
(2010) 09 AHC CK 0486

Allahabad High Court

Case No: C.M.W.P. No. 17389 of 2005

Ishtiyak Ahmad Makrani

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Sept. 9, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 226
- Uttar Pradesh Development Authority (Centralised Service) Rules, 1985 - Rule 20A, 20A(1), 20A(4), 28, 8
- Uttar Pradesh General Clauses Act, 1904 - Section 19A
- Uttar Pradesh Government Servants (Seniority) Rules, 1991 - Rule 6

Hon'ble Judges: R.A. Singh, J; P.C. Verma, J

Bench: Division Bench

Final Decision: Allowed

Judgement

P.C. Verma, J.

By means of present writ petition under Article 226 of the Constitution of India, the Petitioner has prayed for the following reliefs:

(i) to issue a writ of certiorari or an order or a direction in the nature thereof calling for the records and quashing the impugned seniority list issued vide order dated 3.3.2009 (filed as Annexure-13 to the writ petition).

(ii) to issue a writ of mandamus or an order or a direction in the nature thereof commanding the Respondent No. 1 to place the Petitioner at serial No. 1 above Shri Narshimha Reddy who has wrongly been placed at serial No. 1 in the final seniority list issued vide order dated 3.3.2005 (filed as Annexure-13 to this writ petition).

(iii) to issue a writ of mandamus or an order or a direction in the nature thereof commanding the Respondent No. 1 to promote the Petitioner from the date Shri Mahavir Singh has been promoted and give all consequential benefits to the

Petitioner.

(iv) to issue any other writ order or direction which this Hon"ble Court may deem fit and proper in the circumstances of the case.

(v) to award cost of the writ petition to the Petitioner.

2. The brief facts emerging out from the pleadings made in the writ petition are that an advertisement was issued by the State Government (Respondent No. 1) for filling up the post of the Assistant Town Planners by direct recruitment on ad hoc basis in the "U.P. Development Authorities Centralized Services" (in short, "the Centralized Services"). The Petitioner appeared before the Selection Committee, constituted for the purpose on 4.7.1987 and was selected alongwith eight other Assistant Town Planners (A.T.Ps.). Pursuant thereto, an Office Memorandum of the selected candidates was issued by the State Government on 27.7.1987 with a list of nine persons appointed as the A.T.Ps. (Annexure-1 to the writ petition). The name of the Petitioner found place at serial No. 1 of the list, while the names of the rest of 8 appointees were below the Petitioner at serial Nos. 2 to 9. The order of names of 9 appointees was as given below:

Name of the persons ad hoc appointed as the Assistant Town Planners (A.T.P.) in the Centralized Services vide State Governments office memorandum dated 27.7.1987 in the order given below

S.No.	Name	Place of posting
1.	Ishtiyak Ahmed Makrani	Agra Development Authority
2.	Mukul Kumar Hatwal	Kanpur Development Authority
3.	K. Narsimha Reddy	Allahabad Development Authority
4.	Satish Chandra Gaur	Haridwar Development Authority
5.	Km. KarunaMittal	Kanpur Development Authority
6.	AashishShivpuri	Lucknow Development Authority
7.	Ravi Jain	Gorakhpur Development Authority
8.	Ram Gopal Singh	Dehradun Development Authority
9.	NityanandTiwari	Varanasi Development Authority

3. The appointment, as above, was for a period of one year or the regular selected incumbent through U.P. Public Service Commission (U.P.P.S.C.) was available. Since no selection was held through U.P.P.S.C, the Petitioner continued in service uninterrupted. In March 1998, an advertisement was issued for filling up the posts of the A.T.Ps. through U.P.P.S.C. Being aggrieved, a writ petition was filed by the aforesaid ad hoc appointees (including the Petitioner) before the Lucknow Bench of this Court being Writ Petition No. 586/1998 (S/B), J. Narsimha Reddy and Ors. v. State of U.P. and Ors. which was finally disposed on 25.8.2001 with a direction to the State Government to consider their regularisation as per Rule 20A of the U.P. Development Authorities Centralized Services Rules, 1985 (as. amended up-to-date), if applicable.

4. It may be noticed that a new Rule, being Rule 20A, was inserted by the U.P. Development Authorities Centralized Services (Third Amendment) Rules, 1992 in the U.P. Development Authorities Centralised Services Rules, 1985 (in short, "the Service Rules"). It specifically dealt with the regularization of the ad hoc appointees. This Rule 20A was amended in the year 2001 by changing the relevant date in Sub-rule (1) from 1.10.1986 to 29.6.1991.

