
(2015) 08 AHC CK 0045
In the Allahabad High Court
Case No : Writ-A No. 19466 of 2015

Shyodan Singh

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Constitution of India, 1950 — Article 10(3), 12, 14, 16, 16(1)
Uttar Pradesh Industrial Area Development Act, 1976 — Section 12, 19, 3, 4, 5
Uttar Pradesh Urban Planning and Development Act, 1973 — Section 18, 19, 30, 32, 40

Citation : (2015) 7 ADJ 488 : (2015) 6 ALJ 261 : (2015) 5 AWC 4528 : (2015) LabIC 4378 : (2015) 4 UPLBEC 3316

Hon'ble Judges : Vimlesh Kumar Shukla, J;H.G. Ramesh, J

Bench : Division Bench

Advocate : I.N. Singh, Ajay Yadav and Ravi Kant, for the Appellant; A.K. Srivastava, S.K. Srivastava and Shivam Yadav, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vimlesh Kumar Shukla, J—Sheodan Singh is assailing before us the seniority list/order dated 31st March, 2015 and 9th May, 2014 (Annexure 24 and 18 to the writ petition) and has prayed for consequential benefits and to consider his candidature for being promoted on the post of Senior Project Engineer (Civil) in NOIDA Authority on the basis of his seniority as is existed prior to year 2014.

2. Brief background of the case is that under the U.P. Industrial Area Development Act, 1976, for development of certain areas in the State into industrial and urban township and for matters concerned therewith State Government has by way of notification constituted an Authority known as New Okhla Industrial Development Authority constituted under the provision as contained in Section 3 of the 1976 Act. Section 4 of the 1976 Act provides for appointment of Chief Executive Officer by the State Government as a whole time officer of the Authority. Section 5 of 1976 Act deals with, staff of the Authority, and Sub-section (i) of Section 5 authorises the Authority to appoint such number

of employees, officers, as may be necessary for the performance of functions and to determine their grade and designations, subject to control/restrictions to be general/special orders of State Government. Sub-section (2) of Section 5 provides that officers and other employees shall be entitled to receive salaries and allowances from the funds of Authority and shall be governed by such other conditions of service as may be agreed upon by the Authority. Section 12 of 1976 Act, incorporates certain provisions of U.P. Urban Planning and Development Act 1973, such as the provisions of Chapter VII and Sections 30, 32, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58. Section 18, authorises the State Government to frame Rules for carrying out the purpose of the Act. Section 19 authorises the Authority to make Regulations with previous approval of the State Government. Under Section 19 of U.P. Industrial Area Development Act, 1976, New Okhla Industrial Development Authority, has framed service regulation namely NOIDA Service Regulation 1991.

3. Petitioner claims that he holds academic qualification of Bachelor of Engineering (B.E.), Master in Business Administration (M.B.A.) and is also a Law Graduate and hails from Schedule Caste Community and he was appointed as Junior Engineer on 06.06.1990 at NOIDA Authority, which is an authority constituted in exercise of provisions of Section 3 of U.P. Industrial Area Development Act, 1976. Petitioner claims that thereafter he has been promoted on the post of Assistant Project Engineer (A.P.E.) based on recruitment and Promotion Policy, 1993 and further claims that thereafter he has been further promoted on the post of Project Engineer on 27th September, 2002.

4. Petitioner claims that since 27th September, 2002, he has been working as Project Engineer in NOIDA Authority and a tentative seniority list for engineering cadre i.e. Junior Engineer Assistant Project Engineer, Senior Project Engineer and Chief Maintenance Engineer working in NOIDA Authority were published by the Authority on 16th March, 2006. Aggrieved against the said tentative seniority list dated 16th March, 2006, Civil Misc. Writ Petition No. 16342 of 2006 was filed by R.K. Goyal while Civil Misc. Writ Petition No. 16353 of 2006 was filed by Sama Kant Srivastava and Mohd. Ishrat. The said writ petitions were decided by this Court vide judgement and order dated 31st March, 2006 allowing both the writ petitions and the Authority was asked to prepare a fresh seniority list within a period two months from the date of production of certified copy of the order.

5. Pursuant to the said judgement dated 31st March, 2006, a fresh seniority list dated 2nd June, 2006 of Engineering Cadre alongwith other employees of NOIDA Authority has been published. Aggrieved against the seniority list dated 2nd June, 2006, two writ petitions being Writ Petition No. 8756 of 2007 and Writ Petition No. 9909 of 2007 have been filed by Pradeep Kumar Garg and several other persons before this Court and the said writ petitions have been dismissed by this Court vide its judgement and order dated 3rd July, 2007. Against the judgement and order dated 3rd July, 2007 passed by this Court dismissing the writ petitions bearing Writ Petition No. 8756 of 2007 and Writ Petition No. 9909

of 2007, Pradeep Kumar Garg has filed Special Appeal No. 22095 of 2007 was filed before this Court and same has also been dismissed on 3rd December, 2007. Petitioner submits that net effect of the same was seniority list, which has been published by the Authority on 2nd June, 2006 has become final.

6. Petitioner has proceeded to mention that private respondents were promoted on the post of Project Engineer on 03.03.2003, 09.06.2006, 24.07.2007 and 07.10.2008 while petitioner has been promoted on the post of Project Engineer on 27.09.2002 that is much earlier to the dates mentioned above. Petitioner has proceeded to mention that once again on 24th December, 2008, a tentative seniority list was published and objections were invited and Mohd. Ishrat and Sama Kant Srivastava have filed their objections and the said objections in question were rejected by the Authority on 14th May, 2009 and 15th May, 2009 and final seniority list was published on 27th July, 2009 wherein petitioner claims that he was shown at serial No. 5 in the cadre of Project Engineer while M.P. Sharma, Vijay Narain, M.K. Aggarwal and S.C. Aora were shown at serial Nos. 1, 2, 3 and 4, respectively. In the said seniority list, Sama Kant Srivastava and Mohd. Ishrat were shown at serial Nos. 7 and 8, respectively. Petitioner submits that on 6th August, 2012 and on 24th August, 2012, a tentative seniority list was published wherein petitioner was placed at serial No. 10 and he was shown junior to the respondents Sama Kant Srivastava and Mohd. Ishrat and others. Petitioner submits that he made several representations and thereafter seniority list dated 9th May, 2014 has been published wherein petitioner has been placed at serial No. 11. The validity of seniority list dated 9th May, 2014 was challenged by S.C. Arora vide Writ Petition No. 26922 of 2014 and Sama Kant Srivastava has filed Writ Petition No. 31743 of 2014 against seniority list dated 27th May, 2009 and both the writ petitions were decided by this Court by a common judgment and order dated 23.09.2014. Petitioner submits that pursuant to order dated 23rd September, 2014, decision has been taken and ignoring the claim of petitioner, seniority list dated 31st March, 2015 has been drawn wherein private respondents have been declared senior to the petitioner and same has impelled the petitioner to be before this Court.

7. On the matter being taken up today, on behalf of private respondents, Shri T.P. Singh, Senior Advocate alongwith Shri Anil Kumar Srivastava, Advocate has entered appearance and Shri Ravindra Kumar, Advocate alongwith Shri Shivam Yadav, Advocate has entered appearance on behalf of NOIDA Authority and the relevant records in question has also been produced before us and thereafter on the request of parties, the matter has been taken up for being heard and finally decided.

