

(2011) 09 PAT CK 0151

In the Patna High Court

Case No : Letters Patent Appeal No. 822 and 824 of 2011 in Civil Writ Jurisdiction Case 8141/2010

(Dr.) Arvind Kumar

APPELLANT

Vs

The State of Bihar and Others
 Subhas Prasad Sinha
Vs Dr. Pramod Kumar Singh and Others

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Citation : (2011) 09 PAT CK 0151

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.—Since both the Letters Patent Appeals arise out of the same judgement dated 4-5-2011 allowing CWJC No. 8141/2010, they have been heard together and are being disposed of by this common judgment.

2. The main dispute is on account of appointment of Appellant Subhash Prasad Sinha and Appellant Arvind Kumar on the post of Vice Chancellor of Veer Kunwar Singh University, Ara and Magadh University, Bodh Gaya vide orders of appointment dated 9-4-2010 and 15-4-2010 respectively which have been issued by the Principal Secretary to the Governor-cum-Chancellor under the orders of the Chancellor, the appointing authority u/s 10(2) of the Bihar State Universities Act, 1976 (hereinafter referred to as the "Act"). The real controversy between the parties is whether it is necessary or mandatory for the Chancellor to appoint Vice Chancellor in consultation with the State Government and whether there was such a consultation as provided u/s 10 (2) of the Act for appointing the Appellants as Vice Chancellors. The writ court has held that the requirement of consultation is mandatory and there was no consultation for appointment of the Appellants and, hence, their appointments are fit to be quashed as void ab initio.

3. Since the main controversy and vital issues relate to Sub-section (1) and (2) of Section 10 of the Act, it will be useful to extract the same for easy reference.

10. The Vice Chancellor:- (1) No person shall be deemed to be qualified to hold the office of Vice - Chancellor unless such person is, in the opinion of the

Chancellor, reputed for his scholarship and academic interest, and no person shall be deemed to be qualified to hold the office of the Vice-Chancellor of the Kameshwar Singh Darbhanga Sanskrit University unless such person is, in the opinion of the Chancellor, reputed for his scholarship in Sanskrit or has made notable contribution to Sanskrit education.

(2). The Vice-Chancellor shall be appointed by the Chancellor in consultation with the State Government.

4. Before advertizing to the detailed arguments advanced on behalf of Appellants and the Respondents, the relevant facts may be noticed in brief.

5. The writ petition was filed on 6-5-2010 by two Respondents herein, Dr. Pramod Kumar Singh and Dr. Ram Tawakiya Singh, both University Teachers under Veer Kunwar Singh University, Ara. They prayed for cancellation of appointments of both the Appellants on the post of Vice Chancellor and also for cancelling similar other appointments, if any, in the Universities of Bihar on the allegation that they were illegal appointments. They prayed to make fresh appointments of genuine and reputed scholars in the various Universities of Bihar on the basis of recommendation of the State Government after considering the inter-se merit of all the applicants. They also prayed for directing the Respondents to ensure that all appointments on the post of University officers, that is, Inspector of Colleges, Registrar etc. are also made in compliance of Article 16 of the Constitution of India after inviting applications from eligible candidates and then selecting the best. According to writ Petitioners the merit for the post of Vice Chancellors and other University Officers should be reckoned on the basis of "published work" (books/ research papers). The main point raised on behalf of writ Petitioners was whether the appointments made are illegal and against the provisions of Sub-section (2) of Section 10 of the Act.

6. The writ Petitioners claimed to be aspirants for the post of Vice Chancellors and that they had submitted application/ bio data for that purpose before the concerned authorities of the State of Bihar as well as the Chancellor of Universities. According to them the Appellants were illegal appointees and did not deserve the post. Originally, the Appellants were impleaded in their official capacity by their designation but later, after obtaining the orders of the Court they were impleaded by name in their personal capacity. Both the Appellants claimed to be reputed scholars and men of academic interest. Appellant Subhash Prasad Sinha has claimed that he had also submitted his bio data to the Minister, Human Resources Development Department, Government of Bihar as well as to the Chancellor and that his name was included in the panel prepared by the Minister, Human Resources Development Department on 15-1-2010 and the panel was sent to the Chief Minister, Bihar on 19-1-2010 where it remained pending till 14-4-2010. This stand is supported by relevant letters and notes in the connected files which have been brought on record as annexures. While, admittedly, the panel or the names which the State Government or the concerned Minister wanted to be considered during consultation for filling up the

