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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8612 OF 2019

Dr. Abhay Eknath Wagh
Age – 53 years, Occ – Service
R/o Haji Ali Government Quarters,
Mahalaxmi, Mumbai-34

PETITIONER

VERSUS

1. The State of Maharashtra
Through Secretary,
Department of Higher Technical Education
Mantralaya, Mumbai-32
2. The Maharashtra Public Service Commission
Through its Secretary,
Bank of India Building,
3rd Floor, Hutatma Chowk,
Fort, Mumbai-1
3. The Director,
Directorate of Technical Education,
3, Mahapalika Marg,
Mumbai-1
4. All India Council of Technical Education
Nelson Mandela Marg
Vasantkunj
New Delhi 100 067
5. Association of Pharmacy Teachers of India
Through its Member,
Saber Hussain Fazal s/o Hussain Akhtar
Age – 62 years, Occ – Retired
R/o 27-B, N-12, Professor Colony
Opp Himayat Bag, Aurangabad
District – Aurangabad

RESPONDENTS

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Mr. P. M. Shah, Senior Advocate i/b Mr. Girish S. Rane, Advocate
for the petitioner

Mr. L. M. Acharya, Special Advocate with Mr. A. V. Deshmukh,
AGP for respondent - State

Mr. M. S. Kulkarni, Advocate for respondent No. 2

Mr. S. V. Adwant, Advocate for respondent No. 4

Mr. S. V. Dixit, advocate for respondent No. 5

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WITH
WRIT PETITION NO.8646 OF 2019

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| 1. | Dr. Vinod s/o Mahadeorao Mohitkar
Age – 51 years, Occ – Service
R/o R. H. -1, D-6, Sector-6
Vashi, Navi Mumbai
District Thane | PETITIONERS |
| 2. | Dr. Dattatraya Vyankatrao Jadhav,
Age – 51 years, Occ – Service
R/o Flat NO. 53, Padmaja Park
Behind Lane Town, Bibewadi, Pune
District – Pune | |

VERSUS

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|----|--|-------------|
| 1. | The State of Maharashtra
Through Secretary,
Department of Higher Technical Education
Mantralaya, Mumbai-32 | RESPONDENTS |
| 2. | The Deputy Secretary,
Maharashtra Public Service Commission
Through its Secretary,
Bank of India Building,
3 rd Floor, Hutatma Chowk,
Fort, Mumbai-400 001 | |
| 3. | The Director,
Directorate of Technical Education ,
3, Mahapalika Marg,
Mumbai-1 | |
| 4. | The Director,
All India Council of Technical Education
Nelson Mandela Marg | |

Vasantkunj
New Delhi 100 067

5. Association of Pharmacy Teachers of India
Through its Member,
Saber Hussain Fazal
Age – 62 years, Occ – Retired
R/o 27-B, N-12, Professor Colony
Opp Himayat Bag, Aurangabad
District – Aurangabad

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Mr. V. D. Hon, Senior Advocate i/b Mr. A. V. Hon and Mr. C. A. Jadhav, Advocates for the petitioners

Mr. L. M. Acharya, Special Advocate with Mr. A. V. Deshmukh, AGP for respondent - State

Mr. M. S. Kulkarni, Advocate for respondent No. 2
Mr. S. V. Adwant, Advocate for respondent No. 4
Mr. S. V. Dixit, advocate for respondent No. 5

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WITH

WRIT PETITION NO.7512 OF 2019

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| <ol style="list-style-type: none"> 1. The State of Maharashtra
Through Secretary,
Higher and Technical Education Department
Mantralaya, Mumbai-32 2. The Director,
Directorate of Technical Education,
Mumbai | <p>PETITIONERS</p> |
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VERSUS

- | | |
|---|--------------------|
| <ol style="list-style-type: none"> 1. Association of Pharmacy Teachers
of India Through its Member,
Saber Hussain Fazal
Age – 62 years, Occ – Retired
R/o 27-B, N-12, Professor Colony
Opp Himayat Bag, Aurangabad
District – Aurangabad 2. The Deputy Secretary, | <p>RESPONDENTS</p> |
|---|--------------------|

Maharashtra Public Service Commission
Through its Secretary,
Bank of India Building,
3rd Floor, Hutatma Chowk,
Fort, Mumbai-400001

3. The Director,
All India Council of Technical Education
Nelson Mandela Marg
Vasantkunj
New Delhi 100 067

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Mr. L. M. Acharya, Special Advocate for the petitioner-State with
Mr. A. V. Deshmukh, learned AGP

Mr. S. V. Dixit, advocate for respondent No. 1
Mr. M. S. Kulkarni, Advocate for respondent No. 2
Mr. S. V. Adwant, Advocate for respondent No. 3

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**[CORAM : SUNIL P. DESHMUKH AND
S. M. GAVHANE, JJ.]**

DATE : 20th SEPTEMBER, 2019

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. Genesis of the petitions appears to lie in advertisements issued by Maharashtra Public Service Commission (MPSC) in May, 2017 inviting online applications for the posts of Director, Technical Education, Directorate of Technical Education, Joint Director of Technical Education and / or Director of Maharashtra State Board of Technical Education, Maharashtra State

Engineering Administrative Services, Group-A, providing eligibility, *inter alia*, at 4.3, educational qualifications and experience, referring to that a candidate shall possess master's degree in first class in *Engineering* or *Technology* duly recognized by All India Council for Technical Education (AICTE), *Ph. D.* in *Engineering or Technology* and shall possess not less than twenty years' experience in teaching at degree or diploma level in *Engineering educational institute* or in administration of *Technical Education*.

3. Respondent No. 5 in writ petitions No. 8612 of 2019 and 8646 of 2019 and respondent No. 1 in writ petition No. 7512 of 2029 – Association of Pharmacy Teachers of India had moved Original Application bearing No. 592 of 2017 before the tribunal on 1st August, 2017 praying for modification or amendment to clauses 3 to 7 of “*the Director of Technical Education, Joint Director of Technical Education or Director, Maharashtra State Board of Technical Education, Deputy Director of Technical Education or Secretary, Maharashtra State Board of Technical Education, Assistant Director (Technical) of Technical Education or Deputy Secretary, Maharashtra State Board of Technical Education, Assistant Secretary of Maharashtra State Board of Technical Education, Maharashtra Engineering Administrative Service, Group-A (Recruitment) Rules, 2017*” (hereinafter ‘Recruitment Rules, 2017’) with a request to

consider, higher qualification in Pharmacy, for recruitment to administrative posts in technical education with further direction to fix percentage of representation or provide opportunity to persons qualified in pharmacy subject to work on advertised administrative posts and to declare clauses 3 to 7 of the Recruitment Rules, 2017 to be discriminatory.