8. Shri Ravi Kant, Senior Advocate assisted by Shri I.N. Singh, Advocate has assailed the validity of the entire action on the ground that it was not at all open to the NOIDA Authorities to have reopened the closed chapter of seniority and the order passed by this Court has been misread and misinterpreted and the limited dispute has been widened and it has been sought to be contended that in

the past, at no point of time, petitioner has ever been accorded promotion by extending him benefit of Section 3(7) of U.P. Act No. 4 of 1994 read with Rule 8-A of 1991 Rules and as such, the order impugned is liable to be quashed.

9. The arguments raised has been resisted by Shri Ravindra Kumar, Advocate assisted by Shri Shivam Yadav, Advocate as well as by Shri T.P. Singh, Senior Advocate assisted by Shri Anil Kumar Srivastava, Advocate by submitting that record would speak for itself that at all point of time, the petitioner has been beneficiary of the reservation in promotion and before this Court incorrect statement of fact is being mentioned by him.

10. Apex Court in the case of H.S. Vankani and Others Vs. State of Gujarat and Others, AIR 2010 SC 1714 : (2010) 126 FLR 558 : (2010) 3 JT 109 : (2010) 2 SCALE 136 : (2010) 4 SCC 301 : (2010) 1 SCC(L&S) 1012 : (2010) 4 SCR 485 : (2011) AIRSCW 341 has considered the importance of seniority and the litigation generated by the same by providing for as follows:

"Seniority is a civil right which has an important and vital role to play in one's service career. Future promotion of a Government servant depends either on strict seniority or on the basis of seniority-cum-merit or merit-cum-seniority etc. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work. It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. If the settled seniority at the instance of one's junior in service is unsettled, it may generate bitterness, resentment, hostility among the Government servants and the enthusiasm to do quality work might be lost. Such a situation may drive the parties to approach the administration for resolution of that acrimonious and poignant situation, which may consume lot of time and energy. The decision either way may drive the parties to litigative wilderness to the advantage of legal professionals both private and Government, driving the parties to acute penury. It is well known that salary they earn, may not match the litigation expenses and professional fees and may at times drive the parties to other sources of money making, including corruption. Public money is also being spent by the Government to defend their otherwise untenable stand. Further it also consumes lot of judicial time from the lowest court to the highest resulting in constant bitterness among parties at the cost of sound administration affecting public interest. Courts are repeating the ratio that the seniority once settled, shall not be unsettled but the men in power often violate that ratio for extraneous reasons, which, at times calls for departmental action. Legal principles have been reiterated by this Court in Union of India (UOI) and Another Vs. S.K. Goel and Others, AIR 2007 SC 1199 : (2007) 209 ELT 334 : (2007) 3 JT 361 : (2007) 3 SCALE 5 : (2007) 3 SCR 432 : (2007) AIRSCW 1235 : (2007) 2 Supreme 522 , T.R. Kapoor and Others Vs. State of Haryana and Others, AIR 1989 SC 76 : (1989) 4 SCC 71 , Bimlesh Tanwar Vs. State of Haryana and Others, AIR 2003 SC 2000 : (2003) 4 CTC 304 : (2003) 97 FLR 1114 : (2003) 2 JT 610 : (2003) 3

SCALE 29 : (2003) 5 SCC 604 : (2003) SCC(L&S) 737 : (2003) 2 SCR 757 : (2003) 3 SLJ 220 : (2003) AIRSCW 1508 : (2003) 2 Supreme 699 . In view of the settled law the decisions cited by the appellants in G.P. Doval's case (supra), Prabhakar and Others case, G. Deendayalan, R.S. Ajara are not applicable to the facts of the case.

11. Inter-se seniority in a particular service has to be determined as per the service rules/regulations holding the field in question. In view of this before proceeding to examine the issue as to whether seniority position has rightly been determined in the facts of the present case, we would refer to some of the relevant statutory provisions having material bearing with the issues involved in the present case.

12. In exercise of power under Section 19 of the Act 1976 a statutory regulation for providing service conditions of service of employees of the Authority namely the New Okhla Industrial Development Authority Service Regulations 1981 has been framed. To better understand the ambit and scope of the provisions of Regulation it would be useful to extract the relevant provisions of Service Regulation 1981 as under:--

"THE NEW OKHLA INDUSTRIAL DEVELOPMENT Authority SERVICE REGULATIONS 1981

In exercise of the powers under section 19 of the U.P. Industrial Area Development Act 1976 (U.P. Act No. 6 of 1976) the New Okhla Industrial Development Authority, with the previous approval of the Government of Uttar Pradesh hereby makes the following regulations to provide for the conditions of service of employees of the said Authority and for matters incidental thereto.

CHAPTER - 1 PRELIMINARY

1.(1) These regulations may be called the new Okhla industrial Development Authority Service regulations, 1981.

(2) They shall come into force on January 14, 1981.

2. These regulations shall apply to every whole time employee of the Authority except a person working with the Authority on deputation from the Union Government or any State Government or a Local Authority or a Corporation or any other organization by whatever name called, and such a persons shall continue to be governed by the rules applicable to him in relation to his service under his parent department or organization, by whatever name called unless such person is absorbed in the service of the Authority as a regular employee.

3. In these regulations, unless the context otherwise require:--

(a) "Act" means the U.P. Industrial Area Development Act, 1976;

(b) "Appointing Officer" means an officer who for the time being has the power to make appointment to any post under the Authority;

(c) "Authority" means the New Okhla Industrial Development Authority constituted under section 3 of the Act.

(d) "Chief Executive Officer" means the Chief Executive Officer of the Authority;

(g) "Employee" means an employee of the Authority to whom these regulations apply;

(l) "Regular employee" means an employee whose employment by terms of his employment is terminable by three month's notice as provided in regulation 22 or who has been absorbed in a permanent capacity against any post under the Authority without limit of time;

(m) "Service" means service in the Authority;

(o) "State Government" means the Government of Uttar Pradesh;

4. Where the Authority is satisfied that the operation of any regulation causes any undue hardship in any particular case, it may, dispense with or relax the requirements of that regulation to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner consistent or commensurate with the interest of the Authority.

5. (1) The power to interpret these regulations vests in the Chief Executive Officer who may issue such administrative instructions as he may consider necessary to give effect and carry out the purpose of these regulations.

(2) If any employee feels aggrieved by the interpretation or implementation of any of these regulations he shall have a right to appeal to the Authority whose decision thereon shall be final and conclusive.

CHAPTER-II GENERAL CONDITIONS OF RECRUITMENT

6. (1) The classification of posts under the Authority for the purposes of these regulations shall broadly be as in Annexure "A".

(2) The Authority may change the classification in respect of any posts.

(3) The Authority shall from time to time fix the number of posts in all groups of posts and also their pay scales.

13. Reservation for candidates belonging to Scheduled Castes Scheduled Tribes or Backward Classes, in respect of posts under the Authority shall be in accordance with such orders of the State Government for their reservation as may, from time to time, be issued or made applicable through the issue of guidelines or directions.

