

(2013) 07 DEL CK 0190

In the Delhi High Court

Case No : Writ Petition (C) No. 4737 of 1998

Mohd. Naseem

APPELLANT

Vs

Urdu Academy and Others

RESPONDENT

Date of Decision : 09-07-2013

Acts Referred:

Citation : (2013) 07 DEL CK 0190

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Sarvesh Bisaria, for the Appellant;

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By this writ petition, petitioner Mohd. Naseem prays for quashing the promotion of the respondent no. 3-Narinder Kumar Nagpal as a Head Clerk of the respondent no. 1-Urdu Academy. Petitioner claims that petitioner was bound to be appointed because he was senior to the respondent no. 3 in the tentative seniority list of UDCs as petitioner was placed at serial no. 8 and the respondent no. 3 was placed at serial no. 9 in the said seniority list. For the appointment to the post of Head Clerk, and which is a promotion post based on seniority only, 5 years of service is required in the feeder grade i.e. 5 years of service as UDC. Both the petitioner and the respondent no. 3 were appointed as UDCs on 20.11.1992. Order appointing the respondent no. 3 is filed as annexure R-3/1 to the counter-affidavit of respondent no. 3 and the order appointing the petitioner is filed as Annexure-2 to the writ petition. In the counter-affidavits filed by respondents, it is asserted that petitioner was not senior as per the seniority list as pleaded of UDCs because as per the recruitment rules, if two persons are appointed on the same date, then the person who is more in age would get seniority, and the respondent no. 3 was older to the petitioner. It is stated in the counter-affidavit that both the petitioner and the respondent no. 3 were appointed on the same date i.e. 20.11.1992, but since admittedly respondent no. 3 was elder to the petitioner by one year and 11

months, respondent no. 3 is senior to the petitioner. It is contended by the respondents that the seniority list relied upon by the petitioner is admittedly only a tentative seniority list and hence not final.

2. During the course of arguments, the following issues emerge which require the decision of this Court:-

(i) Who is senior as UDC (feeder cadre) for being appointed to the post of Head Clerk. It is not an undisputed fact that both the petitioner and respondent no. 3 have met the qualification criteria of 5 years of service as UDCs.

(ii) Whether the respondent no. 3 has wrongly been appointed as UDC and in fact respondent no. 3 can only be a cashier and not UDC because appointment of UDC can only be by promotion whereas respondent no. 3 as cashier was not appointed by promotion but as a direct recruit.

(iii) Though the petitioner has filed an additional affidavit relying on the rules for appointment of UDCs and whereby the appointment as UDC is only by promotion and not by direct recruitment, yet whether a totally new case which has not been set up in the pleadings of the petitioner (i.e. either in the writ petition or in the rejoinder-affidavit) can be taken by simply filing an application to take on record additional affidavit, more so, when reading of the additional affidavit will lead to pleas which will destroy the main cause of action in the writ petition and that petitioner claims seniority to the respondent no. 3 on account of both being UDCs i.e. the appointment of respondent no. 3 as UDC is specifically admitted.

3. So far as the fact that what would happen if two persons are appointed in the same post then how is the seniority to be determined, reference can be made to the relevant seniority rules, as relied upon on behalf of the petitioner himself. These Seniority Rules are Delhi Administration (Seniority) Rules, 1965. Relevant rule is Rule 9, and which reads as under:-

9. Regulation of seniority of officers selected for appointment to different posts in the same grade requiring different qualifications.

The relative seniority of persons selected for appointment to various posts in the same grade requiring different qualification (e.g. posts of Asstt. Lecturer in History, Economics, Physics, Chemistry etc.) shall be determined by the consolidated order on merit drawn up by the selecting authority who shall invariably be asked by the department concerned while sending their requisitions for recruitment to such posts, to indicate such an order of merit while making selection to such posts.

The authority responsible for approving appointments by transfer shall indicate the inter-se order of seniority of selected persons.

In cases where no order of merit has been indicated by the selecting authority/ authority approving appointment by transfer, the relative seniority of direct recruits/transferees shall be determined on the basis of their length of service in

the next lower grade. In cases of equal length of service, older in age shall rank senior to the younger one.

(Emphasis added)

4. A reading of the aforesaid Rule 9 shows that when two persons are appointed to the same post, on the same date, then, the person who is elder will get seniority. Since respondent no. 3 is admittedly elder to the petitioner, by virtue of the aforesaid Rule 9, the respondent no. 3 will get seniority to the petitioner because both the petitioner and the respondent no. 3 were appointed as UDCs on 20.11.1992. Therefore, the contention of the petitioner that petitioner is senior to the respondent no. 3 has no merit. A tentative seniority list, relied upon by the petitioner, by its very nature is tentative, i.e. not final and thus actual seniority has to be determined in accordance with the relevant rules, and as per relevant rules, respondent no. 3 would become senior in the post of UDC being more in age than the petitioner. Petitioner, therefore, cannot claim seniority to the respondent no. 3 for being appointed as a Head Clerk, seniority admittedly being the only criteria for appointment to the post of Head Clerk.

5. Issues 2 and 3 can be taken together. Neither in the writ petition nor in the rejoinder-affidavit petitioner has challenged the appointment of the respondent no. 3 as UDC. In fact respondent no. 3 is admitted as being a UDC in the writ petition. There is no prayer in the writ petition, for quashing of the appointment made of the respondent no. 3 as UDC or questioning appointment of respondent no. 3 as UDC. It is doubtful whether such relief even if prayed could be asked for because respondent no. 3 was appointed as UDC way back in November, 1992 and the writ petition was filed in September, 1998 i.e. around 6 years later. In any case, at least, the writ petition should have had a specific prayer for quashing of the appointment of the respondent no. 3 as UDC on the ground that recruitment rules do not provide for appointment of UDCs by direct recruitment, and which post of UDC can only be filled by promotion. A case which is absent in the writ petition cannot be argued. As already stated above, no such case was even pleaded in the rejoinder-affidavit inasmuch as, there is no challenge found even in the rejoinder-affidavit to the appointment of the respondent no. 3 as a UDC. The very fact that petitioner claims seniority in the cadre of UDC to the respondent no. 3 shows that petitioner admits that both he and the respondent no. 3 are UDCs. If that be so, the additional affidavit filed alongwith CM No. 7965/2009 (CM allowed on 31.8.2009) can allow the petitioner to set up a case which destroys the very basis/cause of action/foundation of the petition and in which both the petitioner and the respondent no. 3 are stated as being UDCs, and the petitioner was claiming seniority to the respondent no. 3 as UDC on account of the tentative seniority list of UDCs. Clearly, therefore, the second and third issue have to be decided in favour of the respondent no. 3 and against the petitioner because no cause of action is laid out in the writ petition for challenging the appointment of the respondent no. 3 as UDC and an additional affidavit cannot be allowed to destroy the very foundation of the writ petition

that both the petitioner and the respondent no. 3 are UDCs.

6. I may also mention that during the course of arguments, counsel for the petitioner sought to argue that respondent no. 3 has been appointed as cashier in terms of the appointment letter filed as Annexure R-3/1, and therefore, the respondent no. 3 is quite clearly not a UDC. However, when the counsel for the petitioner was asked to show that what all posts were included in the UDC cadre, counsel for the petitioner had no option but to admit that nothing is filed on record to show what all posts are included under the cadre of UDC. This aspect became all the more important because even the appointment letter of the petitioner dated 20.11.1992 does not show his appointment as UDC but shows his appointment as a Purchase Clerk-cum-Caretaker. Therefore, unless there was at least a cadre description as per the relevant rules/circulars on record to show who are and who cannot be UDCs, it is doubtful if the petitioner can orally during the course of final arguments for the first time canvas a stand that cashiers cannot be UDCs, and thus cashiers are not included in the UDC cadre which is feeder cadre for appointment to the post of Head Clerk.

7. In view of the above, clearly the petitioner was not senior to the respondent no. 3, who being senior to the petitioner was appointed as Head Clerk because the criteria for appointment was not selection but only by promotion on completing 5 years of service in the feeder cadre as UDC. In view of the above, the writ petition is dismissed, leaving the parties to bear their own costs.