posts of Vice Chancellors in various Universities of Bihar remained pending for approval of the Chief Minister till 14-4-2010, a meeting between the Governor and the Minister took place on 29-3-2010. The agenda of that meeting is available on record and has been extracted by the writ court at pages 20 and 21 of the judgement under appeal. It shows that the relevant file related to a Bill for constitution of a Tribunal for settling certain disputes and conflicts among the employees and teachers of Universities and Colleges. The Bill had been resent to the Governor for considering the views of the government. On the margin of the pages of relevant file bearing file no Act-01/ 10 which had been called by the writ court for perusal, the Governor/ Chancellor has recorded his minutes in hand on 29-3-2010 at 7.30 PM. The typed copy of this minutes signed by the Governor, Bihar is extracted as page 22 of the judgement under appeal. These have been noticed because the learned Counsels for Appellants, the Universities and for the Chancellor have relied heavily upon the minutes in support of their case that there was a consultation between the State Government and the Chancellor as required by Section 10 (2) of the Act.

7. After appointment of Vice Chancellor of Veer Kunwar Singh University, Ara on 9-4-2010, the Chief Minister, Bihar made a query on the file relating to panel of names under preparation for consultation, as to who had been consulted in relation to the said appointment. In reply, the Minister, Human Resources Development Department gave a note on 19-4-2010 that the department had long back requested the Chancellor to initiate the process but no consultation in the light of the Act had taken place at any level of his department and the Chancellor. The Minister in his notes categorically mentioned that for filling up the vacant posts of Vice Chancellors in the Universities of Bihar no talks had taken place between him and the Chancellor. On the same date the Secretary of Human Resources Development department issued an order mentioning the fact that the Vice Chancellors of Magadh University, Bodh Gaya and Veer Kunwar Singh University, Ara had been appointed without consultation as envisaged under the Act and, therefore, the State Government was considering the validity/ procedural deficiency of the said appointments and the issue was under consideration. Pending such consideration and till final view could be taken by the State Government the two Vice Chancellors were not to exercise any financial powers and they were not to take any decision having any financial implications. On 26-4-2010 the Secretary issued another order reiterating the earlier order and it was clarified that financial decision shall be taken by the pro Vice Chancellors. Payment of salary of both the newly appointed Vice Chancellors was also ordered to be stopped.

8. The relevant notings on the file show that the Chancellor's office stuck to its stand that consultation had already taken place and there was no need for reconsideration. For sending appropriate reply, the Secretary of the department on 8-6-2010 placed the matter before the Minister who in his note dated 9-6-2010 wrote that on 29-3-2010 discussion between him and the Chancellor was confined to constitution of University Tribunal and no talks had taken place

for filling up the vacancies for the vacant posts of Vice Chancellors and pro Vice Chancellors.

9. Thereafter the Chief Minister met the Chancellor on 10-6-2010 to ascertain the views of the latter in respect of the appointments in question and then on 12-6-2010 he recorded his minutes that the Chancellor informed him that he had talked with the Minister, Human Resources Development department in respect of appointment of the two Vice Chancellors although the Minister had informed the Chief Minister differently and had also written in the file that he had no talks with the Chancellor with respect to the related matter. The Chief Minister further recorded that considering the manner in which the Governor had described his talks with the Minister, there could be no justification for keeping the matter alive and it would be a proper step to accept the decision taken by the Governor as Chancellor. This note has been subject of rival interpretations and contentions and, hence, it will be considered further while dealing with the detailed submission of the parties.

10. In view of stand of the Chief Minister, the letters issued by the Secretary, Human Resources Development department dated 19-4-2010 and 26-4-2010 were withdrawn by order of the Principal Secretary of that department on 13-6-2010. On the basis of minutes of the Chief Minister and the letter dated 13-6-2010 the Appellants have seriously raised another issue. According to them the Chief Minister's views amount to an acceptance that there was a consultation earlier on 29-3-2010 between the Chancellor and the Minister and in that view of the matter the writ court had no occasion to decide the issue any further because, according to Appellants, the lis came to an end. In the alternative, it was contended that the talks between the Chief Minister and Governor itself amounted to subsequent consultation and that would cure the defect of consultation, if any. This contention would also be considered later at appropriate stage.