CHAPTER-III RECRUTIMENT AND APPOINTMENT

14. The Authority may create such posts with such designations And carrying such pay so it may consider necessary for the performance of it's functions under the Act.

15. The Authority shall specify the Appointing Officers for different posts or categories or classes of posts under it and until so specified the Chief Executive Officer shall be the Appointing Officer in relation to all posts under the Authority.

16. (1) Recruitment to any post under the Authority may be made from any of the sources:--

(a) by direct recruitment;

(b) by promotion from amongst the employees occupying post carrying a lower scale through a departmental test or an interview of selection or in any other manner specified by the Authority.

(c) by deputation or re-employment or on contractual basis

(d) from any other source as approved by the Authority.

(2)(i) Sixty six percent of Group "A" posts shall be filled in by direct recruitment and the remaining thirty four percent posts shall be filled in by promotion from amongst the employees upon the basis of seniority subject to the rejection of the unfit and fulfillment of the requisite qualifications and also subject to the condition of the particular employee having worked for at least a period of two years on a post carrying scale of pay next below. If at any time it is found that sufficient number of employees are not available for filling in the percentage prescribed for promotion such posts may be filled in by direct recruitments;

(ii) Various posts falling under Group "B" will be filled in such a way as to ensure that fifty percent of the posts are filled in the promotion from amongst the employees and such promotion shall be made on the basis of seniority subject to the rejection of the unfit and fulfillment of the requisite qualifications and also subject to the condition of the particular employee having worked on a carrying the scale of pay next below for a period of at least two years;

(iii) Posts under Group "C" carrying lowest scale of pay shall be filled in to the extent of twenty five percent by promotion from amongst the employees belonging to the Group "D" on the basis of seniority subject to the rejection of the unfit and fulfillment of the requisite qualifications and also subject to the condition of the particular employee having worked on a post carrying a scale of pay next below for at least a period of two years. The remaining seventy five percent of such posts shall be filled in by direct recruitment;

(iv) Notwithstanding any thing hereinbefore contained the Authority shall have full power to modify the source of recruitment or the percentage of promotion or direct recruitment in relation to any posts or class of posts.

Explanation:--Any post the maximum of the scale of which is less than the maximum of the scale of any other post shall be deemed to be post carrying a lower scale of pay.

17. Subject to the provisions of regulation 13 or regulation 16 the Chief

Executive Officer may, from time to time, decide the mode of selection for filling the various posts in the Authority. For every selection there shall be constituted a selection committee by the Appointing Officer which will consist of not less than three persons and such selection committee shall draw up a panel of names of candidates for selection arranged in order of preference and furnish it to the Appointing Officer together with its recommendations in the order of merit. Any panel prepared in this manner will remain alive for one year from the date of its finalization and, in the case of vacancy during the said period of one year, the Appointing Officer may, without calling for fresh applications, appoint the candidates in the order in which their names are arranged on the panel.

19. (1) Any employee whether appointed directly for the first time against a regular post or promoted to a regular post under the Authority shall be placed on probation for a period of one year from the date of joining the new post; provided that the Authority may in exceptional cases, such as the appointment of exports and like, waive the requirement of probation.

(2) The performance of the employee in the new post will be watched during the period of probation and the Appointing Officer may extend the period of probation for a further period not exceeding one year without assigning any reasons thereafter.

20. (1) Any employee directly recruited to a post may at any time, during or at the end of the period of probation or, as the case may be, during the extended period of probation, be discharged from the service of the Authority under the orders of the Appointing Officer without assigning any reasons of giving the notice or pay in lieu thereof.

(2) Any employee promoted to a higher post on probation may be reverted by the Chief Executive Officer to his original post any time during or at the end of probation, as the case may be, without assigning any reason therefor.

21. A probationer may be given a regular appointment by an order in writing, at the end of the period of probation or the extended period of probation, as the case may be, if his work and conduct are reported to be satisfactory, his integrity is certified, and the Appointing Officer considers him to be otherwise fit for appointment.

24. (1) A category wise gradation list of all the regular employees of the Authority shall be maintained for determining the inter-se seniority of employees within the category. The Chief Executive Officer may order that the gradation list for any particular category shall be prepared for the Authority as a whole or separately for each of its units.

(2) Where the seniority of an employee has not been specifically fixed by an order of the Appointing Officer, it will ordinarily be fixed on the basis of the date of his initial regular appointment in the category. Wherever more than one person have been appointed in the same category on the same date their inter-se seniority

shall be determined by the Appointing Officer having regard to the age of the concerned employee.

(3) Where appointment has been made as a result of promotion and no merit list has been prepared, the inter-se seniority of the employee in the next grade in one selection shall be fixed in accordance with their seniority in the lower grade from which the promotion is made.

(4) Where any appointments in the same category and in the same grade are made on the same date by promotion and by direct recruitment an employee appointed by promotion shall be deemed to be senior to the employee recruited directly.

CHAPTER-VII MISCELLANEOUS

79. The provision of U.P. Government Service Conduct Rules, 1956 as amended from time to time, shall mutates mutandis apply to the employees.

80. For the removal of doubt it is hereby declared that these regulations shall be subject to any rules made by the State Government under the Act or any directions issued by the State Government under Section 41 of the U.P. Urban Planning and Development Act, 1973 or to the provisions of any other law made on the subject by an Act of the Legislature of Uttar Pradesh or the Parliament.

81. The Authority may with the previous approval of the State Government add, amend, vary or rescind these regulations to such extent as it may consider expedient."

Service Regulations 1981 are self contained and Regulation 80 of Service Regulation, 1981 declares that these Regulations are subject to the provisions of any Rule made by the State Government under the Act or direction issued by State Government under Section 41 of U.P. Urban Planning and Development Act 1973 or to the provisions of any other law made on the subject by an Act of Legislature of Uttar Pradesh or the Parliament.

13. Service regulations have been framed by New Okhala Industrial Development Authority with the previous approval of the Government of Uttar Pradesh known as New Okhala Industrial Development Authority Regulations, 1981 and the said regulations in question clearly proceeds to talk of reservation under Regulation 13 wherein a clear cut provision has been made that reservation for candidates belonging to Scheduled Case, Scheduled Tribes or Backward Classes, in respect of post under the Authority shall be in accordance with such orders of the State Government for the reservation as the case may be, from time to time, be issued or made applicable through the issue of guidelines or directions. Thus, this much is clear that the provisions of U.P. Act No. 4 of 1994 are applicable to the employees who are working at NOIDA Authority.

14. On the matter being taken up as 1991 Rules quoted above, has been taken recourse to in the impugned order in question, specific query has been put by

the Court, to the parties to the dispute, as to whether for the purposes of determining seniority position in the Authority, the provisions of U.P. Government Servant Seniority Rules 1991, as amended from time to time, would apply or not?

15. To this query, no specific reply, has been submitted and it has been sought to be suggested that there is no dispute inter-se parties that seniority Rules 1991 would apply.

16. Sri Ravi Kant, Senior Advocate accepted this fact that in the pleadings they have accepted applicability of Seniority Rules, 1991 but the fact of the matter is that Seniority Rules 1991 is not applicable.