5. Pursuant to the aforesaid judgment of this Court dated 25.8.2001, a Selection Committee was constituted by the U.P. Government for the regularization of the ad hoc appointed A.T.Ps. and its three meetings were held, followed thereafter by issue of three separate regularization orders in regard to 10 ad hoc appointees including one Shri Rajendra Kumar, who was appointed on 14.4.1988, as per details given below:

S.No.	Date of Selection Committee		Date of Regularization Order	No. of ad hoc appointees regularized
1.	29.9.2001 R.A.-4)	(Annex.	22.11.2001 (Annex-4 to writ petition)	7 persons
2.	11.11.2002 R.A.-4)	(Annex.	30.1.2003 (Ref. Annex. C.A.-1)	1 persons
3.	31.12.2003 R.A.-4)	(Annex.	24.3.2004 (Annex-6 to writ petition)	2 persons

6. The copies of the minutes of the proceedings of the Selection Committee held on 29.9.2001 and 31.12.2003 (obtained under the Right to Information Act, 2005 by the Petitioner) are on record (Annexure R.A.-4). The regularization orders dated

22.11.2001 and 24.3.2004 issued by the State Government are also on record (Annexures-3 and 6 to the writ petition), which clearly mentioned that the seniority of the appointees would be determined separately on the basis of their initial ad hoc appointments as per Rule 20A of the Service Rules. As such, the issue of inter se seniority of the regularized persons was kept open in the aforesaid regularization orders. Further, from a perusal of the copies of the minutes, it is also evident that the Selection Committee on no occasion found the Petitioner to be unsuitable.

7. Thereafter, the State Government prepared and issued the tentative Seniority List of the A.T.Ps. serving in the Centralized Services to invite their objections/suggestions in its respect within a period of 15 days vide its order dated 28.7.2004 (Annexure-7 to the writ petition). In this tentative seniority list, the name of the Petitioner was shown at serial No. 9 and the persons whose names were recorded in the Appointment Order dated 27.7.1987 below the name of the Petitioner were shown from serial Nos. 1 to 8. Feeling aggrieved, the Petitioner submitted his objection dated 9.8.2004 to the proposed seniority list, which were forwarded to the State Government by the Vice-Chairman of the Aligarh Development Authority on 10.8.2004 (Annexure-8 to the writ petition). Finally, the State Government issued the final seniority list vide its office order dated 3.3.2005 (Annexure-13 to the writ petition), wherein the name of the Petitioner was again shown at serial No. 9. In this final seniority list also, the names of the persons who figured lower in the order of the appointment letter dated 27.7.1987 (Annexure-1 to the writ petition) were shown above the Petitioner, meaning thereby the Petitioner was shown as junior to 8 persons. The objection submitted by the Petitioner found reference in the office order dated 3.3.2009 (Annexure-13 to the writ petition) but the same were rejected. The list of seniority of concerned A.T.Ps., as shown in the seniority list, was as under:

Sl. No.	Name of Assistant Town Planner	Date of ad hoc Appointment	Date of Regularization	Serial No. as mentioned in the Office Memorandum dated 27.7.1987 of ad hoc appointment 3 (List of A.T.Ps.)
1.	J. Narsimha Reddy	27.7.1987	22.11.2001	4 (List of A.T.Ps.)
2.	Satish Chandra Gaur	27.7.1987	22.11.2001	

3.	Ravi Jain	27.7.1987	22.11.2001	7 (List of A.T.Ps.)
4.	Ram Gopal Singh	27.7.1987	22.11.2001	8 (List of A.T.Ps.)
5.	NitinMlttal	27.7.1987	22.11.2001	4 (in the list of Asstt. Architects)
6.	Mahavir Singh (S.C.)	27.7.1987	22.11.2001	5 (in the list of Asstt. Architects)
7.	Rajendra Kumar	27.7.1987	22.11.2001	-
8.	NltyanandTiwari	27.7.1987	30.1.2003	9 (List of A.T.Ps.)
9.	Ishtiyak Ahmed Makrani	27.7.1987	24.3.2003	1 (List of A.T.Ps.)
10.	AashishShivpuri	27.7.1987	24.3.2003	6 (List of A.T.PS.)

