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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA 632/2017**

ANAND KUMAR

..... Appellant

Through: Mr. Deo Prakash Sharma with
Mr. Manoj Yadav, Advocates.

versus

**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA &
ANR**

..... Respondents

Through: Mr. Rakesh Agarwal, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

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11.02.2019

SANJEEV NARULA, J.:

1. The present appeal under Clause 10 of the Letters Patent Appeal is directed against the judgment dated 10th August 2017 passed in W.P.(C) 8650/2015 whereby the learned Single Judge has dismissed the writ petition of the Appellant. In effect, Appellant's plea for appointment as Executive Officer has been rejected.

2. The brief facts relevant for disposing of the present appeal are that pursuant to an advertisement issued by Respondents in the month September/October 2007, the Appellant applied for the vacancy in the post of "Management Trainee" in the category of Scheduled Caste (SC). He

successfully cleared the written test as well as the interview and consequently a letter of engagement was issued to him by the Respondents on 7th March 2008. The appointment letter, predicated the training period as one year from the date of joining. It also provided that in case during the training period, the Appellant's performance was not found satisfactory, the training period could be extended by a period not exceeding one year. On successful completion of initial or the extended training period, the Appellant was eligible for being considered for the position of "Executive Officer" in the pay scale of. Rs. 8500-275-13725. This was however subject to conduct and performance review. The relevant clauses of the letter of appointment read as under:

"2. Your training period shall be one year from the date of joining.

3. In case, your performance during training period is not found satisfactory, the training period can be extended by a period not exceeding one year.

4. During the first six months of training period you shall be paid a consolidated amount of Rs.20000/- per month. At the conclusion of initial six months, a preliminary performance appraisal would be made and if your conduct and performance are found to be satisfactory, you would be paid an additional amount of Rs.2,500/- per month for the remaining six months making a total of Rs.22,500/- per month. Apart from the above, you are not entitled to any other perks/allowances either in cash or kind, unless specifically permitted.

.....

9. Upon completion of one year or the period extended as aforesaid, if your performance and conduct are found to be satisfactory, you will be considered for the position of Executive

Officer in the pay scale of Rs.8500-275-13725 with total monthly emoluments of about Rs.27,000/- including allowances presently offered by the Institute. In the absence of any communication in this regard on or before the date of expiry of the said training period, it shall be presumed that your engagements stands terminated automatically (on the expiry of one year from the date of joining or any extended period).”

3. Pursuant to the afore-noted letter of engagement, the Appellant joined the office of the Respondents on 4th April 2008 and continued to work as a “Management Trainee”. Appellant’s performance was reviewed by the Selection Committee on 3rd August 2010 and after evaluating all the relevant factors, the Committee decided to offer him the post of “Assistant (Grade-I)” in pay scale of Rs. 5500-175-9000/-. The Appellant was not satisfied with the offer and did not accept the same and continued to work as a Management Trainee. Later in the year 2014, he filed the W.P.(C) 5670/2014 before this Court seeking directions for appointment as Executive Officer in terms of the offer of engagement dated 7th March 2008. The said writ petition was disposed of with a direction to the Respondents to treat the writ petition as a representation by the Appellant and to pass a speaking order after hearing him.

4. In terms of the aforesaid order, the Appellant was again called for an interaction before two Council Members of the Respondents, on 12th March 2015. Thereafter, on due consideration of his performance during personal interaction, performance reports available on record, the Council Members, submitted their report concluding that Appellant was not fit for the post of Executive Officer. The Executive Committee (one of the Standing

Committees of Respondent No. 1) considered the report at its meeting held on 16th March 2015 and agreed with the views of the Council Members and held that Appellant was not fit for the post of Executive Officer and should instead be offered the post of Assistant (Grade-I) w.e.f. 19th August 2010 together with all the benefits applicable to the said post. The said decision was communicated to the Appellant vide letter dated 20th March 2015. Subsequently, Respondents vide letter dated 19th June 2015 forewarned the Appellant to give his acceptance to the offer of appointment for the post of Assistant (Grade-I) within seven days, failing which they would be at liberty to take appropriate action in the matter including withdrawal of offer. The Appellant instead of conveying his acceptance filed W.P.(C) 8650/2015 seeking the following reliefs:

- “i) Issue an appropriate direction/order of writ of mandamus to the respondents for keeping one post of Executive Officer, vacant till the disposal of the present petition and
- ii) Issue an appropriate direction/order of writ of mandamus or certiorari to the respondents to quash the letters dated 19th June 2015, 20th March 2015 and earlier mails / letters whereby the Respondents has asked acceptance of the Petitioner for the post of Assistant(Gr. I) and
- iii) Issue an appropriate direction/order of Mandamus to Respondents to appoint the Petitioner as Executive officer as per the Offer of Engagement dated 07.03.2008 with all the consequential benefits inclusive of all payments and seniority and
- iv) Issue an directions/orders of imposing exemplary penalty and compensation to the Petitioner as this Hon'ble Court deems fit in the facts and circumstances of the case.

v) Writ Petition filed by the petitioner may kindly be allowed with costs, and

vi) Any other appropriate writ, order or directions which this Hon'ble Court may deem fit just and proper in the facts and circumstances of the case may be kindly be passed favour of the petitioners.”

5. The writ petition has been dismissed by learned Single Judge.

Submissions

6. The Court has heard learned counsel for the parties at length. Learned counsel for the Appellant has argued that the learned Single Judge overlooked the appraisal report of 2009 wherein it was categorically stated that Appellant is fit for absorption. He further emphasized that the appraisal report of 2010 was also in his favour as it also mentioned that The Appellant may be considered for the post of Executive Officer. He also argued that the learned Single Judge wrongly observed that there was no bias and discrimination against the Appellant, ignoring specific allegations qua discrimination made in the pleadings and submissions during arguments. He further urged that performance of the Appellant was satisfactory and Respondents ought to have offered him the post of Executive Officer. In this regard, he also relied upon a circular issued by the Respondent dated 11th May 2007. Besides, learned counsel also made submissions with respect to the law regarding “deemed confirmation” and relied upon the judgments in the case of *Jai Prakash v. School Management of ITL Public School*. 222 (2015) DLT 157 and *Rajinder Singh Chauhan v. State of Haryana* 2005 (85) DRJ 139. He urged that in view of the aforesaid

judgments, the learned Single Judge has erred in disregarding his plea of deemed confirmation. He submitted that the engagement terms provide that probation cannot be extended beyond a fixed period and therefore Appellant ought to be considered as a case of deemed confirmation. Lastly, he urged that this Court while deciding W.P.(C) 5670/2014, had only directed the Respondents to pass a speaking order and it was not permissible for them to hold a fresh round of interaction/interview.

7. Per contra, learned counsel for the Respondents argued that the plea of deemed confirmation was not applicable to the Appellant's terms of appointment. In accordance with the terms and conditions of the appointment letter, the Appellant was duly considered for the post of Executive Officer, but not found suitable. He submitted that the report of 2009, does not create any vested right in favour of the Appellant for claiming a confirmation to the post of Executive Officer. He also argued that Appellant did not accept the position offered to him in August 2010 and thereafter he continued to work as a Management Trainee without any reservation.

8. He also stated that the Respondents are still willing to appoint the Appellant on the post of Assistant (Grade-I) and that he would be considered for the post of Section Officer, subject to review of his performance, after a period of six months from the date he joins as Assistant (Grade-I). This offer was however not acceptable to the Appellant.

Findings

9. We have given our thoughtful consideration to the submissions made by learned counsels for the parties. Clause 3 of the offer of engagement, contents whereof have been reproduced hereinabove, provides for extension of the training period. In terms of Clause 9 of the said letter, the trainee is entitled for consideration for the position of “Executive Officer”. This consideration is subject to review of performance and conduct of the trainee. It evidently means that upon completion of the training period of one year or the extended term of training, the trainee does not have an automatic right for being appointed on the post of Executive Officer. In the present case, on completion of the extended period of training, the Appellant submitted his appraisal form and was called for a personal interaction with the Council Members. On evaluation of his performance, his candidature was not found adequate and appropriate for the post of Executive Officer, he was informed that the Respondents were willing to offer him the post of Assistant (Grade-I) pay scale (Rs. 5500-175-9000/-). This fact is not disputed by the Appellant. The Appellant declined the offer and continued to work as Management Trainee without demur, till 23rd August 2014, when he approached this Court by way of W.P.(C) bearing No. 5670/2014 impugning the action of the Respondents in not giving him the post of an Executive Officer. Thus, it manifestly emerges that for four years, the Appellant continued as a Management Trainee, without any cavil. In fact the Appellant was prompted to file the petition only when the Respondents reminded him that they have not received any consent from the Appellant conveying his acceptance to the post of Assistant (Grade-I).

10. Be that as it may, it is a matter of record that the writ petition bearing No. 5670/2014, was disposed of with the direction to the Respondents to pass a speaking order on his representation. In order to effectively comply with the directions of the court, another interaction was conducted by the Respondents. We find nothing wrong with the decision of the Respondents to conduct a fresh interaction, even if the same was not specifically directed by this Court. The Respondents had already made it palpably evident to the Appellant that they were not willing to confirm him on the post of Executive Officer. Thus, in order to comply with the directions of the court, and to give a meaningful and purposeful decision on the representation it was necessary and proper for the Respondents, to have another interaction with the Appellant. In this interaction/interview, his performance was assessed and the most recent confidential report (appraisal report) was examined and he was not found up to the mark. It was thus concluded that he was not fit for the post of Executive Officer. This was conveyed to the Appellant on 20th March 2015. Thus, essentially the reason for not offering the post of Executive Officer is the shortcoming on account of suitability. On the question of suitability, the law is well settled. Whether a candidate is fit for a particular post or not, has to be decided by duly constituted Selection Committees that have the expertise on the subject. The decision of Selection Committees can be interfered only on limited grounds, either when there is illegality or patent material irregularity in the constitution of the Committee or in the procedure vitiating the selection or where it can be proved that the decision of the Selection Committee was mala fide. The Appellant has not raised any objection to the constitution of the Committee. Although, he has made allegations of mala fide, however such allegations in our considered

opinion remain merely as allegations, without any supporting material. On the plea of mala fide, the law is equally well settled that the Courts do not uphold such a contention, merely on the basis of probability. The charge/allegation of mala fide has to be established by a positive evidence and cannot succeed on the mere *ipse dixit* or an inference. The Supreme Court in several judgments has held that the burden of proving mala fide is very heavy on the person who alleges the same and though allegations of mala fides are made easily, however the gravity of such allegation demands credible evidence. Mere suspicion cannot substitute evidence. In the present case, we do find any material on record which can even remotely suggest that the decision of the Council of Members was mala fide.

11. The contention of the Appellant that the terms of engagement indicate deemed confirmation after the expiry of extended training period is also untenable. In the facts of the present case, the Appellant cannot urge his plea of deemed confirmation, solely for the reason that after the expiry of extended training period, he was offered the post of Assistant (Grade-I). The Appellant elected not to accept such an offer and therefore it is not a case that the Respondents continued his training period or to say the probation period without confirming him. Having chosen not to accept the offer, the plea of deemed confirmation is not applicable. The Appellant has relied upon the decision of this Court in ***Jai Prakash*** (supra) and ***Rajinder Singh Chauhan*** (supra) on this issue. However, in our view the said do not advance his submission. It is noteworthy that the case of ***Rajinder Singh Chauhan*** (supra) relied on by the Appellant can be distinguished on the basis of facts in the said case. Pertinently, ***Rajinder Singh Chauhan*** (supra),

the service rules which governed the Petitioner's employment, specifically stipulated that incase the conduct of probationer is found satisfactory, he shall be confirmed from the date of completion of the probation period. In the present case, there is no such stipulation. On the contrary, Clause 9 of the letter of engagement clearly provides that consideration of the Appellant will be subject to the condition that the Appellant's performance and conduct is found satisfactory. The letter of engagement herein does not provide automatic confirmation on completion of the probation period. Merely because the Appellant, has worked as Management Trainee and that too on account of his own volition, he cannot claim confirmation on the post of Executive Officer by implication. We have also not been shown any provision in the rules or regulations, in support of Appellant's contention. Though, the Appellant has relied upon a circular dated 11th May 2007, however the same also does not assist him. The circular stipulates as under:

“(C) At the entry level, for Management Trainees (MTs) and EO/TO/Edn.O., the following will be adopted during the period of engagement/probation:-

(i) For MTs

- The compensation at the time of joining and upto 6 months would be a minimum of Rs. 20,000/- (all inclusive).
- On completion of 6 months and upto 1 year, the compensation would be Rs. 22,500/- (all inclusive).
- **While the level of performance will be reviewed periodically and a special review will be made finally on completion of the period of 6 months, a comprehensive review would be undertaken at the end of the year and, thereafter, if the candidate is found**

suitable, he/she be absorbed as EO/TO/Edn.O. in the applicable pay scale, as aforesaid.”

12. The other judgment relied upon by the Appellant is that of ***Jai Prakash*** (supra) which has relied upon the judgment of ***Rajinder Singh Chauhan*** (supra). We have carefully perused the judgment and have noted that the facts of the said decision are not applicable in the present case. In the aforementioned case, the issue before this Court, was whether termination of services of the Petitioner on completion of the extended period of probation was justified or not? It is noteworthy that in the present case, the Appellant's services were not terminated rather he was offered to join as an Assistant (Grade-I) on completion of his probation period as per his qualifications. The law on the point of “deemed confirmation” is no longer *res integra*. Where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period, or there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. At the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer. It is significant to note that after interviewing the Appellant, he was offered to join as an Assistant (Grade-I) on completion of his probation period and his services were not terminated. In 2010

Respondents declined to confirm the Appellant on the post of an Executive Officer and yet the Appellant chose to continue as a Management Trainee. In subsequent communications in 2011 as well as in 2013, Respondents stand has been clear and unequivocal that they are not willing to offer the post of Executive Officer to the Appellant. Therefore mere continuance cannot be the ground of confirmation.

13. The learned Single Judge has also *inter alia* held that on completion of the training, the Appellant was only entitled for consideration for the post of Executive Officer. Respondents did not find him suitable for the said post and the subjective assessment is beyond the scope of judicial review as a Court cannot sit an appeal over the decision of the Management viz-a-viz suitability of the candidature of an employee. The learned Single Judge has also carefully examined the judgments relied upon by the Appellant and has held that the same to be inapplicable to the facts of the present case. There is no infirmity in the view taken by the learned Single Judge and we do not find any reason to interfere with the same.

14. Accordingly, the appeal is dismissed. There shall be no order as to costs.

SANJEEV NARULA, J

S.MURALIDHAR, J

FEBRUARY 11, 2019

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