4. Case of Association of Pharmacy Teachers of India before Maharashtra Administrative Tribunal had been, *inter alia*, on the premise that Section 2 (g) in All India Council for Technical Education Act, 1987 (AICTE Act) defines the term "***technical education***" as -

*" 2 (g) "***technical education***" means programmes of education, research and training in engineering technology, architecture, town planning, management, ***pharmacy*** and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare: "*

5. Since aforesaid definition of "technical education" specifically includes pharmacy faculty, pharmacy is a technical subject.

6. The Association had also referred to rule 2 (c) of Recruitment Rules, 2017 defining the term "Collective Experience", as one of the essential qualifications for

recruitment. Rule 2 (c) of the Recruitment Rules, 2017 reads, thus,

“ 2 (c) ‘Collective experience’ means total experience gained in various fields of employments related to engineering or technical education;”

7. While the term “technical education” embraces pharmacy under the AICTE Act, yet, educational qualifications in pharmacy are excluded from eligibility criteria for the higher administrative posts in technical education in the State, eventually their legitimate entitlement to the post of Director, Joint Director etc. of Technical Education in Maharashtra is trampled down.

8. The association has referred to preamble/object of directorate of technical education in Maharashtra State is to ensure technical institutions catering to engineering, pharmacy, architecture etc. conform to the policies, rules, guidelines formulated by Central and State Governments and has under its umbrella about 1600 technical education institutes across the State.

9. It is submitted, there are quite a lot of indications that experience of pharmacy, would make members of the association eligible, but for restricting educational qualifications to engineering faculty, they are kept out of consideration from higher posts viz; director, etc. in technical education in the State.

10. Advertisement issued by the AICTE dated 9th January, 2016, referring to qualifications in all the fields of technical education for the post of similar nature on deputation, reading, thus-

*“ Masters Degree in any of the subjects of Science or Mathematics or Computer Application or Management including **Behavioral** Science, Commerce and Business or **Pharmacy** or Engineering and Technology or Architect and Town Planning are included ”*

had been submitted and relied on by the Association.

11. The Association appears to have contended that while under the AICTE Act persons having education in pharmacy would be eligible and qualified, rules prescribing criteria restrict qualifications to only one single faculty. Those are discriminatory and are untenable. The criteria under the rules for the posts of Director, etc. of technical education tend to undermine definition of '*technical education*' under AICTE Act and its authority to govern the area. Those exclude other faculties from consideration. Thus, those are repugnant to the AICTE Act.

12. It is their case that in such a scenario, members of the association would end up in hierarchy at the highest on the post of principal and their further career progress would stand

blocked rather curtailed and would be kept out of policy making in technical education.

13. Maharashtra Public Service Commission (MPSC) has responded to original application referring to that the Recruitment Rules, 2017 were followed while issuing advertisement.

14. MPSC had referred to notification by AICTE dated 5th March, 2010 with respect to pay scales, service conditions and qualifications for teachers and other staff in technical institutions (degree) Regulations, 2010 and appears to have urged to consider that since chart annexed to the regulations, shows the categories of engineering/technology, management, pharmacy etc. separately, pharmacy would not fall in the engineering/technology category.

15. While resisting the original application, respondent No. 1 has referred to that, historically, since 1948 post of director of technical education has been in existence administering engineering/technology institutions. Around 1964, administration of programme of pharmacy faculty as extended activity in the existing polytechnics had been attached to the directorate. The directorate had also been entrusted with the work of

administering of vocational education and training. In due course of time other faculties were attached to administration of directorate of technical education viz; management, architecture, town planing etc. Despite bifurcation of the directorate into directorate of technical education and directorate of vocational education and training, pharmacy faculty continued to be under administration of directorate of technical education. Referring to provisions 3 to 7 of Recruitment Rules, 2017, eligibility criteria under clause 4.3 of the advertisement for the posts of the Director etc. of Technical Education have been justified.

16. While creation of directorate had been for administration of engineering and technology programmes, said purpose of the directorate continues to be the principal function and it was being so considered and treated all along without interruption. Engineering and Technology education qualification eligibility criteria for the posts in the directorate continued unabated and undisturbed. Even in recruitment rules of 1991, eligibility criteria had been engineering education only. Appendix 2 of of Handbook of AICTE 2018-19 has been taken support of, to state that engineering and technology are distinct from pharmacy,

architecture etc. Said faculties would not be covered by the term engineering or technology.

17. The Maharashtra Administrative Tribunal had taken up two questions for consideration, one about maintainability of original application by association and the other as to whether recruitment rules are at variance with AICTE Act and mandate of department of technical education, including interpretation by respondents No. 1 and 2.

18. The tribunal has considered, the terms “engineering” or “technology” or “pharmacy” bear no specific definitions under the AICTE Act and thereunder, the term ‘technical education’ has been defined in section 2 (g), embracing engineering, technology, pharmacy, architecture etc., which as well gives room for accommodation to any other programme identified by government in consultation with the AICTE.

19. The mandate referred to from website of the Directorate had weighed with the tribunal that while directorate is for administering institutes catering to all the faculties/technical institutes as per policies, rules, guidelines and strategies of Central and State Governments, while the term technical education takes within its fold - pharmacy, inclusion of only *viz*;

engineering and/or technology discipline and exclusion of all other faculties in the recruitment rules is apparently unjustified and is arbitrary. With the changing times, while other faculties are being covered under directorate of technical education in addition to engineering technology, then those should not be treated deferentially. It would be proper to consider all the faculties under umbrella of the directorate and to select best candidate to supervise institutions of various faculties.

20. The tribunal, under its decision dated 15th March, 2019, impugned in present set of three petitions, issued directions to amend Recruitment Rules, 2017 incorporating pharmacy under clause 'technology' with a further direction to undertake reprocessing of recruitment by re-advertising posts for fresh appointments.

21. Petitioners, the State and persons who were appointed to various posts, pursuant to the advertisements in May, 2017, as affected and aggrieved by aforesaid order, are before this court under writ petitions questioning its validity and sustainability.