17. We once again in our turn put specific query to Sri Ravindra Kumar, Advocate representing the Authority as to in what way and manner Authority has proceeded to adopt the Seniority Rules 1991 and has been acting based on the same. Sri Ravindra Kumar has conceded to this situation that there is nothing in black and white with the Authorities that would answer the query of the Court in the said direction but has tried to submit before the Court, that Rule 3 of Seniority Rules 1991 quoted above overrides all other Rules and would ipso facto apply and in the case of Mohan Karan Vs. State of U.P. and Another, (1998) 3 AD 662 : AIR 1998 SC 1601 : (1998) 79 FLR 126 : (1998) 2 JT 521 : (1998) 2 SCALE 361 : (1998) 3 SCC 444 : (1998) SCC(L&S) 897 : (1998) 2 SCR 328 : (1998) 3 SLJ 118 : (1998) AIRSCW 1331 : (1998) 3 Supreme 220 , decided on 18.03.1998, the Apex Court considered the overriding effect of Seniority Rules 1991, as follows:

"As per Rule 2, the U.P. Government Servants Seniority Rules, 1991 apply to all government servants in respect of whose recruitment and conditions of service rules are made or to be made by the Governor under the proviso to Article 309 of the Constitution. Rule 4(f)) defines "service" to mean the service in which the seniority of the member of the service has to be determined. "Service rules" are defined in Rule 4(g) to mean the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed, to the relevant service. The more important rule, namely, Rule 3 reads as follows:--"These rules shall have effect notwithstanding anything to the contrary contained in any other service rules made heretobefore." We have already extracted Rule 6 of these Rules, which relates to seniority where the appointments by promotion only from a single feeding cadre. But for Rule 3 above mentioned, we would have accepted the contentions of learned counsel for the appellant and upset the judgment of the High Court. Rule 3, in our view, overrides all other rules made earlier in other services in the State, whereas Rule 7 of the Centralised Services Rules has the overriding effect against Rule 28 of those Rules only. Further, the title of 1991 Rules clearly suggests that the seniority among the Government servant in U.P. Government Servants Seniority Rules, 1991 cannot be ignored as it has overriding effect on Rule 7 of the Centralised Services Rules."

18. In the light of arguments advanced, we are examining the issue of applicability of seniority Rules 1991 qua the staff of Authority concerned.

19. In exercise of power conferred under Section 19 of 1976 Act, with the previous approval of the Government, Service Regulation 1981 has been made. In the said Regulation, Regulation 5(1) defines "Regular employee" as an employee whose employment by term of his employment is terminable by three months notice as provided in Regulation 22 of Regulation 1981 or who has been absorbed in permanent capacity against any post under Authority without the limit of time. Regulation 24 deals with seniority and Regulations 24(1) categorically provides that category wise gradation list of all the regular employees of the Authority shall be maintained for determining the inter se seniority of employees within the category. Regulation 24(2) provides that where the seniority of any employee has not been specifically fixed by an order of the Appointing Officer, it will ordinarily be fixed on the basis of the date of his initial regular appointed in the category. Where ever more than one person have been appointed in the name category on the same date their inter se seniority shall be determined by the Appointing Officer having regard to the age of the concerned employee. Regulation 24(3) provides that where appointment has been made as a result of promotion and no merit list has been prepared the inter se seniority of the employee in the next grade in one selection shall be fixed in accordance with their seniority in the lower grade from which the promotion is made. Regulation 24(4) provides that where any appointments in the same category and in the same grade are made on the same date by promotion and by direct recruitment an employee appointed by promotion shall be deemed to be senior to the employee recruited directly.

20. These service regulations in consonance with the provisions of Regulation 80 are subject to any Rules made by the State Government under the Act or directions issued by the State Government under Section 41 of the U.P. Urban Planning and Development Act, 1973 or to the provisions of any other law made on the subject by an Act of the Legislature of Uttar Pradesh or the Parliament. Regulation 81 provides that the Authority may with the previous approval of the State Government add, amend, vary or rescind these regulations to such extent as it may consider expedient.

21. Regulations, thus on its face value are self contained and will hold the field but are subservient to any Rules made by the State Government under the Act/ any directions issued by the State Government under Section 41 of the U.P. Urban Planning and Development Act, 1973/to the provisions of any other law made on the subject by an Act of the Legislature of Uttar Pradesh or the Parliament.

22. In the present case accepted position is that till today, State Government has not framed any Rules under 1976 Act and till date State Government has not issued any direction under Section 41 of the U.P. Urban Planning and Development Act, 1973 and there is no other law on the subject by Act of the

Legislature of Uttar Pradesh or the Parliament.

23. Once such is the factual situation that has so emerged on factual front, and this fact has been accepted before this Court then in this background as to whether Seniority Rules 1991 would ipso facto be applicable to the employees of the said Authority has to be tested on the parameters of Article 309 as well as Seniority Rules 1991.

Article 309: Recruitment and conditions of service of persons serving the Union or a State - Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

24. U.P. Government Servants Seniority Rules 1991 has been framed in exercise of power conferred under the proviso to Article 309 of the Constitution of India and as per Rule 2 of the aforesaid Rules in question, said rules are to apply to all Government servants in respect of which recruitment and conditions of service, rules under may be or have been made by the Governor under the proviso to Article 309 of the Constitution. Rules made under the proviso to Article 309 are for transitory period until provision in that behalf is made by or under an Act of Appropriate legislature under the said Article. Rule 3 clearly proceeds to make mention that these rules shall have the effect notwithstanding anything to the contrary contained in any other service rules made heretobefore.

25. Area of operation of the aforesaid Rules is clear and categorical that it shall apply to all government servant in respect of which recruitment and conditions of service, Rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution.

26. Under the scheme of thing provided for, authority to frame Service Regulation has been conferred upon the Authority itself under Section 19 of U.P. Industrial Area Development Act, 1976. Once such is the factual situation that the Authority is empowered to appoint such number of officer and employees, as may be necessary for the performance of duties and functions and to determine their grade and designations, and the Authority is also empowered to frame service regulations with the concurrence of the State Government then automatically the provisions of U.P. Government Servant Seniority Rules 1991 cannot be pressed in to service and seniority of the employees of the Authority

has to be determined on the parameters as is provided for under Regulation 1981. In view of this answer to the issue is that the provision of U.P. Government Servant Seniority Rules 1991 are not at all applicable or attracted in the matter of determination of seniority of employees of Authority.

27. Judgement in the case of Mohan Karan v. State of U.P. and others reported in 1998 INSC 167 relied upon for this purpose that the provision of 1991 seniority Rules are applicable in the context of the U.P. Urban Planning and Development Act, 1973 and similar is the situation here will not at all come to the rescue and reprieve of the Authorities for the simple reason that amendment has been introduced under U.P. Urban Planning and Development Act, 1973 on 22.10.1984 by inserting Section 5A which enabled the creation of Development Authorities Centralised Service by creation of U.P. Development Authorities Centralised Services Rules, 1985, that were framed under Section 5-A read with Section 55 of 1973. In such a situation and in this background as no amendment has been made under 1976 Act nor any Rules have been framed under 1976 Act, then reliance placed on the said judgement is misplaced and out of context.