11. The issues, as per their significance may be noted in the following sequence: (1). Whether the consultation required u/s 10 (2) of the Act is directory or mandatory, (2) Whether there was consultation between the Chancellor and the State Government for appointing the Appellants as Vice Chancellors and (3) whether the minutes of the Chief Minister dated 12-6-2010 would be conclusive for determining as to whether the consultation required by law took place or not or whether it shows fresh consultation so as to cure the defect of lack of consultation, if any. Some other ancillary issues were raised by the parties relating to the aforesaid issues and they will be discussed at appropriate stage.

Issue No. 1: Whether consultation u/s 10(2) of the Act is mandatory or directory-

12. The stand of the Appellants is that although Sub-section (2) of Section 10 uses the word "shall", it does not make the requirement of consultation with the State Government in the matter of appointment of Vice Chancellors mandatory for the following reasons:

(i) u/s 10 (1), the Chancellor has been named as the sole authority for deciding who shall be deemed qualified to hold the post of Vice Chancellor,

(ii) Under Sub-section (2) of Section 10 the Chancellor has been made the sole appointing authority,

(iii) The Act itself is self contained code wherein the University with Chancellor as its head has been created as an autonomous body. The State Government has been assigned a limited role in financial or budgetary matters including the matter of creation of teaching or non teaching posts. Although consultation with the State Government is required in the matter of appointment and removal of Vice Chancellors as well as in appointment of Pro Vice Chancellors, the Act grants primacy to the Chancellor and only his decision is important and binding.

(iv) The Act does not lay down any consequence of non compliance with the requirement of consultation.

Learned Counsels for the two Universities have adopted the aforesaid stand of the Appellants.

13. Learned Counsels appearing for the writ Petitioners and learned AAG 1 appearing for the State, however, have taken a contrary stand. According to them the provision for consultation is mandatory because;- (1) The word "shall" generally as well as by its ordinary grammatical meaning renders the required action mandatory,

(2) There is no suitable or good reason why the ordinary grammatical meaning of the word "shall" should be replaced by reading it as "may",

(3) The words used, nature, context and object of the provision in Section 10 (2) make the requirement of consultation mandatory,

(4) The old Acts, that is, the Bihar State Universities (Bihar, Bhagalpur, Ranchi University) Act, 1960, the Magadh University Act of 1961 and other Acts also relating to different Universities which have been replaced by the Act of 1976 vested the power of appointment of Vice Chancellors in the Chancellor of the Universities without any requirement of consultation with the State Government. The Legislature, on account of experience, in its wisdom has now introduced the requirement of consultation under the Act as well as in the Patna University Act, 1976. Such deliberate introduction indicates that the consultation has been given clear importance and significance. It takes care of mischief or perceived mischief in the earlier Acts and, hence, must be treated to be mandatory.

14. Various judgements cited by the parties on this issue show that there is no conflict of opinion so far as general principles are concerned. The relevant judgments cited for explaining the concept of Mandatory and Directory provisions or treating "shall" as Mandatory are: 1. N. Kannadasan Vs. Ajoy Khose and Others, 2. K.S. Srinivasan Vs. Union of India (UOI), 3. Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan, 4. AIR 1966 SC 1987 Chandra Mohan v.

State of U.P and 5. Supreme Court Advocates-on-Record Association and another Vs. Union of India, Some other judgements cited on behalf of Appellants in support of the proposition that provision for consultation should not be treated as mandatory have been dealt with separately hereinafter.

Learned AAG 1 placed special reliance upon the case of Shri Mandir Sita Ramji Vs. Lt. Governor of Delhi and Others, and upon the case of State of Uttar Pradesh Vs. Singhara Singh and Others, in support of the proposition that if the statutory provision uses the word "shall" while prescribing a procedure for appointment or for doing of any other important work then such provision should be considered as mandatory.

15. From the general principles it follows that for forming a definite opinion as to whether a particular provision such as one for "consultation" is mandatory or not, the words of the Statute, the nature of concerned duty and responsibility, the context in which the provision appears and its object have to be kept in mind. If the consultation is prior or it is to secure a fair procedure and its disregard may affect fundamental rights, the requirement of consultation is mandatory. It is also mandatory where the advice or opinion binds the authority who is to propose for consultation to seek opinion or advice. However, if the opinion or advice is not binding, the proposer after seeking the opinion or advice by way of consultation may take a contrary decision and in that eventuality, the decision may not be illegal or void. It is also well recognized in law that if a Statute lays down the manner of doing something, it must be done in that manner or not at all.

