relied on by the appellant. Therefore, the entries ‘good’ if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.”

8. In our opinion, the view taken in *Dev Dutt* that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR—poor, fair, average, good or very good—must be communicated to him/her within a reasonable period.

9. The decisions of this Court in *Satya Narain Shukla*

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v. Union of India and K.M. Mishra v. Central Bank of India and the other decisions of this Court taking a contrary view are declared to be not laying down good law.

10. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing more is required to be done. The civil appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the authorities concerned for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the authorities concerned appropriately in accordance with law.”

Once the adverse confidential remarks of an employee are upgraded, then it has to be presumed that the earlier remarks were wiped out from very inception. Under these circumstances, the principle of prospective application cannot be applied for the simple reason that the confidential remarks are recorded by the superior officer of an employee and the employee cannot be made to suffer for a remark which was subsequently wiped out and was upgraded. Under these circumstances, this Court is of the considered opinion that the claim of the petitioner for reconsideration of her case for promotion has been wrongly turned down.

Accordingly, the recommendation dated 28/5/2018 is hereby

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quashed. The respondents are directed to convene a review DPC for consideration of entitlement of the petitioner for promotion.

The petition succeeds and is hereby **allowed**.

Arun*

(G.S. Ahluwalia)
Judge