28. Even otherwise the said judgement in the case of Mohan Karan (Supra), has not been approved by the Apex Court in the case of D.R. Yadav and Another Vs. R.K. Singh and Another, AIR 2003 SC 3935 : (2003) 5 JT 555 : (2003) 5 SCALE 307 : (2003) 7 SCC 110 : (2003) 1 SCR 583 Supp : (2004) 1 SLJ 19 : (2003) AIRSCW 3475 : (2003) 5 Supreme 45 : (2003) 5 Supreme 57 . In the said case matter pertained to Lucknow Development Authority, qua members of Centralised Service and mention was made that two different Rules relating to determination of seniority were operating in field, one being general rule known as Seniority Rules 1991; the other being special rules known as U.P. Development Authorized Centralised Service Rules 1985, and the issue was as to which of the two Rules would apply. Arguments have been advanced in the said case that High Court went wrong in applying 1991 Rules relying on or on the basis of decision of Mohan Karan, (Supra) without effectively considering the provisions of Article 309. Apex Court in the said case held as follows:

"20. The 1991 Rules were framed by the Governor of Uttar Pradesh in exercise of his power conferred under the proviso appended to Article 309 of the Constitution of India. The Proviso appended to Article 309 of the Constitution reads thus:

"Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

21. On a plain reading of the said provision, there cannot be any doubt whatsoever that rules framed thereunder would apply so long as a statute or statutory rules or any other subordinate legislation governing the conditions of service are not enacted or made or not otherwise operating in the field. In other words, rules made under proviso to Article 309 of the Constitution are for a transitory period and the same would give way to the special rules once framed. However, if a statute or rules made thereunder was/were already operating in the field, the general rules made under proviso to Article 309 would not apply to the Services created thereunder.

22. The submission of Mr. Dwivedi to the aforementioned extent appears to be correct.

23. In the event two conflicting rules are operating in the same field, the doctrine of *generalia specialibus non derogant* shall apply. It was so held in Chandra Prakash Tiwari (*supra*)."

29. Consequently viewed from any angle, the 1991 Rules framed by the Governor of Uttar Pradesh in exercise of his legislative power conferred under the proviso to Article 309, would not at all apply and seniority status of employees of Authority would be governed by Service Regulation 1981. After we have proceeded to answer the said issue, one more incidental issue has been raised before us and the said incidental issue is in reference to the fact that the Noida Authority in their turn had proceeded to promulgate promotion policy of the year 1993 and of the year 2005 and as to whether the principles contained in Clause 7 of promotion policy 1993 and Clause 8 of promotion policy 2005 would at all apply to the case of petitioner and private respondents in the facts of present case.

30. In the said policy in question general principles of promotion provides for as follows:

General Principles for Promotion Year 1993

1. Promotion from class II posts to Class I posts and promotion within class I cadre will be based on merit.
2. Promotion from Class III to Class II and promotion within Class II and Class III will be on the basis of seniority subject to rejection of unfit.
3. NOIDA employees will be permitted to apply for higher post in direct selection if they are otherwise eligible and they will be given age relaxation of 3 years.
4. All promotions will be done within the cadres.
5. Reservation quota rules will be adhered to as per govt. directions issued from time to time.
6. In direct recruitments the inter se seniority of candidate will be as per merit list prepared by the selection committee.

7. Where according to the service rules, appointments are to be made only by promotion from a single feeding cadre in promotion is on the basis of seniority subject to rejection of unfit, the seniority inter se of persons so appointed shall be the same as it was in the feeding cadre. Even if a senior person is promoted after the promotion of his junior, he will regain the seniority of the feeding cadre. Normally the selection panel should decide inter se seniority clearly.

8. Seniority of candidates will be decide by the date of meeting of DPC/selection committee.

9. All other conditions of promotions will be subject to Noida Service Regulations.

10. On completion of 10 years of continuous satisfactory service on a substantive post, an employee shall be entitled time scale equal to the next higher scale above the scale of his substantive post.

11. One substantive post shall carry only one time scale.

Rules of pay fixation prevalent in the Govt. of U.P. shall be applicable in this regard.

General Principles for Promotion Year 2005

1. Promotion from class II posts to Class I posts and promotion within class I cadre well be based on merit.

2. Promotion from Class III to Class II and promotion within Class II and Class III will be on the basis of seniority subject to rejection of unfit.

3. NOIDA employees will be permitted to apply for higher post in direct selection if they are otherwise eligible and they will be given age relaxation of 5 years.

4. All promotions will be done within the cadres & as per Promotion Policy 2005.

5. All promotions should be effected after working for a minimum of 3 years apart from meeting the specific cadre requirement.

6. Reservation quota rules will be adhered to as per govt. directions issued from time to time.

7. In direct recruitments the inter se seniority of candidate will be as per merit list prepared by the selection committee.

8. Where according to the service rules, appointments are to be made only by promotion from a single feeding cadre in promotion is on the basis of seniority subject to rejection of unfit, the seniority inter se of persons so appointed shall be the same as it was in the feeding cadre. Even if a senior person is promoted after the promotion of his junior, he will regain the seniority of the feeding cadre. Normally the selection panel should decide inter se seniority clearly.

9. Seniority of candidates will be decide by the date of meeting of DPC/selection committee.

10. All other conditions of promotions will be subject to Noida Service Regulations.

On completion of 10 years of continuous satisfactory service on a substantive post, an employee shall be entitled time scale equal to the next higher scale above the scale of his substantive post.

One substantive post shall carry only one time scale.

Rules of pay fixation prevalent in the Govt. of U.P. shall be applicable in this regard."

31. This is accepted position that as far as promotion policy in question is concerned, at no point of time policy in question has ever been accorded approval by the State Government rather record in question reflects that at the point of time when promotion policy-2005 has been sent to the State Government, the State Government in its turn returned back the said proposal vide letter dated 18.10.2007 and State Government informed that NOIDA authority was competent to amend the same but at the same time it was also directed that the Authority should ensure that in carrying out any amendment or framing any policy, there was no repugnancy or overriding effect on the NOIDA Service Regulation 1981.

32. Once such is the factual situation that Noida authority in their turn framed promotion policies in the year 1993 and in the year 2005 and at no point of time said policy decision has ever been accorded approval by the State Government whereas Noida authorities were conscious of the fact that for carrying out amendment, according of approval is a condition precedent and specially in the backdrop when there was diversion from the provision contained under Service Regulation, 1981, State Government in its turn had made it very clear that in the policy decision so taken there should be no repugnancy or overriding effect on the NOIDA Service Regulation 1981. Net effect of the same is that NOIDA Service Regulation 1981 has been holding the field.

33. We have also examined the promotion policy of the year 1993 read with policy of the year 2005 and what we find on perusal of the same that the provision that has been sought to be introduced are totally contrary to the provision provided under NOIDA Service Regulation 1981. under Regulation 16(2) of NOIDA Service Regulation 1981 provides that 66% of Group A posts shall be filled in by direct recruitment and the remaining 34% by promotion from amongst employees on the basis of seniority subject to rejection of unfit whereas under 1993, promotion policy and proposed policy of the year 2005 it was mentioned that promotion from class II posts to Class I posts and promotion within class I cadre would be based on merit. Once entire procedure was sought to be changed and was running counter to the provision as provided in NOIDA Service Regulation 1981 then said policy decision cannot be given effect to unless and until if it was accorded approval by the State Government failing which promotion of Group "A" posts has to be made strictly on the basis of

seniority subject to rejection of unfit.