16. The mischief rule is well known as one of the principles of interpretation. If the Legislature changes the earlier law by providing safeguard like consultation with another authority, clearly a mischief or likely mischief in the estimate of the Legislature is sought to be remedied. Such provisions introduced by way of remedy cannot be easily disregarded as trivial or unimportant and, hence, they are generally treated as mandatory. In this context learned AAG 1 has relied upon the following three judgements of the Supreme Court: 1. Mohan Lal Tripathi Vs. District Magistrate, Rae Bareilly and others, 2. Raja Bahadur Motilal Bombay Mills Ltd., and Another Vs. Govind Ram Brothers (P) Ltd., and Another, and 3. Jaywant S. Kulkarni and others Vs. Minochar Dosabhai Shroff and others, These judgements support the aforesaid proposition put forward on behalf of the State.

17. The Universities under the Act are autonomous bodies and the Act is a complete code in which the Chancellor enjoys unique primacy having administrative as well as adjudicatory roles. The purpose of making the Universities autonomous and free from day to day control of the State Government is quite understandable. Day to day control and care of higher education has been kept insulated and free from political expediency and compulsions. The role of Vice Chancellor is that of Chief Executive Officer of the University. The Chancellor is superior but his powers are generally supervisory. He grants approval to the Regulations and Statutes framed by the bodies of the Universities, reviews decisions where grievances are brought to him by the

teachers or other employees and issues necessary directions wherever deemed necessary. The Governor of the State is the ex-officio Chancellor of the Universities. The Governor of a State is head of the executive of the State and in all normal situations he is required to act on the aid and advice of the State Government. Any citizen of India who has completed 35 years of age is eligible for appointment as Governor. On the other hand the Vice Chancellor is a whole time officer who has to take care of Academics, run the day to day affairs of the University as well as plan its development. Hence, he is required to be a person "reputed for his scholarship and academic interest". The search for a suitable person to head a University as its whole time officer, in the context of the Act as well as Section 10 of the Act, is a task of utmost significance and importance. That appears to be the reason why need for consultation with the State Government was introduced in the Act. On applying well accepted canons of interpretation of law including the Mischief Rule, and on consideration of the words used, the nature of the Statute and context relating to consultation and its object, the requirement of consultation u/s 10 (2) of the Act has to be held as mandatory.

18. The word "shall" is only indicative. The need of consultation is between two constitutional authorities, one is the Chancellor whose role has been noticed above and the other is the State Government which has a high stake in ensuring that standard of higher education in the State is maintained and the hundreds of crores of rupees allocated to the Universities every year are well utilized by appointment of suitable persons who are not only reputed for their scholarship and academic interest but can also be good administrators, capable of safeguarding the finances and interests of the Universities. The Governor as Chancellor does not have the elaborate requisite machinery to enable him to form the appropriate opinion for appointing persons as Vice Chancellors and this is adequately taken care of by providing consultation with the State Government. The nature of duty of both the Constitutional authorities in this context is to promote public interest and interest of higher education by selecting and appointing best persons available out of eligible candidates. To achieve this object the stipulated consultation has to be effective. It is not only desirable but clearly a must, before selection and appointment.

19. Though the judgement of the Supreme Court in the case of Indian Administrative Service (S.C.S.) Association v. Union of India (1993) 1 Supp. SCC 731 has been cited on behalf of the Appellants, a careful perusal shows that the settled principles as to what shall constitute consultation and when it is mandatory do not support the case of the Appellants. The judgement approves that prior consultation is mandatory and more so if its violation would affect fundamental rights or fair procedure. In the present case, the dispute whether opinion or advice of the State Government will bind the Chancellor or not is not at all in issue. The controversy is in respect of earlier stage-as to whether the State Government should have adequate opportunity to give its opinion or advice in respect of the appointees. The procedure and details as to who shall be taken

into consideration on account of eligibility and who shall be selected out of eligible persons has rightly not been prescribed by the Act because the appointment and consultation process has been left in the hand of high Constitutional functionaries. Nonetheless, like any selection process it must be fair. Consultation with the State Government has been introduced by the Legislature with the obvious aim of making the selection procedure wider in ambit, deeper in contents, transparent and fair. The State Government has the means to render intensive and extensive information and input in course of consultation. The consultation in such important matter and at such high level needs to be effective so that after the Chancellor has made tentative choice on considering the entire information and input given by the State Government, the latter may provide further relevant information, if available, in respect of tentatively selected persons, in order to avoid the risk of Universities being placed in the hands of wrong persons or unsuitable persons.