8. Feeling aggrieved, the Petitioner filed the present writ petition, in which an interim order was passed on 14.3.2005 by this Court that "if promotion is made in the meanwhile, it shall be subject to the decision of the writ petition". It was also pointed out that during the pendency of this writ petition, three A.T.Ps., who were junior to the Petitioner , were promoted as the Town Planners vide the State Government's order dated 28.5.2005. Thereafter, two more A.T.Ps. were promoted in the year 2006 as Town Planners, while the Petitioner was promoted as Town Planner much later on in the year 2007.

9. Heard Sri Manish Goyal, assisted by Sri R.S. Ram. learned Counsels appearing on behalf of the Petitioner , learned standing counsel for the Respondent No. 1 and Sri V.B. Upadhaya, learned senior counsel assisted by Sri A.K. Mishra for the Respondent Nos. 2, 3 and 8 and perused the records. None appeared on behalf of the Respondent Nos. 4 to 7 despite sufficient service of notice upon them. The parties have exchanged the affidavits.

10. The question for consideration in this writ petition is "Could the seniority of the Petitioner who was entitled to be considered for his regularization in the year 2001 be adversely affected by his delayed regularization in the year 2004 by the State Government (delay attributable to the State Government), while the persons junior to the Petitioner were regularized in the year 2001?

11. The entire controversy of the seniority of the Petitioner revolves around the provisions of Rule 20A of the Service Rules, which is the governing provision relating to seniority of the ad hoc appointees who were regularized by the State Government.

12. learned Counsel appearing on behalf of the Petitioner contended that a perusal of Sub-rule (1) of the Rule 20A would show that any person who was appointed on ad hoc basis on or before 29.6.1992 (as it stood amended) and possessed the prescribed qualification and completed 3 years of continuous service "shall be considered for appointment on the basis of his service record and suitability before any regular appointment is made in such vacancy in accordance with the Rules." Thus, a valuable right of the "consideration for appointment" on the "basis of service record and suitability" has been given to all eligible ad hoc appointees. Since the Petitioner admittedly possessed the requisite eligibility, he had a right of consideration for his appointment under Rule 20A, and such right of his consideration could not be lightly taken.

13. It is further contended that Sub-rule (4) of Rule 20A is also most significant for the purposes of resolving the present controversy. This sub-rule peremptorily required that "an eligibility list of the candidates shall be prepared and the names of the candidates shall be arranged in order of seniority as determined from the date of order of their ad hoc appointment by the Appointing Authority." The sub-rule further enjoins that "if two or more persons are appointed together, from the order in which their names are arranged in the appointment order." The other most important requirement of this sub-rule is that "the list shall be placed before the Selection Committee alongwith their character rolls and such other service records pertaining to them as may be considered necessary to judge their suitability." The facts on record would show that when the meeting of the Selection Committee was held on 29.9.2001, an eligibility list of 11 persons was placed before it wherein the names of the incumbents were arranged as per their ad hoc appointment order dated 27.7.1987. Most significantly, the name of the Petitioner in this List was at serial No. 1. In this eligibility list, the names of Shri J. Narsimha Reddy and Shri Satish Chandra Gaur were at serial Nos. 3 and 4. It clearly established that the Petitioner was at the top in the order of all of the incumbents, i.e., he was shown as the senior most ad hoc appointed A.T.P. The placement of the eligibility list before the Selection Committee, as such, complied with the first part of Sub-rule (4), but strangely enough, the later part of Sub-rule (4) was not complied with. Reason being that the character rolls and service records of 4 persons (namely, the Petitioner, Mukul Kumar Hatwal, Aashish Shivpuri and Nityanand Tiwari) out of 11 persons of the eligibility list were not placed before the Selection Committee due to non-receipt of the records for the requisite years. In the minutes, it was also mentioned that the Committee would consider the matters of the said 4 persons separately. This mode of "partial consideration" of 7 persons out of the eligibility list of 11 persons and the postponement of the consideration for regularization of 4 persons (namely, the