22. The petitions assail decision by the tribunal predominantly contending that the directions issued to include *pharmacy* faculty also along with *engineering* or *technology* in the Recruitment

Rules, 2017 for the posts under directorate of technical education, being outside powers, authority and jurisdiction of the tribunal. It is highlighted that such a direction is equal in effect to order to legislate. Legislation would not be a province of judiciary, judicial bodies or tribunals. The directions overreach power, authority and jurisdiction of judicial bodies. It is submitted, it would have to be considered that while high court as a constitutional authority in excess of powers would not be able to give directions to the State to legislate, a statutory tribunal would be much less empowered, authorized or would have jurisdiction to issue directions to legislate as has occurred under the impugned order.

23. Apart from aforesaid, learned advocates for the petitioners purport to question justiciability of the challenge at the instance of association, in the absence of any affected person being a party.

24. The contention, on behalf of respondent Association, *inter alia*, has been advanced submitting that the grievance had been against the recruitment rules. Their propriety, legality and validity had been questioned and in such matter, it was not necessary for the original applicant to implead petitioners as party.

25. While original application had been filed, petitioner had not been a party, neither petitioner had been selected nor was having any right to the post.

26. Moreover, it is contended that very appointment of the petitioner is subject to decision of original application, pursuant to interim order dated 10th November, 2017 passed by the tribunal and even the appointment order specifically refers to the same. In spite of incorporation of such a condition in appointment order, petitioner has on his volition chosen not to question condition under the appointment order or for that matter even the interim order passed by the tribunal. Despite knowledge about pendency of original application and interim order therein, petitioner had not taken any steps to get impleaded in the original application.

27. In view of aforesaid, it is contended, petitioner is estopped from challenging interim order and final decision in the original application. Conduct of the petitioner depicts giving in to interim order.

28. It is being referred to that originally pharmacy education had not been within the fold of directorate of technical education. Subsequently, while bringing under administration of

the directorate, the institutions of pharmacy education were very few in number. Gradually there has been manifold increase in number of pharmacy education institutions and are now in the range of 500 and more running with full intake capacity. Pharmacy education having been brought under the fold of directorate of technical education, it is incumbent for the State to amend recruitment rules in order to enable candidates from pharmacy stream to vie for the administrative posts of the directorate.

29. It is submitted that this aspect has not been given any thought to, while framing recruitment rules. Restricting higher administrative posts in directorate of technical education to engineering personnel causes grave discrimination and prejudice to qualified persons from other faculties *viz;* pharmacy, architecture, management etc. Equal opportunity is deserved and is due to other disciplines as well to assume higher administrative posts in directorate of technical education. Rules preclude such possibility. Thus, this situation had constrained the association to approach the tribunal.

30. On behalf of petitioners, Mr. P. M. Shah, learned senior advocate, Mr. V. D. Hon, learned senior advocate, Mr. Acharya, learned special counsel for the State have appeared. Mr. Hon,

additionally adopts and subscribes to the submissions by Mr. P. M. Shah. Mr. Acharya as well, in addition to his submissions subscribes to submissions by learned senior advocate Mr. Shah. On behalf of respondent association, learned advocate Mr. S. V. Dixit led submissions.

31. Learned senior advocate Mr. P. M. Shah who led arguments on behalf of petitioners, submits that directions to amend recruitment rules as referred to in impugned order are an encroachment over the province of legislation. Recruitment rules of 2017 have been framed by the State government pursuant to proviso under Article 309 of the Constitution of India. It is legislative power of the authorities. The encroachment over territory of legislation is unsustainable and deserves to be removed, allowing the writ petitions. For removal of so called short comings in the rules courts would hardly be remedy which lies elsewhere. In the prevailing legal position, decision by the tribunal is incompatible and thus, the impugned order is liable to be set aside.

32. The learned senior advocate has drawn attention to a decision of the Supreme Court in the case of *“Ganpat Ladha V/s Shashikant Vishnu Shinde”*, (1978) 2 SCC 573, wherein it is observed that

if statutory provisions do not reach out and relieve hardship to persons, remedy lies with legislature and it is not with the courts. That was a case in respect of sections 12 (3) (a) and 12 (3) (b) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, wherein the Supreme Court had observed that section 12 (3) (b) of the Act provides protection to tenants on certain conditions and the conditions are to be strictly observed by the tenant to seek benefit of the same and if he does not fulfill those conditions, he cannot claim protection under section 12 (3) (b) of the Act and in that event or by judicial valour, discretion would not be available in favour of tenant.

33. Case of *“Brudaban Nayak V/s Election Commission of India and Another”* (1965) 3 SCR 53 : AIR 1964 SC 1892 has been referred to, to contend that it had been expressed that election commission should be vested with powers of a commission under the Commissions of Enquiry Act, 1952, while the commission had been in unsatisfactory position to give a decisive opinion on the basis of affidavits and documents produced before it. The Supreme Court had observed that it would like to invite attention of the Parliament to these observations and the difficulty experienced by the election commission in rendering its opinion

and Parliament may well consider whether the suggestion made by the Chief Election Commissioner should not be accepted and appropriate legislation be adopted in that behalf. It is in the context, submitted that, in case of lacunae in the provisions, courts would hardly be a remedial measure.

34. *“State of Himachal Pradesh and Others V/s Satpal Saini” (2017) 11 SCC 42* has been relied on by petitioners. In said case, the Supreme Court has taken stock of the situation and has unequivocally held that direction cannot be issued to legislature to enact a law or to amend the law for the simple reason that constitutional function lies in the exclusive domain of the legislation.

35. On the other front, Mr. Shah, learned senior advocate, submits, one of the aspects involved in the matter that will have to be focused on is, even if in remotest case decision of the tribunal is to be sustained, the law in this sector is pretty much settled that eligibility will have to be taken into account according to existing rules as on the date of vacancy.