20. The judgement of the Supreme Court in the case of Administrator, Municipal Committee, Charkhi Dadri and another Vs. Ramji Lal Bagla and others, was cited for the well known proposition of law that the word "shall" is not determinative and even where this word is used by the Legislature, generally the provision is treated as directory if consequence of disregard of the provision is not provided. This proposition is not absolute and is only one of the known tests for deciding whether a provision is mandatory or directory.

21. In the leading case of State of U.P. Vs. Manbodhan Lal Srivastava, in the matter of penal action against a public servant in accordance with Article 311 of Constitution of India, it was held that use of the word "shall" in Article 320(3) did not make consultation with the Union Public Service Commission in such a matter mandatory. That Constitution Bench judgement also made it clear that the word "shall" is generally taken in a mandatory sense but sometimes the entire provision may not be treated as mandatory considering the entire context such as the effect of proviso to Article 320(3) of the Constitution of India. It was subsequently explained by another Constitution Bench of the Supreme Court in the case of Banwarilal Agarwalla Vs. The State of Bihar and Others, (paragraph 16) that the relevant part of Article 320 was treated to be directory mainly on account of the contents of the proviso.

22. Learned AAG 1 appearing for the State has highlighted paragraph 6 of that judgement wherein it was clarified that to decide whether a provision is directory or mandatory, the Court has to decide the Legislative intent in each case. The relevant consideration should be not only the words used but the scheme of the Statute, intended benefit to public and the material danger to the public by the contravention of the provision under consideration.

23. Learned Counsel for the Chancellor has relied upon a judgement of the Supreme Court in the case of State of Andhra Pradesh and another Vs. Dr. Rahimuddin Kamal, The facts of that case attracted the principle laid down in the case of State of U.P. v. Manbodhan Lal Srivastava (Supra) which has already

been discussed. That judgement and other judgements cited on behalf of Appellants and the Universities do not help the stand of the Appellants. The provision for consultation u/s 10 (2) of the Act had rightly been held mandatory by the writ court. We find no good reasons to take a different view.

Issue No. 2: Whether there was consultation as required u/s 10 (2) of the Act-

24. On behalf of the Appellants, the Chancellor and the Universities the minutes of the Chancellor extracted at page 22 of the judgement under appeal was highlighted and some other circumstances were pointed out to submit that in fact there was consultation in respect of appointment of the Appellants as required by law. The foundation for this submission is minutes of the Chief Minister dated 12-6-2010 available as annexure-1/B to supplementary affidavit in CWJC No. 8141/ 2010 which has been annexed as annexure-3 to LPA No. 822/2011. That has already been noticed earlier. It has been submitted that since the meeting on 29-3-2010 between the Chancellor and the Minister is admitted, the contents of the consultation is not at all justiciable and it must be presumed that there was sufficient consultation leading to appointment of the Appellants.

25. It has further been submitted that the orders dated 19-4-2010 and 26-4-2010 affecting the financial powers and functioning of the Appellants show that the issue of consultation was under examination and subsequently those orders were withdrawn by order dated 13-6-2010 issued by the Principal Secretary of the department, hence, the conclusion should be that the State Government was satisfied about the consultation having taken place as per minutes of the Chief Minister and, therefore, the enquiry ended and the lis came to an end. It has further been submitted that thereafter the State cannot take the stand that there was no consultation as required by law and the writ court should also have held accordingly.

26. On the other hand learned Counsels for the writ Petitioners and learned AAG 1 for the State have taken a contrary stand. According to them, the Chief Minister felt obliged to respect the stand of the Chancellor but on facts he never came to a conclusion that the stand of the Minister was factually incorrect. It has further been submitted that the State was under legal obligation to assist this Court by placing all the relevant facts to enable it to take a decision on the issue whether there was consultation as required u/s 10 (2) of the Act and whether the appointment of the Appellants was in accordance with law or not. On their behalf it was submitted that in order to decide this issue the writ court rightly went into the question as to what amounts to "consultation" and whether the materials on record and, particularly, the minutes of the Chancellor amount to consultation as understood in law. It was pointed out that in paragraph 43 of judgement under appeal, relevant part of judgement in the case of Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, was extracted. That part of the judgement of the Constitution Bench of the Supreme Court refers to several authorities and case laws. It also noticed Supreme Court's judgement in the case of S.P. Gupta Vs. President of India and Others, In the case of Rollo and Anr.

v. Minister of Town and Country Planning (1948) 1 All E. R. 13 the Statute required the Minister to consult some authorities. Bucknill J. held that " the Minister, with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved". It was clarified that the Minister must supply sufficient information in order to obtain advice and sufficient opportunity should be given in tendering proper advice. That would only amount to meaningful consultation.