Petitioner. Mukul Kumar Hatwal, Aashish Shivpurt and Nityanand Tiwari) was wholly illegal, arbitrary and de hors Sub-rule (4). The sine qua non requirement of Sub-rule (4) was that "the list shall be placed before the Selection Committee alongwith their character rolls etc. necessary to judge their suitability." The non-placement of the service records (i.e. A.C.Rs.) of 4 persons including the Petitioner was per se illegal. Sub-rule (4) never comprehended that there should be piecemeal consideration of the suitability of only some of the persons of the eligibility list much to the detriment of the remaining persons. It cannot be gainsaid that the entire scheme of Sub-rule (4) enjoined the consideration of all of the candidates at one time with their complete service records. The provisions of Sub-rule (5) further reinforces this proposition as it lays down that the "Selection Committee shall consider the cases of the candidates on the basis of their records." Here again, the candidates would mean all of the eligible candidates and not only some of the eligible candidates. The underlying purpose of the consideration of all of the eligible candidates at one and the same time has been to protect the inter se seniority of the candidates, earlier appointed on ad hoc basis with their different length of services or merits. This purpose is clearly visible from the perusal of Sub-rules (6) and (7) also.

14. It is further contended by Petitioner's counsel that Sub-rules (6) and (7) of Rule 20A also manifest the anxiety of the rule-framers to protect the inter se seniority of the selected candidates. Sub-rule (6) enjoins the list of selectees to be arranged "in order of seniority." Similarly, Sub-rule (7) mandates the Government to make appointment from the list prepared by the Selection Committee "in order in which their names stand in the list". Thus, the examination of Sub-rule (4) to Sub-rule (9) of Rule 20A clearly reveals that the Rule-Framers were very much concerned to protect the inter se seniority of the selectees and Sub-rule (4) spelled out a well defined seniority criterion, namely, (i) firstly, the order of seniority shall be determined from the date of order of their ad hoc appointment, which gives importance to the length of service; secondly, if two or more persons were appointed together on the same date, then their seniority shall be determined "from the order in which their names are arranged in the said appointment order" and it gives importance to the merits of the candidate. The above well-defined and just criterion was to be necessarily followed by the Selection Committee while preparing the list of selected candidates in Sub-rule (6) and also by the Government while making appointment in Sub-rule (7).

15. Undoubtedly, the partial consideration of the suitability of 11 candidates by the Selection Committee on 29.9.2001 was against the scheme of Rule 20A. In so far as Sub-rule (9) of Rule 20A is concerned, it needed to be given effect to only when the provisions contained in Sub-rule (4) to Sub-rule (7) were complied with in their letter and spirit truly. Since in the present case, the mandate of Sub-rule (4) was not complied with, the provisions of Sub-rule (9) could not be pressed into service. Sub-rule (9) laid down that the seniority would be from the date of order of appointment but Sub-rule (9) should apply only in a situation when the suitability of

all the candidates, i.e., ad hoc appointees stood decided by the Selection Committee. By not considering the suitability of all of the 11 eligible ad hoc appointees on 29.9.2001 and the regularization of only 7 candidates adversely effected the clear, just and reasonable rule of seniority as outlined in Sub-rule (4). In fact, the seniority criterion laid down in Sub-rule (4) is also in conformity with the provisions of Rule 28 of the Service Rules. The order in which the names of selectees are arranged in an appointment order shows the merits achieved by the respective selectee. In the present case, the Petitioner's name was shown at the first position in the order of names shown in the Appointment Order dated 27.7.1987 and, as such, the Petitioner was the senior most candidate whose seniority could not have been taken away by reason of the non-placement of his service records to judge his suitability. The piecemeal consideration, as was made by the Selection Committee on 29.9.2001, was wholly arbitrary and against the scheme of the statutory Rule 20A.

16. We are also of the considered opinion that in the fact-situation of the matter, the date of regularization order, i.e., 24.3.2004 could not be decisive for determining the seniority of the Petitioner in view of the noncompliance of the mandate of Sub-rule (4) of Rule 20A. The final seniority list (Annexure-13 to the writ petition) prepared by the Government also lost sight of the pertinent fact that the regularization orders dated 22.11.2001 (Annexure-3) and dated 24.3.2004 (Annexure-6) left open the issue of inter se seniority.

17. In any view of the matter, if Sub-rule (9) of Rule 20A is sought to be pressed into service in oblivion of Sub-rules (4) to (7), then it would be vulnerable to an attack under Article 14 of the Constitution of India. In some what similar circumstances, in *S.B. Patwardhan and Anr. v. State of Maharashtra and Ors.* (1997) 3 SCC 399, the Supreme Court struck down Rule 8(iii) where the executive act of confirmation was made the basis for seniority. It was held that the "confirmation is one of the inglorious uncertainties of Government service, depending neither on efficiency of the incumbent nor on the availability of substantive vacancies" and it was also said that "the accident of confirmation cannot be an intelligible criterion for determining seniority." Applying the same analogy, the belated executive action of the State Government in regularizing the Petitioner on 24.3.2004 could not have adversely affected his seniority. It is not a case that he was found unsuitable after the examination of his service records.

18. Moreover, the non-placement of the service records, i.e., A.C.Rs. of some of the years of the Petitioner in the meeting of the Selection Committee on 29.9.2001 was the fault or lapse attributable to the State Government and the Petitioner cannot be made to suffer for it. This laudable principle described in the latin legal maxims are *nemo punitur pro alieno delicto*-no one is punished for an other's wrong and *nemo punitur sine injuria, facto, seu defalta*-no one is punished unless for some wrong, act, or default. Further, the Government cannot make the Petitioner to lose his seniority for failure to comply with the provisions of Sub-rule (4). In these telling

circumstances, to treat 24.3.2004 as the relevant date for reckoning the Petitioner's seniority is wholly arbitrary, unreasonable, unjust and cannot be sustained. The non-consideration of the Petitioner by the Selection Committee on 29.9.2001 was also violative of Articles 14 and 16 of the Constitution of India. The State Government could not have chosen the pick and choose policy, which has resulted in the civil consequences, namely, deprivation of Petitioner from his seniority and also of the pecuniary benefits. Our this view also finds full support from the ratio of AIR 1989 1688 (SC) wherein the view taken was that the incumbent would not suffer for the lapse on the part of the Government in delay in amending the Schedule to the Rules. It was also observed therein that a "narrow and technical ground would be doing great injustice to them."

19. Our above view also finds support from a very recent decision of the Hon"ble Supreme Court in H.S. Vankani and Ors. v. State of Gujarat and Ors. 2010 (2) ESC 269, wherein the question of inter se seniority of the Range Forest Officer arose between two batches one was of the non-graduates (1979-81) who underwent training for 2 years and another batch of the graduates which underwent training of one year only (1980-81). The candidates who underwent one year training were placed senior to this batch. The relevant Rules though requiring that "seniority of the rangers shall be governed by their respective ranks in the final examination at the Rangers College irrespective of their joining the service" were held to be unworkable and were not given effect to by the Supreme Court.

20. In view of the ratio in the case of H.S. Vankani and ors. (supra), the contention of the Respondents to press Sub-rule (9) of Rule 20A to reckon the seniority of the Petitioner only from the date of his regularization order dated 24.3.2004 has no force. Sub-rule (9) should be given an effect in a manner which does not lead to manifest absurdity, futility, palpable injustice and absurd inconvenience or anomaly and it is possible only when the entire scheme of Rule 20A is kept on the mental screen and Sub-rule (4) as well as Sub-rule (9) are harmoniously construed.

21. From the above, it is also no more in doubt that the Petitioner was senior to one Mr. J. Narsimha Reddy and 7 others, who were wrongly shown as senior to the Petitioner in the impugned final seniority list dated 3.3.2005. All of the said 8 persons illegally scored a march over the Petitioner and, therefore, on the principle of recognized service jurisprudence on "next below rule", the Petitioner should be deemed to be senior to all of them and be deemed to be also regularized w.e.f. 22.11.2001 when the regularization order was first issued of Mr. J. Narsimha Reddy and 6 others. As explained by the Hon"ble Supreme Court in [R.K. Sethi and another Vs. Oil and Natural Gas Commission and others](#), the "next below" rule in service jurisprudence seeks to ensure that if a junior employee is given promotion without considering his senior, then the senior employee can claim the right to be considered for such promotion w.e.f. the date of which the junior was so promoted." In [State of Mysore Vs. M.H. Bellary](#), the "next below rule" was explained as where an

officer on deputation is given a paper-promotion and shown as holding a higher post in the parent department if the officer, next below him is promoted there. In the present case, the principle of the "next below rule" applied which extended an indefeasible right to the Petitioner for his consideration for the regularization when the persons junior to him were so considered on 29.9.2001. The principle of "relating back" was also laid down in [G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others](#), wherein it was held that where the officiating appointment was followed by confirmation, then unless a contrary rule was shown, would relate back to the date on which the first appointment was made. The drawing of the seniority list on the basis of the date on which approval/selection was made by the Public Service Commission was held to be violative of Article 16 of the Constitution of India. This decision was also followed by the Supreme Court in [Shri L. Chandrakishore Singh Vs. State of Manipur and Others](#), The application of the "next below rule" is based on the doctrine of "relation back" which means that an act committed at a later time is considered as having occurred at the time of an earlier event or that "an act done today is considered to have been done at an earlier time." On applying this doctrine also, the Petitioner shall be deemed to be regularized on 28.8.2001, when the persons junior to him were regularized. The State Government had also such power in view of Section 19A of the U.P. General Clauses Act, 1904.

22. It may also be useful to refer statutory provisions of Rule 6 of U.P. Government Servants Seniority Rules, 1991 which lay down that "a person senior in the feeding cadre shall, even though promoted after the promotion of a person junior to him in the feeding cadre shall, in the cadre to which they are promoted, regain the seniority as it was in the feeding cadre." Applying this salutary principle to the facts of the present case, once the Petitioner was regularized on 24.3.2004, he shall regain his seniority vis-a-vis his junior who were regularized on 22.11.2001.

23. On behalf of the Respondents, it was also contended that when the meeting of the Selection Committee was held on 29.9.2001, the disciplinary proceedings were pending against the Petitioner and, therefore, he was rightly not considered for regularization.

24. A bare reading of paragraph No. 12 of the minutes of the meeting dated 29.9.2001 shows that in the meeting, the Selection Committee never held the Petitioner to be unsuitable and rather the non-consideration of the Petitioner was on account of the non-availability of the service records of the Petitioner and not on ground of his suspension. Same fact also finds mention in the minutes of the meetings dated 31.12.2003. As such, it is factually incorrect for the answering Respondents to state that the Petitioner was not considered on account of his suspension operating on 29.9.2001.

25. Besides this, it may be mentioned that the Petitioner has brought on record a copy of the charge-sheet dated February, 2001 (Annexure RA-1) and also the consequent order of his exoneration dated 21.11.2001 (Annexure RA-2). Both of

these documents would show that though a charge-sheet was issued to the Petitioner in February, 2001, it was only for his going on leave without permission of the Competent Authority and after enquiry he was exonerated with no punishment except a warning and even the withheld part of his salary due to the suspension was also directed to be paid. to him. Interestingly, it was the State Government which issued the charge-sheet and also decided the same on 21.11.2001 while the order of regularization of seven persons junior to the Petitioner was issued on 22.11.2001. As such, on 22.11.2001 when the State Government regularized 7 persons junior to the Petitioner , the Petitioner stood already exonerated on 21.11.2001, clearly demonstrating that the disciplinary proceedings had no consequence.

26. It may also be noticed that it is also a settled law that pending disciplinary proceedings, an incumbent can be promoted or a "sealed cover procedure" can be followed to avoid any prejudice to an employee. In [Union of India Vs. K.V. Jankiraman, etc. etc.](#), it was said that "the sealed cover procedure is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over." It was also held that the "sealed cover" is opened on exoneration of the employee who is then given a notional promotion from the date when his juniors were promoted. Besides that, arrears of the salary could be granted from the date of the notional promotion. In [B.C. Chaturvedi Vs. Union of India and others](#), it was held when disciplinary proceedings are pending, "two courses are open to the Competent Authority, viz., sealed cover procedure which is usually followed, or promotion subject to the result of pending disciplinary action." Recently, in [Delhi Jal Board Vs. Mahinder Singh](#), it was held that "the right to be considered by the D.P.C. is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed." The entire idea and purpose of the "sealed cover procedure" is to protect the, interest of an employee from being deprived of his legitimate right of promotion etc. if he is finally exonerated of the charges. The Petitioner in the present case was exonerated from the charges on 21.11.2001. On 29.9.2001, when the Selection Committee met, it should have considered the Petitioner also for regularization which at best could have followed the sealed cover procedure and kept the decision in abeyance up till the final outcome of the disciplinary proceedings. Having not followed the procedure, the Selection Committee/State Government acted in defiance of the settled principle of service jurisprudence.

27. Sri V.B. Upadhaya, the learned senior counsel appearing on behalf of the Respondent Nos. 2, 3 and 8, has relied upon a recent judgment dated 26.4.2010 of

the Lucknow Bench of this Court in Writ Petition No. 1388 of 2007 (S/B) Ajay Kumar Singh and Anr. v. State of U.P. and Ors., 2010 (6) AWC 5526. A perusal of this judgment would show that it does not have any bearing on the controversy in hand as it does not deal with an issue similar to the present matter where the Petitioner was not regularized on account of the lapse (namely, the non-placement of Petitioner "s A.C.Rs.) attributable to the State Government.

28. Sri Upadhaya also contended that the Petitioner did not challenge his non-inclusion in the list granting regularization in the year 2001 and his regularization w.e.f. 24.3.2004 and, therefore, the Petitioner cannot be permitted to challenge the date of his inclusion in the cadre in the garb of the seniority list. Such contention is also unfounded. The minutes of the Selection Committee held on 29.9.2001 and 31.12.2003 would clearly show that his regularization was not declined but the consideration was only postponed in the meetings held on 29.9.2001 and 11.11.2002 on account of non-availability of Petitioner"s A.C.Rs. Further, the question of inter se seniority was left open in the orders issued by the State Government on 22.11.2001 and 24.3.2004. The Petitioner never waived any of his rights at that point of time. After the State Government issued the order of regularization on 22.11.2001, the Petitioner in fact made his representation dated 28.1.2002, requesting therein to the State Government to regularize him also like 7 other persons have been regularized by the order dated 22.11.2001. Thereafter, the Petitioner also met the authorities concerned and this fact has not been denied by the State Government in its counter-affidavit. Further, the real grievance of the Petitioner surfaced only when the tentative seniority list was issued on 28.7.2004 (Annexure-7 to the writ petition) against which the Petitioner rushed to file his objections (Annexure-8 to the writ petition) and finally, when the State Government issued the impugned final seniority list on 31.3.2005 (Annexure-13 to the writ petition). In view of these telling facts, the Petitioner cannot be said to be guilty of lapses on his part. He had, in fact, a valuable right to challenge the final seniority list.

29. On behalf of the answering Respondents, it was also contended that the Petitioner was under suspension on 29.9.2001, which resulted in awarding a minor punishment to him and, therefore, the Petitioner"s claim was rightly overlooked by the Selection Committee on 29.9.2001. Such contention is factually unfounded for several reasons, namely, (1) in the meeting dated 29.9.2001 of the Selection Committee, the Petitioner"s candidature for regularization was not considered at all, which was postponed for want of his A.C.Rs.; (2) in the disciplinary proceedings, the Petitioner was given only a warning and not any punishment, whether major or minor and was also reinstated with all benefits for the suspension period; and (3) the Selection Committee on 31.12.2003 regularized the Petitioner after finding him "suitable" after due consideration of his A.C.Rs. for last 10 years, which included the above disciplinary proceedings. As such, it is evident that the disciplinary proceedings initiated against the Petitioner by issue of the charge-sheet in the month of February, 2001 and the final order dated 21.11.2001 pursuant thereto had

no effect, whatsoever, upon the Petitioner's regularization.

30. The other ground urged by the Respondents about the alternative remedy of U.P. Public Service Tribunal has also no substance. This writ petition is pending for last more than five years and the parties have exchanged their affidavits. Many of the Respondents have already been promoted to the post of Town Planner. It would, at this stage, be unjust to require the Petitioner to approach the said Tribunal for redressal of his grievances, when the impugned order suffers from errors of law apparent on the face of record and is an arbitrary exercise of powers de hors the statutory rules.

Having considered the rival contentions, we are of the considered opinion that the impugned seniority list dated 3.3.2005 (Annexure-13) is arbitrary, illegal and violative of the provisions of the statutory Rule 20A of the Service Rules. The impugned seniority list also violates the settled principles of service jurisprudence and suffers from arbitrariness and discrimination.

31. Since Sri Mahavir Singh, Respondent No. 7, is a Scheduled Caste candidate and was promoted on 25.1.2005 as per the reservation policy of the State Government, the Petitioner can not claim parity with him in promotion and therefore, the Petitioner's claim on the basis of the promotion of said Sri Mahavir Singh is not sustainable and is liable to be rejected.

32. In view of the foregoing discussions, this writ petition has merits and is, accordingly, allowed. The Petitioner, having been held suitable by the Selection Committee on 31.12.2003 after due examination of his service records, is deemed to be regularized w.e.f. 22.11.2001, when the persons junior to him were regularized and is also held as the senior most with his name arranged at serial No. 1 of the aforesaid final seniority list dated 3.3.2005. The final seniority list stands, accordingly, amended to the above extent. The Petitioner is also deemed notionally promoted to the post of Town Planner w.e.f. 28.5.2005 with all service benefits, when the persons junior to him were promoted to the post of Town Planner. No order as to costs.