36. *“State of Rajasthan V/s R. Dayal and others” (1997) 10 SCC 419* has been referred to and relied on in support of aforesaid proposition and paragraph No. 8 thereunder has been emphasised, reading, thus -

“ 8. Therefore, it is not in dispute and cannot be disputed that while selecting officers, minimum requisite qualifications and experience for promotion specified in the relevant column, should be taken into consideration against vacancies existing as on 1st April of the year of selection. But since the Rules came to be amended and the amendment became effective with immediate effect and clause (11-B) of Rule 24-A indicates that options have been given to the Government or the appointing Authority, as the case may be, to revise the select list as existing as per the law as on the date of the appointment or as may be directed by a competent court, selection is required to be made by the concerned DPC. An appointment made, after selection as per the procedure, to the vacancies existing prior to the amendment, is valid. But the question is: whether selection would be made, in the case of appointment to the vacancies which admittedly arose after the amendment of the Rules came into force, according to the amended Rules or in terms of Rule 9 read with Rules 23 and 24-A, as mentioned hereinbefore? **This Court has considered the similar question in paragraph 9 of the judgment above cited. This Court has specifically laid that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing as on the date when the vacancies arose.** Undoubtedly, the selection came to be made prior to the amendment of the Rules in accordance with law then existing since the anticipated vacancies also must have been taken into consideration in the light of Rule 9 of the Rules. But after the amended Rules came into force, necessarily the amended Rules came into force, necessarily the amended Rules would be required to be applied for and given effect to. But, unfortunately, that has not been done in the present case. The two

courses are open to the Government or the appointing authority, viz; either to make temporary promotions for the ensuing financial year until the DPC meets or in exercise of the power under Rule 24-A (11-B), they can revise the panel already prepared in accordance with the Rule and make appointments in accordance therewith. ”

37. The Supreme Court appears to have observed in paragraph No. 9 of its judgment reported in (1983) 3 SCC 284 : 1983 SCC (L&S) 382 “Y. V. Rangaiah V J. Sreenivasa Rao”.

“ This court has specifically laid that vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amended Rules would be governed by original rules and not by amended rules. ”

38. “P. Mahendra and Others V/s State of Karnataka and Others” AIR 1990 SC 405 has been referred to for eligibility of person will have to be considered as per existing rules as on the date of advertisement and even if rules are amended pursuant to directions, those would not have retrospective application. Amended rules would not affect existing rights of those candidates who were considered for selection as they possessed requisite qualifications prescribed by rules before its amendment and construction of amending rules shall be made in a manner to avoid unnecessary hardship to those who have no control over the subject matter. In said case, it had been held that selection

and appointments of appellants could not be held to be illegal, since process of selection had commenced in accordance with law as it stood at the commencement of selection. Amended rules could not be applied to invalidate selection made by commission.

39. Learned senior advocate draws attention to paragraph No. 7 of judgment in *“P. Mahendra and Others V/s State of Karnataka and Others”* (*supra*) referring to that while the tribunal had decided otherwise, the Supreme Court even has observed, '*strangely the tribunal did not follow the latest authority of this court as laid down in Calton's case*' (AIR 1983 SC 11433).

40. *“A. Manoharan and Others V/s Union of India and Others”* (2008) 3 SCC 641 has been cited in support of contention that subsisting vacancies before amendment to rules, would be required to be filled up according to rules prior to amendment.

41. Mr. Acharya, learned special advocate for the State subscribing to submissions of learned senior advocate Mr. Shah, purports to draw attention to that primarily historically, the directorate is headed by highly educated persons from engineering discipline/faculty. Higher administrative posts were being manned by engineering personnel having higher

educational qualifications. In 2017, under the recruitment rules, higher qualifications in 'technology' have been introduced as valid qualification for said post. It is submitted that though the term "technical education" under AICTE Act refers to pharmacy, it would not mean that pharmacy is engineering/technology discipline. It appears to have been incorporated in the term technical education in order to facilitate administration of its education to be regulated by AICTE Act. Pharmacy by itself would hardly be an engineering or technical subject and is not understood so in sciences' field. Other faculties were, thus, not so introduced.

42. Engineering or technology occupies very vast field compared to pharmacy and other subjects and, thus, it is but natural that engineering and technology would be a major and larger area for administration than the other ones covered under the AICTE Act. It would not be said that continuing with higher posts in directorate by engineering or technology personnel would have no nexus with the object sought to be achieved. He hastens to add that this is not to denigrate importance of other faculties coming under the umbrella of AICTE Act. Yet, having regard to that major area to be covered is that of engineering and technology for which originally directorate had been formed

and, thus, is being headed by highly qualified engineering personnel. With the addition of other faculties under the directorate, it is not the case that the area of administration so far as engineering and technology is concerned, has abated or been contracted or diminished. It is submitted, it would emerge that said faculty has been ever expanding and is growing by leaps as compared to other disciplines *viz;* pharmacy etc. It appears to be with this undercurrent and while customarily engineering personnel were heading and would be required to head vast expanse of its field, rules have been framed accordingly. It is submitted that it is not the case that there is no logic or rationale underlying the qualifications prescribed in 2017 rules.

43. Resisting the writ petitions, Mr. Sushant V. Dixit, learned advocate for respondent No.5 contends that petitioners in writ petitions No. 8612 of 2019 and 8646 of 2019 would not have *locus standi* to pose any challenge to the decisions of Maharashtra Administrative Tribunal. Petitioner has no right of audience and no *locus* to be heard. It is policy and rules of the government which were at stake in the original application.

44. The challenge to interim order is at a belated stage and cannot be entertained. Even final decision of the tribunal has been challenged belatedly. Petition suffers laches.

45. It has been submitted that Maharashtra Administrative Tribunal (Procedure) Rules, permit association to approach the tribunal, particularly Rule 4 (B) thereof lets an access to association to such an application.

46. He purports to refer to that respondent No. 5 association is established for welfare of teachers in pharmacy colleges and to uplift and enhance standard of education. It is a registered organization. While teachers of pharmacy stream stand excluded from having representation in the administration of directorate of technical education etc. causing injustice to them, they had approached the tribunal. The exclusion hits members of the association and the association has authorized original application to be filed through a retired member. Original application being filed by association in view of Rule 4 (B) of the Maharashtra Administrative Tribunal (Procedure) Rules, maintainability of original application can hardly be shaken.

47. He submits, recruitment rules published refer to master's degree in engineering discipline, not letting room for

consideration of candidates from pharmacy stream. Highly and/or equally qualified candidates from pharmacy stream as those from engineering discipline, in the process, absolutely stand precluded from administrative posts. A more experienced pharmacy person completely stands outsted from even being considered while comparatively even less experienced engineering discipline persons would assume higher administrative posts. Pharmacy stream entirely loses out on opportunity causing incisive discrimination and causes grave prejudice to their rights to have opportunity to vie for the higher administrative posts in directorate of technical education.

48. In such a case, Mr. Dixit urges to consider that, there ought to be opportunity to personnel from pharmacy discipline to have representation at the higher administrative posts. They deserve equal opportunity with engineering personnel.

