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**HIGH COURT OF CHHATTISGARH, BILASPUR****WP (S) No. 6761 of 2016**

Smt. Swati Chandrakar, W/o Shri Rakesh Chandrakar, A/o 29 years, R/o C/o Naresh Chandrakar, Near Sushil Niwas, Clubpara, Ward No.26, Mahasamund, Dist Mahasamund (CG)

**---- Petitioner****Versus**

- 1.** State of Chhattisgarh, Through-Department of Rural Development, Mahanadi Bhawan, Naya Raipur, Dist. Raipur (CG)
- 2.** Chief Executive Officer, District Panchayat Mahasamund, Distt. Mahasamund (CG)
- 3.** Collector, Mahasamund C.G.
- 4.** Chief Executive Officer, Janpad Panchayat, Bagbehar, Dist- Mahasamund (CG)

**---- Respondents**


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| For Petitioner   | : | Mr.Sourabh Dangi, Advocate |
| For Res.No.1 & 3 | : | Mr.Ashish Surana, P.L.     |
| For Res.No.1 & 4 | : | None present though served |

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**Hon'ble Shri Justice Sanjay K. Agrawal****Order on Board****10/02/2017**

1. The petitioner was appointed by the Zila Panchayat on 27.8.2010 on the post of Program Officer on contract basis under the Mahatma Gandhi Rashtriya Gramin Rojgar Guarantee Scheme (MNEREGA) for a period of one year and condition of order of appointment clearly states that she will be entitled for re-appointment on the basis of her Annual Confidential Report (ACR). Thereafter, she continued in

service on the basis of her ACR till 8.11.2016, however, her services have not been renewed by order dated 8.11.2016 (Annexure P/1) on the ground that she has not secured 'Good' grading in her ACR. Legality, validity and correctness of the order dated 8.11.2016 has been questioned in this writ petition on the ground that for the year 2015-16 her case was recommended by her Reporting Officer to the Chief Executive Officer, Janpad Panchayat, Mahasamund, but she was down graded by the Reviewing Authority, duly accepted by the Accepting Authority, which has not been communicated to her and thereby uncommunicated adverse remark has been accepted and her services have not been renewed by the Appointing Officer. It has been further pleaded that Rule 15 (3) of the Chhattisgarh civil Service (Contract Appointment) Rules, 2012 (hereinafter called as "Rules of 2012") clearly provides that appointment will be extended subject to grading assessment 'Excellent' or 'Very Good'. That amendment has come in force w.e.f. 31.3.2015. It is the case of the petitioner that she has been given adverse remark in her ACR, which has not been communicated to her and that uncommunicated adverse remark has been acted upon to deny the extension of contractual appointment to her, which is unsustainable and bad in law.

2. Return has been filed on behalf of respondents No.1 and 3,

in which it has clearly been stated that the petitioner was appointed on contract basis and appointment has been made for the specific period, therefore, she cannot claim to be posted for the said post for an indefinite period, therefore, the writ petition deserves to be dismissed.

3. No return has been filed on behalf of respondent No.2 and 4 though served through registered post.
4. Mr.Sourabh Dangi, learned counsel appearing for the petitioner, would submit that the writ petition under Article 226 of the Constitution of India is maintainable challenging the impugned order denying to extend her services though she was appointed on contract/temporary basis and adverse remark grading 'Average' to the petitioner has been acted upon without communicating that adverse remark to the petitioner, therefore, on that basis, order Annexure P/1 has been passed, which is unsustainable and bad in law and deserves to be quashed.
5. Mr.Ashish Surana, learned Panel Lawyer appearing for respondents No.1 and 3, would support the impugned order.
6. I have heard learned counsel appearing for the parties, considered their rival submissions made herein and also gone through the documents appended with the petition with utmost circumspection.
7. The first question would be whether the writ petition is

maintainable challenging the impugned order by which the petitioner's contractual service has not been extended as she was appointed on contract basis.

8. The question raised is no longer res-integra. The Supreme Court in the matter of **Gridco Limited and another Vs. Sadananda Doloi and Another**<sup>1</sup>, wherein the services of the respondent was terminated during the tenure of contract, the Supreme Court framed two issues, wherein one of the issue was whether the termination order passed for employees engaged on contractual basis is amenable to judicial review ? The Supreme Court replying in affirmative held as under:-

“25. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. Judicial review and resultant interference is permissible where the action of the authority is mala fide, arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses.

38. A conspectus of the pronouncements of this

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<sup>1</sup> (2011) 15 SCC 16

court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review.

39. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge."

9. Thus, in view of the principle of law laid down by the Supreme Court in above-stated judgment, the order passed by respondent No.2 refusing to extend the services of contractual employee is amenable to judicial review and the writ petition is held to be maintainable.
10. The next question would be whether respondent No.2 is

justified in acting upon uncommunicated adverse remark to the petitioner for the year 2015-2016 as the said remark is the sole basis for denying extension of services to the petitioner.