34. Apart from this, on the issue of seniority, under Regulation 24, a categorywise gradation list of all employees of the Authority has to be maintained for determining inter-se seniority of employees within the category. Regulation 24(3) provides that where appointment has been made as a result of promotion and no merit list has been prepared, the inter-se seniority of employee in the next grade in one selection shall be fixed in accordance with their seniority in the lower grade from which the promotion is made. Regulation 24(3) deals with fixation of seniority in one selection where appointment has been made by way of promotion in the next grade based on seniority position in the lower grade from which selection is made. Under policy decision 1993 and 2005, Clause 7 and 8 are similar and it provides that where appointments are made by promotion, from a single cadre based on the criteria of seniority subject to rejection of unfit, the seniority inter-se of persons shall remain the same as it was in the feeding cadre. Further mention has been made, that even if senior person is promoted after the promotion of junior, he will regain the seniority. Criteria for fixing of seniority has been changed under policy decision, as here even in reference of different selections, based on the criteria of seniority subject to rejection of unfit, seniority has been permitted to be regained. Such provisions in the policy decision, in effect, amounts to amending the Regulation whereas without prior approval of the State Government same could not be enforced and specially when same has been creating new criteria for determining seniority and has been running counter to the provisions of Service Regulation 1981.

35. At this juncture we proceed to make a mention that law on the subject is clear that executive instruction/policy decision cannot be permitted to override over the statutory rules and regulation.

36. Constitution Bench of the Hon"ble Apex Court in Sant Ram Sharma Vs. State of Rajasthan and Another, AIR 1967 SC 1910 : (1968) 2 LLJ 830 : (1968) 1 SCR 111 , has observed as under:--

"It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed."

37. The law laid down above, has consistently been followed and it is settled proposition of law that an Authority cannot issue orders/office memorandum/ executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (vide C. Rangaswamaiah and Others Vs. Karnataka Lokayukta and Others, AIR 1998 SC 2496 : (1998) 5 JT 64 : (1998) 4 SCALE 266 : (1998) 6 SCC 66 : (1998) SCC(L&S) 1448 : (1998) 3 SCR 837 : (1998) AIRSCW 2498 : (1998) 6 Supreme 68 .

38. The Constitution Bench of the Apex Court, in *Naga People's Movement of Human Rights Vs. Union of India* (UOI), AIR 1998 SC 465 : (1997) 9 JT 431 : (1997) 7 SCALE 741 : (1997) 7 SCALE 210 : (1998) 2 SCC 109 : (1997) 5 SCR 469 Supp , held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

39. Thus, it is settled law that executive instructions cannot amend or supersede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law vide *Pahwa Chemicals Pvt. Ltd. Vs. The Commissioner of Central Excise, New Delhi*, (2005) 99 ECC 91 : (2005) 181 ELT 339 : (2005) 274 ITR 87 : (2005) 11 JT 21 : (2005) 2 SCC 720 : (2005) 2 SCR 380 ; *K.P. Sudhakaran and Another Vs. State of Kerala and Others*, AIR 2006 SC 2138 : (2006) 110 FLR 20 : (2006) 11 JT 101 : (2006) 6 SCALE 92 : (2006) 5 SCC 386 : (2006) SCC(L&S) 1105 : (2006) 3 SCR 291 Supp : (2007) 1 SLJ 38 : (2006) AIRSCW 2700 : (2006) 5 Supreme 31 ; and *K.K. Parmar and Others Vs. H.C. of Gujarat thr. Registrar and Others*, AIR 2006 SC 3559 : (2006) 6 JT 509 : (2006) 5 SCALE 691 : (2006) 5 SCC 789 : (2006) SCC(L&S) 1201 : (2006) 2 SCR 565 Supp : (2006) 3 SLJ 324 : (2006) AIRSCW 2856 : (2006) 4 Supreme 625 ; and it has been observed that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

40. Therefore, it is evident that subordinate legislation cannot override the statutory rules nor can it curtail the content and scope of the substantive provision for or under which it has been made.

41. View to the similar effect has been expressed by Hon'ble Apex Court in the case of *Virender Singh Hooda and Others Vs. State of Haryana and Another*, AIR 2005 SC 137 : (2005) 1 ESC 19 : (2004) 9 JT 293 : (2004) 9 SCALE 120 : (2004) 12 SCC 588 : (2005) SCC(L&S) 1044 : (2005) 3 SLJ 421 : (2005) AIRSCW 6386 : (2005) 1 Supreme 589 .

42. This fact is accepted that petitioner belongs to Scheduled Caste Category and the issue that is being raised before use is as to whether the petitioner has succeeded to make place for himself strictly on merits or whatever benefits he has reaped during his career is on account of fact that he happens to be from Scheduled Caste Category.

43. Before proceeding to answer the said issue, we take note of the survey pertaining to reservation in promotional matters as noted by Apex Court, in the case of *U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others*, AIR 2012 SC 2728 : (2012) 134 FLR 692 : (2012) 4 SCALE 687 : (2012) 7 SCC 1 : (2012) 2 SLJ 307 : (2012) AIRSCW 2791 : (2012) 3 Supreme 386 , in following paragraphs:

"23. Eventually, in the case of *Indra Sawhney and another v. Union of India* and

others, the nine-Judge Bench, while dealing with the question whether clause (4) of Article 16 of the Constitution provides for reservation only in the matter of initial appointment, direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well, recorded the submissions of the petitioners in paragraph 819 which reads as follows:--

"The petitioners" submission is that the reservation of appointments or posts contemplated by clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to leap-frog over his compatriots, which is bound to generate acute heartburning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are give how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of disheartening which kills the spirit of competition and develops a sense of disinterestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supported to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon inefficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (j) of Article 51-A (Fundamental Duties)."

24. Thereafter, the Bench referred to the decisions in *General Manager, S. Rly. v. Rangachari*, *State of Punjab v. Hira Lal*, *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India* and *Comptroller and Auditor General v. K.S. Jagannathan* and did not agree with the view stated in *Rangachari* (supra), despite noting the fact that *Rangachari* has been a law for more than thirty years and that attempt to reopen the issue was repelled in *Akhil Bharatiya Soshit Karamchari Sangh*

(Railway).

25. Thereafter, their Lordships addressed to the concept of promotion and, eventually after adverting to certain legal principles, stated thus:--

"831. We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. The relaxation concerned in State of Kerala and Another Vs. N.M. Thomas and Others, AIR 1976 SC 490 : (1976) LabIC 395 : (1976) 1 LLJ 376 : (1976) 2 SCC 310 : (1976) 1 SCR 906 and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in Karamchari Sangh are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs - consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove."

26. In paragraph 859, while summarising the said aspect, it has been ruled thus:--

"859. We may summarise our answers to the various questions dealt with and answered hereinabove:

.....