49. Additionally, it is being referred to that having regard to definition of "technical education" under section 2 (g) of AICTE Act and while Rule 2 (c) of recruitment rules, 2017 provides for experience in employment related to technical education, yet, pharmacy education is not referred to as qualification in the recruitment rules. Realizing this lacunae in the rules, the tribunal has passed order allowing the original application.

50. Long standing position without challenge, when the situation brings forth discrimination violating Article 14 of the Constitution of India, would not be a justification for denial of opportunity.

51. It is further submitted that no prejudice would be caused to the petitioners if candidates belonging to pharmacy stream are allowed to participate in recruitment process for higher administrative posts of the directorate, particularly, since petitioner's appointment is conditional. Cumulative effect of Articles 14, 16 and 21 of the Constitution of India would reveal that denial of opportunity and discriminatory treatment meted out to other streams, depriving them, the administrative posts *viz;* director etc. is unjustifiable. Thus, the decision by the tribunal can hardly be impeached. Petitions, according to respondent No. 5 are liable to be dismissed on all counts.

52. Learned advocate refers to "*L. Chandra Kumar V/s Union of India and Others*" (1997) 3 SCC 261. The judgment, primarily decides, as referred to in the judgment of "*Vijay Ghogare and Others V/s The State of Maharashtra and Others*" reported in MANU/MH/0835/2013, under its paragraph No. 9 that tribunal will function as court of first instance in respect of areas of law for which they have been

constituted and to pose challenge to validity of a provision, except where legislation under which tribunal has been set up, litigants will not be able to directly approach high court, overlooking jurisdiction of the tribunal.

53. “*Vijay Ghogare and Others V/s The State of Maharashtra and Others*”, (*supra*) is in the context of tenability of writ petitions before high court posing challenge to constitutional validity of Maharashtra State Public Services [Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes] Act, 2001 and Government Resolution dated 25th May, 2004. The court, taking into account decision of the Supreme Court in the case of “*S. P. Sampath Kumar V/s Union of India and Others*”, (1985) 4 SCC 458 and “*L. Chandra Kumar V/s Union of India and Others*” (1997) 3 SCC 261, had considered that even constitutional validity of legislative action is amenable to be challenged before tribunal. Thus, writ petition was returned to the petitioners for presentation to the tribunal to be treated as original application by the tribunal. Respondent No. 5 has referred to and relied on a decision of the Supreme Court in the case of “*J. B. Chopra and Others v/s Union of India and Others*”, AIR 1987 SC 357, submitting that Administrative Tribunal is competent to test constitutional validity and ‘vires’ of a

legislation. This proposition has been treaded often by courts and is no longer *res integra*.

54. Learned advocate Mr. Dixit places reliance on “*Rajiv Kumar and Another V/s Hemraj Singh Chauhan and Others*” reported in *AIR 2010 SC 1679* purporting to draw analogy, contends that petitions by the petitioners and/or at their behest before this court, would not be tenable.

55. A decision of Allahabad High Court in the case of “*Bhanu Prakash Singh V/s Chancellor, Agra University, Rai Bhawan, Lucknow and Others*” *MANU/UP/0843/1999* has been referred to. While appointment of respondent No. 4 therein had been made subject to final decision of the high court, said condition had never been questioned by respondent No. 4 and despite been aware of the same from very beginning and thus, condition binds respondent No. 4 and he would not be able to take shelter of technical objection that he was not party to writ petition.

56. For the proposition that when the proceedings challenge *vires* of a provision, it is not necessary to implead all the persons who are likely to be affected, since it would not be possible to identify who are likely to be affected and a question of validity of provision is to be decided on merits and thus, the proceedings

are not liable to be turned down on account of vice of non joinder of parties, decision of the Supreme Court in the case of *“Government of A. P. and Another V/s Jaya Prasad Rao and Others”*, AIR 2007 SC 1503 has been referred to and relied on, on behalf of respondent No. 5.

57. Judgment in the case of *“A. Janardhna V/s Union of India and Others”*, AIR 1983 SC 769, is being referred to, to plead that while relief is being sought only against the State and its authorities and no relief is claimed against any individual member, as has been considered that while primary relief is claimed against not any particular individual, non impleading of parties would not hit maintainability of proceedings.

58. Learned advocate Mr. Dixit has also relied on a decision of the Supreme Court in the case of *“The General Manager, South Central Railway, Secunderabad and another V/s A. V. R. Siddhanti and Others”*, AIR 1974 SC 1755 to contend that in the challenge to validity of policy decisions on the ground of being violative of Articles 14 and 16 of the Constitution of India, non joinder of employees likely to be affected by the decision in the case is not fatal and at the most employees would have been proper parties.

59. On behalf of respondent No. 2 – Maharashtra Public Service Commission, judgment of the Supreme Court in the case of “*Ravi Agrawal V/s Union of India, 2019 SCC OnLine SC 5* has been cited referring to that it is province of legislature to take care, to consider all the aspects and provide suitable provision by making necessary amendments. Though it may be a case of harsh discrimination, yet, remedial measure is to be had before legislative bodies and not the courts.

60. Decision in Original Application No. 592 of 2017 of the Maharashtra Administrative Tribunal dated 15th March, 2019 is being challenged, raising grounds *asto* whether the decision would be sustainable in the face of other’s territory being trodden upon and while position prevailing charts the course for treatment in the situations as the one involved in the matter.

61. Decision in Original Application No. 592 of 2017 of the Maharashtra Administrative Tribunal emanates convergence on a point *asto* whether the tribunal would be said to be within its bounds in issuing direction to include pharmacy under the clauses of “*technology*” in Recruitment Rules, 2017 dated 13th January, 2017 published by higher and technical education department, for various posts referred to thereunder and to issue further direction that on compliance, recruitment process

according to such rules be followed making fresh appointments by re-advertising the posts.