11. It is not in dispute that the the petitioner was appointed by order dated 27.8.2010 on contract basis, in which it has clearly been mentioned that she will be entitled for re-appointment on contract basis on the basis of her Annual Confidential Report and on the basis of ACR, her services were extended time to time till 8.11.2016. Her services were extended for a period of one year up to 28.2.2016 and therefore, respondent No.4 by its memo dated 17.8.2016 also recommended to respondent No.2 for extension of her services for further period of one year holding her work to be 'Very Good'. In the meanwhile, Rules 2012 was amended on 31.3.2015, in which it has been held as under:-

“For sub-rule (3) of rule 15, the following shall be substituted, namely:-

(3) Confidential Report/P.A.R. (Performance Appraisal Report) of the person, appointed on contract basis, shall be recorded and for extending the period of contractual service, it is mandatory that his/her's Confidential Report/P.A.R. (Performance Appraisal Report) is assessed as Excellent or Very Good, in case he/she is to be considered for further appointment on contract basis.”

12. In accordance with the Rules of 2012 as amended on 31.3.2015, the petitioner's ACR was recorded for the year

2015-2016 by respondent No.4 to be 'Very Good'. Reviewing Authority/respondent No.2 did not accept with the said grading and down graded her to be 'Average', which was accepted by Accepting Authority/respondent No.3. Thus, the grade 'Average' given to the petitioner is adverse remark for the said year, which ought to have been communicated to her before acting upon the said remark for the purpose of considering her extension of service on the post, but that was not communicated and said grading has been considered for extension of service and she has been denied extension on the basis of grading 'Average'.

13. The question for consideration would be whether uncommunicated adverse remark in ACR can be acted upon to deny extension of service of the petitioner.
14. The law on this point is no longer indispute and well settled by Their Lordships of the Supreme Court in the matter of **Dev Dutt Vs. Union of India and others**<sup>2</sup> and Their Lordships have clearly held that every entry in ACR (whether poor, fair, average, good or very good) must be communicated to him/her within a reasonable period. It was observed as under:-

“17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in

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2(2008) 8 SCC 725

two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India*<sup>3</sup> that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

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 concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the

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<sup>3</sup>(1996) 2 SCC 363

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.

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.”

15. The correctness of proposition of law laid down by the Supreme Court in the matter of **Dev Dutt** (supra) was doubted and ultimately, the matter was referred to the larger Bench and three-Judge Bench of the Supreme Court in the matter of **Sukhdev Singh Vs. Union of India and others**<sup>4</sup> have held that the view taken in the matter of **Dev Dutt** (supra) is correct. It was observed as under:-

“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

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4(2013) 9 SCC 566

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."

16. The judgment of **Sukhdev Singh** (supra) was followed by the Supreme Court recently in the matter of **Prabhu Dayal Khandelwal Vs. Chairman, Union Public Service Commission and others**<sup>5</sup>.
17. In the matter of **Gurdial Singh Fijji Vs. State of Punjab**<sup>6</sup>, Their Lordships of the Supreme Court have held that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified.
18. In the light of law laid down by the Supreme Court in the matters of **Dev Dutta (supra)**, **Sukhdev Singh (supra)** and **Prabhu Dayal Khandelwal (supra)**, if the facts of the

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5(2015) 14 SCC 427

6(1979) 2 SCC 368

present case are examined, it is quite vivid that adverse remark grading the petitioner as 'Average' ought to have been communicated to her and liberty to make representation ought to have been given to her, which has not been done and it has been acted upon in denying the extension of service.

19. In the matter of **Gurdial Singh Fijji** (supra), the Supreme Court has clearly held that uncommunicated adverse report in the confidential report cannot be acted upon to deny promotional opportunities. Admittedly, the petitioner has not been communicated adverse remark and it has been acted upon and she has been denied extension on the ground of her adverse remark.
20. Consequently, the order impugned dated 8.11.2016 (Annexure P/1) passed by respondent No.2 denying her extension of service is hereby quashed. Respondent No.2 is directed to communicate adverse remark to the petitioner within a period of 15 days from the date of receipt of copy of this order and thereafter, the petitioner will be entitled to make representation to the State Government. The State Government will consider the representation and decide the same fairly and objectively as held by the Supreme Court in the matter of **Dev Dutt** (supra) and if her grading is upgraded, her case for renewal of extension for

appointment on the post of Program Officer shall be considered in accordance with law expeditiously.

21. The writ petition is allowed to the extent indicated hereinabove. No order as to cost(s).

Sd/-

(Sanjay K.Agrawal)  
Judge

B/-