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of "State" in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of "backward class of citizens" in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of

promotion without compromising the efficiency of the administration."

27. After the said decision, another decision, namely, *Union of India and others v. Virpal Singh Chauhan and others* came to the field. In the said case, the two-Judge Bench was concerned with the nature of rule and reservation in promotions obtaining in the railway service and the rule concerning the determination of seniority between general candidates and candidates belonging to reserved classes in the promotional category. The Bench referred to the decision in *R.K. Sabharwal v. State of Punjab*, various paragraphs of the *Indian Railways Establishment Manual* and paragraphs 692 and 693 of the *Indra Sawhney (supra)* and opined that the roster would only ensure the prescribed percentage of reservation but would not affect the seniority. It has been stated that while the reserved candidates are entitled to accelerated promotion, they would not be entitled to consequential seniority.

28. Thereafter, in *Ajit Singh Januja and others v. State of Punjab and others*, the three-Judge Bench posed the question in the following terms:--

"The controversy which has been raised in the present appeals is: whether, after the members of Scheduled Castes/Tribes or Backward Classes for whom specific percentage of posts have been reserved and roster has been provided having been promoted against those posts on the basis of "accelerated promotion" because of reservation of posts and applicability of the roster system, can claim promotion against general category posts in still higher grade on the basis of their seniority which itself is the result of accelerated promotion on the basis of reservation and roster?"

29. The Bench referred to the decisions in *Virpal Singh Chauhan (supra)*, *R.K. Sabharwal (supra)* and *Indra Sawhney (supra)* and ultimately concurred with the view expressed in *Virpal Singh Chauhan* by stating as follows:--

"16. We respectfully concur with the view in *Union of India v. Virpal Singh Chauhan*, that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e. with reference to their inter se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category is promoted later to that higher grade the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Tribe candidate. As already pointed out above that when a Scheduled Caste/Tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such Scheduled Caste/Tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such Scheduled Caste/Tribe candidate vis-?-vis his seniors belonging to the general category. As such it will be only rational, just and proper to hold that

when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the Scheduled Caste/Tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution."

30. In *Jagdish Lal and others v. State of Haryana and others*, a three-Judge Bench opined that seniority granted to the Scheduled Caste and Scheduled Tribe candidates over a general candidate due to his accelerated promotion does not in all events get wiped out on promotion of general candidate. The Bench explained the decisions in *Vir Pal Singh Chauhan* (supra) and *Ajit Singh Januja* (supra).

31. In *Ajit Singh and others (II) v. State of Punjab and others*, the Constitution Bench was concerned with the issue whether the decisions in *Vir Pal Singh Chauhan* (supra) and *Ajit Singh Januja* (supra) which were earlier decided to the effect that the seniority of general candidates is to be confirmed or whether the later deviation made in *Jagdish Lal* (supra) against the general candidates is to be accepted. The Constitution Bench referred to Articles 16(1), 16(4) and 16(4A) of the Constitution and discussed at length the concept of promotion based on equal opportunity and seniority and treated them to be facets of Fundamental Right under Article 16(1) of the Constitution. The Bench posed a question whether Articles 16(4) and 16(4A) guarantee any Fundamental Right to reservation. Regard being had to the nature of language employed in both the Articles, they were to be treated in the nature of enabling provisions. The Constitution Bench opined that Article 16(1) deals with the Fundamental Right and Articles 16(4) and 16(4A) are the enabling provisions.

32. After so stating, they proceeded to analyse the ratio in *Indra Sawhney* (supra), *Akhil Bharatiya Soshit Karamchari Sangh* (supra) and certain other authorities in the field and, eventually, opined that

"89 it is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as ad hoc. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a court decides that in order only to remove hardship such roster-point promotees are

not to face reversions,- then it would, in our opinion be, necessary to hold - consistent with our interpretation of Articles 14 and 16(1) - that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. While courts can relieve immediate hardship arising out of a past illegality, courts cannot grant additional benefits like seniority which have no element of immediate hardship."

33. Ultimately while dealing with the promotions already given before 10.2.1995 the Bench directed as follows:--

"89.....Thus, while promotions in excess of roster made before 10-2-1995 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster-point promotees shall have to be reviewed after 10-2-1995 and will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising in a post previously occupied by a reserved candidate. That disposes of the "prospectivity" point in relation to Sabharwal."

34. At this juncture, it is condign to note that Article 16(4A) and Article 16(4B) were inserted in the Constitution to confer promotion with consequential seniority and introduced the concept of carrying forward vacancies treating the vacancies meant for reserved category candidates as a separate class of vacancies. The said Articles as amended from time to time read as follows:--

"16(4-A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

16(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of that year."

35. The validity of the said Articles were challenged under Article 32 of the Constitution of India before this Court and the Constitution Bench in *M. Nagaraj* (supra) upheld the validity of the said Articles with certain qualifiers/riders by taking recourse to the process of interpretation. As the controversy rests mainly on the said decision, we will advert to it in detail at a later stage. Presently, we shall dwell upon the provisions that were under challenge before the High Court.

36. The Legislative Assembly of Uttar Pradesh brought in a legislation, namely, the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (UP Act No. 4 of 1994):

"to provide for reservation in public services and posts in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens and for matters connected therewith or incidental thereto."

37. Section 3(7), which is relevant for our present purpose, reads as follows:--

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes:--

(7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

Sub-section (7) of Section 3 was the subject-matter of assail before the High Court."

44. Sub-section (7) of Section 3 of U.P. Act No. 4 of 1994 by itself did not provide for any reservation, rather it simply visualised and provided for that the Government Orders providing for reservation in promotion, as on the date of commencement of Act will continue to be applicable till they are modified or revoked.

45. Section 3(7) of U.P. Act No. 4 of 1994 has been declared ultra-vires and promotion that has been given on the dictum of Indra Sawhney and without the aid or assistance of Section 3(7) and Rule 8-A have been only saved, rest of the promotions with consequential seniority will have to go. Paragraph 87 of the judgment in the case of U.P. Power Corporation (Supra) provides for as follows:

"In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum of M. Nagaraj. Any promotion that has been given on the dictum of Indra Sawhney and without the aid or assistance of Section 3(7) and Rule-8 shall remain undisturbed."

46. Once Section 3(7) of U.P. Act No. 4 of 1994 has been declared ultra-vires, then as per the dictum of Apex Court in the case of Indra Sawhne (Supra) reservation in promotion, in case there existed any provision for promotion, the same has been permitted to continue for a period of five years. Judgment in the case of Indra Sawhney (Supra) has been delivered on 16.11.1992 and accordingly all promotions, based on reservation, made up till 15.11.1997 are only protected and are not be disturbed, rest of the promotions accorded based purely on reservation w.e.f. 16.11.1997 will have to go, for the reason that on account of Section 3(7) of 1994 Act, the Government Order that provided for reservation in promotion were permitted to continue, else otherwise same has become inoperative w.e.f. 15.11.1997. Reservation in promotion for SC/ST candidates has been vogue in the State of Uttar Pradesh, earlier percentage of reservation has been 18% and by Government Order dated 10.10.1994, promotion quota has been increased to 21% under Section 3 of U.P. Act No. 4 of

1994. The said extension of quota from 18% to 21% has been subject matter of challenge before the Full Bench of this Court in the case of V.K. Banerji v. State of U.P. 1999(1) E.S.C. wherein Full Bench has upheld the validity of extension of reservation quota in promotion following the judgment of Apex Court in the case of Ashok Kumar Gupta and Another Vs. State of U.P. and Others, (1997) 4 JT 251 : (1997) 3 SCALE 289 : (1997) 3 SCALE 288 : (1997) 5 SCC 201 : (1997) SCC(L&S) 1299 : (1997) 3 SCR 269 proceeded to save the existing policy of promotion.

47. On these parameters, we are examining the record as to whether promotion has been based exclusively on reservation or bereft of the same.

48. Record in question reflects that petitioner's initial engagement has been as a Junior Engineer and at the said point of time, 23 vacancies of Junior Engineer (reserved category) were advertised and out of said 23 vacancies, 20 vacancies were reserved for Scheduled Caste and 3 vacancies were reserved for Scheduled Tribe candidates. At the said point of time, out of 20 numbers of Scheduled Caste vacancies, 14 were for Civil, 4 were for Electrical and 2 were for Mechanical. The Departmental Promotion Council (D.P.C.) prepared select list for each branch and in this select list, petitioner's name figured at serial No. 17 in Civil Category while there were only 14 vacancies and thereafter when office order dated 28th November, 1989 was issued offering appointment to 14 persons as Junior Engineers, Civil category, surprisingly, the name of petitioner did not figure in the appointment order as he was at serial No. 17 of the select list. In the said select list, the incumbents, who were at serial No. 1, 7 and 11, did not join and consequential exercise of cancellation of their appointment was undertaken and resolve to offer appointment to next three persons in the select list has been taken and the incumbents who were at serial No. 15, 16 and 17 got appointment and this is how the petitioner has entered into service as Junior Engineer (Civil) and appointment letter dated 29th May, 1990 was issued to the petitioner requiring him to join and petitioner consequently joined on 6th June, 1990.

49. After joining of the petitioner, the first seniority list of Junior Engineers (Civil) was prepared on 22.10.1991 where the petitioner's name figured at serial No. 54 and he was the junior most junior engineer after being selected against reserved category post and a combined seniority list of Junior Engineers (Electrical, Mechanical) was also prepared on 19th June, 1991 wherein petitioner's name figured at serial No. 73.

50. In the cadre of Assistant Project Engineer, there was a backlog for reserved category persons and appointment to the post of Assistant Project Engineer could be filled by way of direct recruitment or by way of promotion from Junior Engineers to Assistant Project Engineer. Total posts of Assistant Project Engineer under promotion quota were 20. The State of U.P. Provided for 21% reservation and accordingly, on the presumption that there is reservation in promotion out of 20 posts, 4 posts were computed to be falling in reserved category.

51. For direct recruitment as Assistant Project Engineer, the essential qualification has been Degree in Engineering and under the promotion quota, the qualification has been 15 years experience as Junior Engineer and petitioner, at the said point of time, was not at all having to his credit essential qualification of 15 years experience as Junior Engineer and out of 4 reserved category posts falling under the promotion quota, three were filled up and there was one vacancy available and as no other Junior Engineer was fulfilling the criteria of 15 years experience as Junior Engineer and there was no degree holder available in the reserved category except petitioner, in this background, the Departmental Promotion Council, on 22nd July, 1997 recommended the petitioner for promotion as Assistant Project Engineer. Petitioner, in the present case it is reflected has received promotion to the post of Assistant Project Engineer on the basis of reservation and at that point of time, the seniority status of petitioner was at serial No. 42 and at serial Nos. 28 to 41, there were persons, who were senior to the petitioner also belonging to Scheduled Caste Category but they did not possess the requisite degree and at the said point of time, petitioner has bypassed 25 persons from General Category and 14 of reserved category, who were senior to petitioner received promotion as Assistant Project Engineer vide order dated 08.08.1997. The record in question speaks that in about 7 years time, petitioner received his first promotion by virtue of reservation on promotional post. Seniority list of Assistant Project Engineer was issued in July, 1997 i.e. just before the petitioner got promoted and as petitioner had received promotion in August, 1997, he was the junior most Assistant Project Engineer. Such a promotion accorded prior to 15.11.1997 stands saved.

52. The Government of Uttar Pradesh issued Government Order dated 3rd July, 2002 notifying backlog of Scheduled Caste quota on all promotions. NOIDA Authority in its 110th Board Meeting held on 24th September, 2002 adopted the Government Order dated 3rd July, 2002 and as the cadre strength of Project Engineer was 10 and as per the Recruitment and Promotion Policy, there were to be 03 direct recruits and 07 promotees and then going by 21% reservation Rule, 02 posts of Project Engineer had been kept in the reserved category. At the said juncture, by virtue of being from the reserved category, 19 Assistant Project Engineers, who were senior to the petitioner but they were from the General Category, the claim has not been considered and petitioner's claim has been considered superseding many incumbents from General Category and he was accorded promotion as Project Engineer w.e.f. 27th September, 2002.

53. The record in question is thus speaking for itself that at all point of time whenever he has been accorded promotion, it is all accelerated promotion on account of reservation and his promotion as Project Engineer is certainly on the strength of Section 3(7) of U.P. Act No. 4 of 1994.

54. The entire gamut of the argument that has been raised on behalf of petitioner is to the effect that closed chapter is being reopened and he has never taken the benefit of reservation and with the aid of Section 3(7) of U.P. Act No. 4

of 1994 he has not been promoted and Rule 8-A of the 1991 Rules has also not been taken recourse to, is being looked into.

55. Petitioner's argument is totally contrary to the record inasmuch as, at all point of time, he has been the beneficiary of the provision of reservation extended in promotion as at all point of time whenever his claim has been considered for promotion, General Category candidates have always been excluded and have never been considered alongwith him, in view of this, the averments that are being mentioned by him that at all point of time he has proceeded to make place for himself on merits is contrary to the record.

56. We have already expressed our view that the provisions of Seniority Rules 1991 are not at all applicable in the matter of determination of seniority of employees of the Authority and accordingly, Rule 8-A of 1991 Rules would also not consequently apply, but in the facts of present case what we find that in spite of the fact Rule 8-A of Seniority Rules was not applicable, benefit of the same has been extended to him, as in the seniority list dated 02.06.2006 where after omission of Rule 8-A, petitioner's name is placed below the name of Sri S.K. Gupta but after re-insertion of Rule 8-A he has been placed over Sri S.K. Gupta.

57. Once such is the factual situation that petitioner has been the beneficiary of reservation in the matter of promotion also and accelerated seniority has also been extended to him, then pursuant to the directives issued by the Apex Court, all those incumbents, who are beneficiary of Section 3(7) and Rule 8-A of 1991 Rules will have to go back to their original position and question of long drawn seniority will not at all come to the rescue of petitioner and in the present case, as far as petitioner is concerned, exactly in the said direction steps have been undertaken against him.

58. In view of the above, the arguments advanced sans merit and the writ petition is accordingly, dismissed.