62. The educational and experience eligibility criteria under the advertisements of May, 2017 appears to be corresponding to *Recruitment Rules, 2017*, published under notification dated 13th January, 2017, pursuant to proviso to Article 309 of the Constitution of India, superseding existing rules, orders, instruments in this behalf. Rules 3 to 7 thereunder, provide education and experience criteria as under-

“ 3. *Appointment to the post of Director*

(i)

(ii) *possess Master's Degree in first class or an equivalent grade in a point scale wherever grading system is followed in Engineering or Technology duly recognized by AICTE and passed out from the institute affiliated to a University recognized by UGC ”*

(iii) *possess Doctorate of Philosophy (Ph.D) in Engineering or Technology from Indian or Foreign university or autonomous academic institutes duly recognized by UGC or have published minimum five research papers in referred t International Journal;*

(iv) *possess experience of not less than twenty years either in the field of teaching at degree or diploma level in engineering educational institutes or in administration of technical education or collectively in these fields, gained after acquiring degree in Engineering or Technology:*

Provided that, out of twenty years' experience, minumum five years administrative experience shall be on the post of Principal or Director of Polytechnic or Engineering College; or Head of Research Institute

or Joint Director of Technical Education or Director, Maharashtra State Board of Technical Education; or Deputy Director of Technical Education or Secretary of Maharashtra State Board of Technical Education:

Provided also that, the candidate who has done research while teaching, in that case the experience either of teaching or research shall be considered, for calculating the experience of teaching:

Provided also that, for the purpose of clause (iv), the appointment to the post of teacher at degree or diploma level in engineering educational institutes shall be duly approved by the concerned University or the Competent Authority, as the case may be.

4. Appointment to the post of Joint Director

(a)

(b) by nomination from amongst the following candidates who,-

(i)

(ii) possess Master's Degree in first class or an equivalent grade in a point scale wherever grading system is followed in Engineering of Technology duly recognized by AICTE and passed out from the institute affiliated to a University recognized by UGC.

(iii)

(iv)

5. Appointment to the post of Deputy Director -

(a)

(b)

(i)

(ii)

(iii) possess experience of not less than ten years either in the field of teaching at degree or diploma level in engineering educational institutes or in administration of technical education or collectively in these fields, gained after acquiring degree in Engineering or Technology.

6. Appointment to the post of Assistant Director (Technical) -

(a)

(b)

(i)

(ii) possess Master's Degree in first or an equivalent grade in a point scale wherever grading system is followed in Engineering or Technology duly recognized by AICTE and passed out from the institute affiliated to a University recognized by UGC:

7. Appointment to the post of Assistant Secretary (Technical)

(a)

(i)

(ii) possess Bachelor's Degree in first class or an equivalent grade in a point scale wherever grading system is followed in Engineering or technology duly recognized by AITCTE and passed out from the institute affiliated to a University recognized by UGC: ”

63. Maharashtra Administrative Tribunal, in its judgment and order appears to have been impressed by the definition of the term “technical education” contained in All India Council for Technical Education Act, 1987.

64. Tribunal has considered that when several faculties *viz*; pharmacy, architecture etc., other than engineering technology, being brought under administrative umbrella of Directorate of Technical Education, then those should not be meted out with differential treatment. It would be proper to let all faculty personnel to vie for higher administrative posts in the directorate and to select best from among them all.

65. Preamble of AICTE Act shows that its purpose and object is to have proper planning and coordinated development of technical education system throughout the country. Definition of technical education thereunder may have to be taken into account in that context and purposes and objects of the Act. Incidental benefits of the AICTE Act may be utilized by employers. It does not appear that concern under aforesaid enactment is to govern and to give a mandate on employers' choice or option.

66. From a long time pharmacy had been an adjunct to polytechnic where generally engineering and technology diploma education courses are undertaken. Degree courses in pharmacy are ordinarily carried out in degree colleges and ordinarily not in engineering or technology degree colleges.

67. One of the aspects that may be pertinent to advert to is that the tribunal has purportedly peeped into legislative intent in the use of conjunction “OR”, and purported to dwell on legislative aspect involved in recruitment prescribing qualification *Engineering or Technology*.

68. Legislation not being function of judicial bodies, it would have to refrain from passing orders which enter an arena where they are not supposed to. In this respect, observations of the Supreme Court in the case of “*State of Himachal Pradesh and Others V/s Satpal Saini*” reported in (2017) 11 CC 42, particularly in paragraphs No. 6, 7 and 8 elucidate the position, which are reproduced herein below:

“ 6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the state legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been enacted

in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law - as did the Himachal Pradesh High Court - is a plain usurpation of a power entrusted to another arm of the state. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review under Article 226 by issuing the above directions to the state legislature to amend the law. The government owes a collective responsibility to the state legislature. The state legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

7. *In Mallikarjuna Rao v. State of Andhra Pradesh, AIR 1990 SC 1251 and in V.K. Sood v. Secretary, Civil Aviation, AIR 1993 SC 2285 this Court held that **the court under Article 226, has no power to direct the executive to exercise its law-making power.***

8. *In State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla, AIR 1985 SC 910 this Court deprecated the practice of issuing directions to the legislature to enact a law :*

"...The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging..."

The same principle was followed in Asif Hameed & Ors v. State of Jammu & Kashmir, AIR 1989 SC 1899 where this Court observed that :

"...The Constitution does not permit the Court to direct or advice the Executive in matter of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive."

In Union of India v. Association for Democratic Reforms, 2002(2) R.C.R.(Civil) 640 : AIR 2002 SC 2112 this Court observed that :-

"...it is not possible for this Court to give any direction for amending the Act or the statutory rules. It is for the parliament to amend the Act and the Rules."

In paragraph No. 9 of said judgment, an extract from decision in the case of *"State of J & K V/s A. R. Zakki"* 1992 4 SCC 548 : 1992 SCC (L&S) 427 : AIR 1992 SC 1546 has been quoted. Paragraph No. 9 of said judgment reads, thus -

“ 9. Similarly, in *Supreme Court Employees' Welfare Assn V. Union of India* (1989) 4 SCC 187 : 1989 SCC (L&S) 569, this Court held that a court cannot direct the legislature to enact a particular law. This is because under the Constitutional scheme, Parliament exercises a sovereign power to enact law and no other authority can issue directions to frame a

particular piece of legislation. This principle was reiterated in State of J & K V A. R. Zakki’, where this court observed that :

10. A writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power of make rules, which are in the nature of subordinate legislation. Section 110 of the J & K Constitution, which is on the same lines as Article 234 of the Constitution of India, vests in the Governor, the power to make rules for appointments of persons other than the District Judges to the Judicial Service of the State of J & K and for framing of such rules, the Governor is required to consult the Commission and the High Court. This power to frame rules is legislative in nature. A writ of mandamus cannot, therefore, be issued directing the State Government to make the rules in accordance with the proposal made by the High Court. ”

69. This appears to be a long standing position and may emerge from following observations from the penultimate paragraph of the decision of the Constitution Bench of the Supreme Court in the case of “*Brudaban Nayak V/s Election Commission of India and Another*” reported in (1965) 3 SCR 53 : AIR 1965 SC 1892-