27. It is worthwhile to notice the opinion of Queen's Bench expressed by Justice Webster, J. in the case of R v. Secretary of State for Social Services, ex parte Association of Metropolitan Authorities (1986) 1 All E.R. 164. The passage extracted in paragraph 46 of the judgement of the writ court is so eloquent in respect of general principle relating to the consultation that it needs to be extracted again:

But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.

28. The learned writ court has also noticed the judgement of the Supreme Court in the case of Gauhati High Court and Another Vs. Kuladhar Phukan and Another, In that case the consultation required was between the Governor and High Court. The matter related to subordinate judiciary. The effect of non consultation was held to be so incurable that even an ex-post facto approval would not cure the invalidity.

29. A perusal of the minutes of the Governor dated 29-3-2010 shows that the agenda of the meeting related to a Bill for constituting a Tribunal for settlement of disputes among employees and teachers of the Universities and Colleges. Only some general talks took place regarding urgency of appointing good and efficient Vice Chancellors in Magadh University and Patna University. The only name mentioned by the Minister was of one Dr. Simadri for Patna University.

30. Since the minutes of the meeting have been recorded by Hon"ble the Governor of Bihar which may be taken to be that of the Chancellor, there is no

scope to presume that there was any consultation in respect of names of eligible persons or at least the Appellants for appointment as Vice Chancellors of the concerned Universities. Subsequent minutes of the Minister is not in conflict with the minutes prepared by the governor or the Chancellor and it is difficult to reject the stand of the Minister that he had no consultation with the Chancellor on 29-3-2010 for appointment of the Appellants on the post of Vice Chancellors, as required by Section 10 (2) of the Act. The minutes of the Chief Minister and the consequent decision to cancel some earlier orders and allow the Appellants to continue as Vice Chancellors is clearly an administrative decision as per convenience or propriety and does not appear to be a stand taken on the basis of merits of the matter. The minutes of the Chief Minister in no way rejects the stand of the Minister on account of any proven facts. In any case, in the overall context, the view recorded by the Chief Minister cannot and should not prevent the State Government from placing all the facts before the court in a fair manner to enable it to come to a proper conclusion.

31. The facts and circumstances available on record clearly show that the State Government had not finalized its own list or panel of deserving candidates because the matter was pending for approval of the Chief Minister till the meeting held on 29-3-2010. Further, the minutes of the Chancellor noticed above as well as subsequent stand of the Minister and correspondences show that the process of consultation was yet to begin and the State Government's views were yet to be finalized. From the materials available on record before this Court it has to be held that there was no consultation as required by Section 10(2) of the Act either on facts or in law. As held earlier, the consultation must be effective and it cannot be complete unless views of the State Government are available in respect of the proposed appointees. That never happened.

Issue No. 3: Whether the minutes of the Chief Minister dated 12-6-2010 must be taken as a binding determination on consultation or whether it shows fresh consultation, taking care of lack of consultation:

32. It has already been discussed and held that consultation u/s 10(2) of the Act is mandatory. It has also been discussed and held after noticing the submissions in respect of order dated 13-6-2010 of the Principal Secretary of the department and minutes of the Chief Minister dated 12-6-2010 that in fact there was no consultation either on facts or in law. Thus, in substance the issue No. 3 has already been answered in the context of issue No. 2.

33. It may further be observed that the minutes of the Chief Minister dated 12-6-2010 do not show any reasons for his deciding to respect the views of the Chancellor and, hence, it cannot have even persuasive value so far as this Court is concerned, in the context of all the relevant facts including the minutes of the Chancellor and those of the Minister. The Chief Minister rightly avoided to give any categorical finding. When a challenge to the legality of appointment to a public and Statutory post like that of Vice Chancellor came up for decision before this Court, the State Government rightly placed all the materials and facts before

the court because the findings, if any, by the Chief Minister or the State Government cannot be binding on the court. In a dispute of present nature, the State Government cannot be held bound by principles of estoppel or waiver when the issue is-whether the statutory requirement of consultation was actually met or not. It is well settled that there is no estoppel against the Statute.

34. In the judgement of the Supreme Court in the case of Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., a tenant raised the issue of waiver on the ground that the landlord had agreed to allow the tenant to sublet the premises. The Apex Court rejected the plea on various grounds including the ground that rights under the statutory provisions based on public policy must be enforced by the courts. It was further held that an agreement to waive an illegality is void on grounds of public policy and would be unenforceable. Some judgements of the Privy Council were also relied upon. One may usefully refer to the case of AIR 1925 83 (Privy Council) The relevant principle of law enunciated by Lord Sumner is in following words:

...No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset----

35. The Supreme Court also noted the law as to waiver in Corpus Juris Secundum Volume 92 at page 1068 and highlighted that a waiver in derogation of statutory rights is not favoured, and it will be inoperative and void if it infringes on the rights of others or would be against public policy or morals. Thus, it is not possible to accept that the lis must be deemed to have come to an end with the views of the Chief Minister in his minutes dated 12-6-2010 or with the issuance of an order by the Principal Secretary on 13-06-2010 allowing the Appellants to work as Vice Chancellors. Even the alternative argument that as per minutes of the Chancellor, the Minister waived the right of consultation must also be rejected for the aforesaid reasons. The provision for consultation u/s 10 (2) of the Act is to serve a public purpose and it cannot be waived by any Government functionary.

36. Having clarified the legal position that mandatory requirement like the one u/s 10 (2) of the Act cannot be waived by the Minister or the State Government, it also needs to be highlighted that in fact the Minister was aware that the panel containing the names of candidates which the State Government was to discuss in course of consultation with the Chancellor had yet not been finalized by the Chief Minister. In such facts and circumstances, it was not possible or proper for the Minister to waive the requirement of consultation between the Chancellor and the State Government. In fairness to the Minister, it must be added herein that the minutes of the Chancellor are not clear and it cannot be safely concluded that the Minister had agreed to waive the right of "consultation".

37. One of the arguments on behalf of Appellants was that contents of

consultation are not justiciable. For that reliance was placed upon the judgement of the Supreme Court in the case Mahesh Chandra Gupta Vs. Union of India (UOI) and Others, In the case at hand the subject of enquiry or the issue, as noted above, is whether there was any consultation as required by Section 10(2) of the Act or not and for that purpose only the minutes of the Chancellor were noticed by the writ court and also by us. The justiciability of contents of consultation cannot arise as an issue when it has been found that there was no consultation at all.

38. Another contention of the Appellants was that in exercise of writ jurisdiction this Court should not decide whether there was any consultation because it is an issue involving disputed questions of facts. This contention is also devoid of any merits. Both the concerned parties, that is, the Chancellor and the State Government have placed all the materials which are relevant for deciding the issue involved. The facts are not much in controversy and the task before the court is mainly of drawing deductions or inferences from the facts available on record of the case. It is not a case which should be thrown out on the plea of disputed questions of facts.

39. On behalf of the writ Petitioners it was pointed out that the Vigilance Department of Jharkhand has filed an affidavit in which a report has been enclosed which shows pendency of investigation into various acts of financial and other irregularities against some others and Appellant Arvind Kumar in the capacity of erstwhile Vice Chancellor of Vinoba Bhave University, Hazaribagh (Jharkhand). In reply, learned Counsel for the aforesaid Appellant attempted to show that the allegations were not relatable to Arvind Kumar or had no substance. In reply, it was submitted on behalf of writ Petitioners that whatever be the worth of allegations and materials under investigation, the State Government of Bihar should have been afforded an opportunity by the Chancellor to collect such materials for effective consultation otherwise public interest would and has suffered.

40. It is not necessary to go into the merits of the allegations and materials against Appellant Arvind Kumar in the present proceeding. Since it has already been held that prior consultation is mandatory and the required consultation did not take place, such or other materials and allegations must be left for consideration by the Chancellor and the State Government at the appropriate stage, if required.

41. The aforesaid discussion and findings leave no option but to affirm the views taken by the learned writ court. As a result the appeals must fail. They are accordingly, dismissed.

42. There shall be no order as to costs.

Shivaji Pandey, J.

43. I agree.