“ There is one more point to which we may refer before we part with this appeal. Our attention was drawn by the learned Attorney – General to the observations made by the Chief Election Commissioner when he rendered his opinion to the Governor on May 30, 1964, on a similar question under Article 192 (2) in respect of the alleged disqualification of Mr. Biren Mitra, a member of the Orissa Legislative Assembly, “where, as in the present case”, observed the Chief Election Commissioner, “the

relevant facts are in dispute and can only be ascertained after a proper enquiry, the Commission finds itself in the unsatisfactory position of having to give a decisive opinion on the basis of such affidavits and documents as may be produced before it by interested parties. It is desirable that the Election Commission should be vested with the powers of a commission under the Commissions of Enquiry Act, 1952, such as the power to summon witnesses and examine them on oath, the power to compel the production of documents, and the power to issue commissions for the examination of witnesses". We would like to invite the attention of Parliament to these observations, because we think that the difficulty experienced by the election commission in rendering its opinion under Article 103 (2) or 192 (2) appears to be genuine, and so Parliament may well consider whether the suggestion made by the Chief Election Commissioner should not be accepted and appropriate legislation adopted in that behalf. "

70. Although, the tribunal had touched upon distinction in the territorial areas of the legislation and powers and authority of judicial tribunals, later, it appears that the tribunal had been completely oblivious of this imperative aspect involved in the matter, as such, did not notice its implications, and went on issuing directions.

71. Directions of the tribunal under the impugned order, thus, appear in excess of its authority overreaching the legislative terrain. Directions issued by the tribunal make inroads on territory which is a reserved province of legislative authorities.

72. Tribunal also appears to be oblivious of the other legal aspect highlighted by petitioners in the process of recruitment viz; date of vacancy and the rules as would be governing at the time of recruitment. Regard would have to be given to legal position prevailing in the matters of recruitment as referred to in the decisions by the courts.

73. In the case of “*Kulwant Singh and Others V/s Daya Ram and Others*” reported in (2015) 3 SCC 177, while dealing with situation, relevant to be considered in the present matter, the Supreme Court has observed thus –

“ 38. Keeping the aforesaid proposition of law in mind we shall proceed to deal with various other facets which have been canvassed before us, for we feel it is not a case which can be shut down by holding that the order dated 8-1-1990 having gone unassailed, the doors of justice from all quarters get closed. The Tribunal in *Acchhar Chand* case which was decided on 28-9-1988, had strictly gone by the principles stated in *Y. V. Rangaiah* by directing to prepare a fresh list of constables for sending to Lower School Course at Police Training College, Phillaur, in accordance with the pre-amended Rule as far as vacancies of Head Constables which had come into existence prior to the Notification dated 17-6-1988. It had further clarified that it is open to the respondent to act in accordance with the amended Rule in respect of the vacancies / posts of Head Constables which may have occurred subsequent to coming into force of the amended Rule. Submission of Mr. Gupta is that the said order was not only in accord with Y.

V. Rangaiah but also in consonance with the principles stated in P. Ganeshwar Rao, R. Dayal, B. L. Gupta and Arjun Singh Rathore.

39. *In P. Ganeshwar Rao the Court reproduced a passage from Y. V. Rangaiah and observed that it appositely applied to the facts of the said case. The question that emerged for consideration in the said case was whether the amendment made on 28-4-1980 to the Special Rules in the said case applied only to the vacancies that arose after the date on which the amendment came into force or whether it applied to the vacancies which had arisen before the said date also. Interpreting the Rule the Court observed that the amendment on 28-4-1980 did not apply to the vacancies that had arisen prior to the date of amendment. The ratio of the said decision is that the vacancies that had arisen after the amendment would be governed by the amended Rule and the vacancies that had arisen prior to the amendment would be governed by the unamended Rule.*

40. *In R. Dayal the Court was considering the effect of Rule 24-A of the Rajasthan Service of Engineers (Building and Roads Branch) Rules, 1954 (as amended). It pertained to the vacancies which were filled up prior to the amended Rule. Question arose whether the vacancies were prepared to be filled up under the amended Rule or unamended Rule. On behalf of the respondents therein reliance was placed on Y. V. Rangaiah. The court, appreciating the factual scenario and the rule position, came to hold as follows:*

‘8. But the question is whether selection would be made, in the case of appointment to the vacancies which admittedly arose after the amendment of the Rules came into force, according to the amended Rules or in terms of Rule 9 read with Rules 23 and 24-A, as mentioned hereinbefore. This

Court has considered the similar question in para 9 of the judgment above-cited. This Court has specifically laid that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in in accordance with the law existing as on the date when the vacancies arose.’

41. *In B. L. Gupta the Court reiterated the principle stated in Y. V. Rangaiah, P. Ganeshwar Rao and A. A. Calton V. Director of Education, wherein it had been held that the vacancies which had occurred prior to the amendment of rules were governed by the old rules and not by the amended rules. In Arjun Singh Rathore the views stated in Y. V. Rangaiah and R. Dayal were reiterated. ”*

74. In the present matter while occurrence of vacancies has preceded publication of advertisements in May, 2017, in such a case, even if rules are to be amended as directed by the tribunal, so far as recruitment on the vacancies is concerned, it would have to be in accordance with the rules as those were prevailing prior to the directed amendments to the rules and would have to be filled in as per subsisting rules, prior to proposed amendments. In view of aforesaid tribunal’s directions do not appear to be compatible with the prevailing legal position.

75. Respondent No. 5 has relied on a decision in the case of *“Rajeev Kumar and Another V/s Hemraj Singh Chauhan and Others” (supra)*, contending that the direct approach to high court by petitioners may not be entertained.

It appears in *Rajiv Kumar (supra)*, the situation had been that in two original applications by three persons before Central Administrative Tribunal, the appellants before the Supreme Court were not parties, were matters of promotions. The Central Administrative Tribunal, it appears, had dismissed original application by two persons and other had been partly allowed with certain directions to the authorities. While one of the applicants, whose original application which was filed along with another, had been dismissed, had been to high court and the high court had set aside decision of the Central Administrative Tribunal and had issued certain directions to the authorities. It is in the proceeding before high court, the appellants before the Supreme Court had filed applications for getting impleaded and those were allowed. Thereafter, the high court had delivered judgment which had been assailed by the appellants in the Supreme Court. Having regard to factual circumstances in those matters, the Supreme Court had considered that in view of

earlier decision of the Supreme Court in the case of "*L. Chandra Kumar V/s Union of India*" reported in *AIR 1997 SC 1195*, the Central Administrative Tribunal had jurisdiction in respect of certain disputes and in the circumstances, high court had committed an error in letting in appellants before it. The contextual aspects involved in present matter and the ones in "*Rajiv Kumar's case* (*supra*) are different. The decision appears to be on the facts and circumstances involved in that case which are apart from those in present writ petitions.

76. Paragraphs No. 45 and 49 of judgment in "*Kulwant Singh's case*" (*supra*), can be referred to in this respect wherein the observations appear as under:

“ 45. At this stage, we shall notice certain authorities which have been commended to us for adjudging the effect of such non-impleadment. In *Khetrabasi Biswal case Orissa Public Service Commission* had issued an advertisement inviting applications in the prescribed form for twenty-five posts of temporary Munsif (Emergency Recruitment) in Class II of the Orissa Judicial Service. The appellants and the respondents had applied before the Commission. A written examination was held by the Commission, a list of successful candidates was prepared and selectees were later on interviewed by the Commission and in the same proceeding a sitting Judge of the High Court acted as an expert. Thereafter the select list was prepared on the basis of merit which contained 39 names. The names of the appellants before this Court

*found place therein. The said list was sent to the State Government for approval. The State Government on receiving the said list, prepared another list in which the name of the appellant was found placed therein but the names of Bijaya Jynar Oatra and Govinda Chandra Parida and others were omitted. Number of writ petitions were filed before the High Court purporting to interpret the service rules prepared the list of candidates who should have been selected. Pursuant to and in furtherance of the directions issued by the High Court offers of appointment were issued by the State Government in terms of the list prepared by the High Court. **The appellants who had come this Court were not parties to the writ petitions. The High Court, while preparing its own list did not think it fit to issue notices to other candidates like the appellants before this Court who had suffered prejudice by reason of the directions issued by the High Court. While dealing with the justifiability of the same this Court held that they were necessary parties** and, in that context, expressed thus –*

6. The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect.”

49. It is submitted by Mr. Patwalia that the respondents were sent for Lower School Course subject to final result of the original application and the original application was allowed in favour of the appellants, the respondents were bound by the said verdict. It is urged by him that once the respondents were aware of the litigation and their training was subject to the result of the original application, they cannot be permitted to advance a contention that their non-impleadment makes it a nullity. In certain cases where mass copying in an examination or an examination is conducted in a mala fide manner by the authorities in the absence of vacancies

or such ancillary situation, the position may be different. In the case at hand, the authorities did not accept the order but challenged the same before this Court in Special Leave Petition (C) No. 12535 of 1992 and this Court disposed of the same in 1996 by observing that as the respondents therein had already completed their training, the special leave petition has been rendered infructuous. However, this Court chose not to decide the lis. The factual matrix would reveal that the authorities acted in accordance with the earlier order of the Tribunal and fixed the seniority. That was the grievance which was agitated by the appellants before the Tribunal wherein the order was passed on 23-9-1998. Had the respondents been made parties to the original application in the second round i.e. OAs Nos. 697 and 872 of 1988 which gave rise to the order dated 8-1-1990, they could have been in a position to assert about the legal position and faced their fate, making themselves liable to challenge the order. **After they appeared in the competitive examination and selected being more meritorious, indubitably they were an identified category. It was not a vague or unidentified body. When by the determination of the Tribunal their rights had squarely been affected, the situation commanded, we are inclined to think, that they should have been impleaded being necessary parties and their non-impleadment now permits them to take the plea that the said order does not bind them.** The High Court has appreciated the chronology of events and quashed the order dated 8-1-1990 though it could not have entertained the prayer in that regard as per L. Chandra Kumar case, but while dealing with the lis that travelled to the High Court from the order dated 23-9-1998 it was within its domain to declare that the order dated 8-1-1990 is not binding on the writ petitioners therein. There was no bar and, therefore, the High Court's order does not suffer from any legal infirmity on that score. ”

77. In the present matter, it appears that reasons appearing in *Kulwant Singh's case (supra)*, would largely govern the present situation.

78. Moreover, as has often been referred to in the decisions of this court and the Supreme Court, that the high court would not exercise its extraordinary writ jurisdiction when an equally efficacious and alternate remedy is available is not rule of law but is a rule of prudence. The rule of alternate remedy is a rule of discretion and not a rule of jurisdiction. In the present matter, a remedy is sought against decision of the tribunal by which the petitioners' appointments are being impinged bringing those in peril. There is no further remedy against decision of tribunal in the statute under which they are formed. Their appointments were subject to decision by the tribunal and in the circumstances would not take away their right to have recourse to remedial measure if the decision goes against their interest. Fact situation in the present matter is different from the one in, "*Rajeev Kumar and Another V/s Hemraj Singh Chauhan and Others*" (*supra*), relied upon on behalf of respondent No. 5. In any case, it would not be said that remedial measures would be debarred for the petitioners from being invoked against the decision of the tribunal, while the petitioners are aggrieved by the decision of the tribunal.

79. Situation emerges that directions were sought from the tribunal to cause modification/amendment to the rules framed pursuant to legislative powers under proviso to Article 309 of the Constitution of India. In prevailing legal position, direction by a judicial authority to executive would be incongruous and incompatible. Having regard to exposition of law, from time to time, over highlighted aspects, we find it difficult to approve of the impugned decision by the tribunal.

80. It appears that despite many faculties/subjects/disciplines *viz;* engineering, technology, pharmacy, architecture, management etc., being put under the umbrella of directorate of technical education, yet, the recruitment rules are not accommodative on certain posts, personnel from faculties other than engineering or technology.

81. Decision in this set of petition shall not hamper, prejudice or cause impediment for respondent No. 5 and like organizations, other interested parties, persons, bodies, individuals, aggrieved persons for appropriate remedial, redressal measures, resorts etc.

82. We are disposing of the writ petitions finding that directions issued by the tribunal tend to be excessive and, thus,

untenable. It does not appear to be necessary to dwell upon maintainability of action by respondent No. 5, the other question dealt with by the tribunal for the reasons referred to by the tribunal, in paragraph No. 22 of its decision, in the peculiar circumstances.

83. The writ petitions are allowed. Impugned judgment and order dated 15th March, 2019 in Original Application No. 592 of 2017 passed by Maharashtra Administrative Tribunal, Aurangabad is set aside.

84. Rule is made absolute in aforesaid terms. Writ petitions stand disposed of.

[S. M. GAVHANE]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE