

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WP(C) .NO. 24180 OF 2012 (S)

PETITIONER(S) :

DR.K.D.PRATHAPAN AGED 47 YEARS
S/O.T.P.DIVAKARAN, ASSISTANT PROFESSOR
DEPARTMENT OF ENTOMOLOGY, COLLEGE OF AGRICULTURE
KERALA AGRICULTURAL UNIVERSITY, VELLAYANI.P.O
THIRUVANANTHAPURAM. 695 522.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SMT.SMITHA GEORGE

RESPONDENT(S) :

1. STATE OF KERALA
REPRESENTED BY THE CHIEF SECRETARY
GOVERNMENT SECRETARIAT, GOVERNMENT OF KERALA
THIRUVANANTHAPURAM. 695 001.

2. THE SECRETARY TO HIGHER EDUCATION DEPARTMENT
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM. 695 001.

3. KERALA UNIVERSITY OF VETERINARY AND ANIMAL SCIENCES
POOKODU, WAYANAD DISTRICT-673 576
REPRESENTED BY REGISTRAR.

WP(C) .NO. 24180 OF 2012 (S)

4. DR.B.ASHOK
VICE CHANCELLOR DESIGNATE
KERALA UNIVERSITY OF VETERINARY AND ANIMAL SCIENCES
POOKODU, WAYANAD-673 576.

R3 BY ADV. SRI.MILLU DANDAPANI,SC,K.V & A.S. UTY
R4 BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
R4 BY ADV. SMT.K.RADHAMANI AMMA
R4 BY ADV. SRI.ANTONY MUKKATH
R1,R2 BY SPECIAL GOVERNMENT PLEADER SMT.GIRIJA GOPAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
30.06.2015, THE COURT ON 22-07-2015 DELIVERED THE FOLLOWING:

WP(C) .NO. 24180 OF 2012 (S)

APPENDIX

PETITIONER(S) EXHIBITS

EXHIBIT P1	TRUE COPY OF THE EXTRACT OF THE ORDER NO.GO (P) 58/2010/H.EDN. DATED 27.3.2010.
EXHIBIT P2	TRUE COPY OF THE EXTRACT OF THE UGC REGULATIONS DATED 30.6.2010.
EXHIBIT P3	TRUE COPY OF THE ORDER NO.G O (RT) 2202/10/AD DATED 10.12.2010.
EXHIBIT P4	TRUE COPY OF THE ORDER G O (P) 392/10/H.EDN DATED 10.12.2010.
EXHIBIT P5	TRUE COPY OF THE LETTER NO.1-2/2009 (EC/PS) PT.FILE 3 DATED NOVEMBER 2010.
EXHIBIT P6	RUE COPY OF THE ORDER NO.7977/2011/GAD DATED 21.10.2011 ISSUED BY THE GOVT.
EXHIBIT P7	TRUE COPY OF JUDGMENT DATED 20.12.2011 IN WP(C) NO.37836 OF 2010.
EXHIBIT P8	TRUE COPY OF THE NOTIFICATION NO.GS3-2588/2010 DATED 13TH AUGUST, 2012.
EXHIBIT P9	TRUE COPY OF THE JUDGMENT DATED 17.8.2012 IN WP(C) NO.18453 OF 2012.
EXHIBIT P10	TRUE COPY OF THE KERALA VETERINARY AND ANIMAL SCIENCES UNIVERSITY ACT, 2010 (NOTIFICATION DATED 24.1.2011 PUBLISHED IN THE KERALA GAXETTE DATED 24.1.2011)

RESPONDENTS' EXHIBITS:

EXHIBIT R1 (A)	TRUE COPY OF G.O (RT.) NO.9095/10/GAD DATED 10.12.2010.
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WP(C)NO. 24180 OF 2012 (S)

- EXHIBIT R4 (A) PHOTOCOPY OF THE COUNTER AFFIDAVIT FILED BY
THE 6TH RESPONDENT IN W.A. NO.347 OF 2012
DATED 04.03.2012.
- EXHIBIT R4 (B) PHOTOCOPY OF THE JUDGMENT DATED 30.07.2012
IN W.A.NO.347 OF 2012 OF THIS HONOURABLE
COURT.
- EXHIBIT R4 (C) PHOTOCOPY OF THE APPLICATION DATED
11.02.2013 ALONG WITH THE REPLY LETTER
NO.F.9-8/2000(PS)/MISC DATED 06.05.2013 OF
THE UNDER SECRETARY, UNIVERSITY GRANTS
COMMISSION, NEW DELHI.
- EXHIBIT R4 (D) PHOTOCOPY OF THE GO(RT.) NO.2286/10/AD
DATED 28.12.2010 OF THE 1ST RESPONDENT.
- EXHIBIT R4 (E) PHOTOCOPY OF THE NOTIFICATION
NO.GS32588/2010 DATED 29.10.2010 OF THE 1ST
RESPONDENT.
- EXHIBIT R4 (F) PHOTOCOPY OF THE NOTE FOR THE COUNCIL OF
MINISTERS FURNISHED UNDER THE RIGHT TO
INFORMATION ACT.
- EXHIBIT R4 (G) PHOTOCOPY OF THE NOTE FOR CIRCULATION TO
GOVERNOR FURNISHED UNDER THE RIGHT TO
INFORMATION ACT.
- EXHIBIT R4 (H) PHOTOCOPY OF THE MINUTES OF THE 487TH
MEETING OF THE UNIVERSITY GRANTS COMMISSION
HELD ON 18TH AND 19TH JULY, 2012.

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.P(C) No.24180 of 2012

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Dated this the 22nd - day of July, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Petition, having treated as public interest litigation, has been filed by the petitioner praying for issue of writ of quo warranto against the fourth respondent, who is holding the office of Vice Chancellor of the Kerala University of Veterinary and Animal Sciences, Pookkode, Wayanad. Brief facts of the case, which emerge from the pleadings of the parties are:

2. The Kerala Veterinary and Animal Sciences University (hereinafter referred to as 'the University') has been established by a State legislation, namely, the Kerala Veterinary and Animal Sciences University Act,

2010 (hereinafter referred to as 'the 2010 Act'). Section 12 of the 2010 Act relates to the Vice Chancellor. Under Section 12(5), the first Vice Chancellor is to be appointed by the Chancellor on the recommendation of the Government. The State Government recommended to the Chancellor the name of fourth respondent out of a panel of three names for appointment of the first Vice Chancellor. The fourth respondent, who was working with the Central Government, was appointed as Vice Chancellor by order of the Chancellor dated 29.12.2010 with effect from 29.12.2010. The petitioner, who is working as Assistant Professor in the Kerala Agriculture University, Thrissur, filed W.P(C).No.37836 of 2010 questioning the appointment of the petitioner as Vice Chancellor of the University. The State Government, in the meantime, passed an order on 21.10.2011 recalling the fourth respondent from the post of Vice Chancellor of the University. In view of the recalling of the

appointment of the fourth respondent as Vice Chancellor, W.P(C).No.37830 of 2010 filed by the petitioner questioning the appointment of the fourth respondent was closed observing that in view of removal of the fourth respondent from the office of Vice Chancellor, the subject matter of the Writ Petition no longer survives for consideration on merits.

3. Against the notification dated 21.10.2011 recalling the fourth respondent from the post of Vice Chancellor, W.P(C).No.28284 of 2011 was filed by the fourth respondent. The said Writ Petition was dismissed by the learned Single Judge by judgment dated 08.12.2011. The Review Petition was also dismissed on 01.12.2012. W.A.No.347 of 2012 filed by the fourth respondent was allowed by the Division Bench setting aside the order of the State Government dated 21.10.2011 recalling the fourth respondent from the post of Vice Chancellor. The Division Bench also directed

the State Government to immediately restore the fourth respondent on the post of Vice Chancellor. In pursuance of the Division Bench judgment dated 30.7.2012, the State Government issued notification dated 13.08.2012 restoring the fourth respondent on the post of Vice Chancellor of the University. The petitioner again filed W.P(C).No.18453 of 2010. After the Government issued order dated 07.08.2012 in compliance of the judgment in the Writ Appeal, the petitioner moved an application in W.P(C).No.18453 of 2012 to permit him to withdraw the Writ Petition with liberty to file a fresh one. The prayer seeking liberty was opposed by the University. The learned Single Judge, however, refrained himself from going into the respective pleas and observed that it shall be open for the petitioner to seek remedy against the order dated 07.08.2012. W.P(C).No.18453 of 2012 was thus dismissed as withdrawn. After withdrawal of the aforesaid Writ Petition, the petitioner filed the

present Writ Petition praying for the following reliefs:

- i) *To issue a Writ of Quo-warranto calling upon the 4th respondent to show before this Hon'ble Court under what authority of law he is holding the post of Vice Chancellor of the Kerala University of Veterinary and Animal Sciences.*
- ii) *To call for the records leading upto Exhibit P8 and quash the same by the issuance of a writ of certiorari or any other appropriate writ, order or direction.*
- iii) *To issue a writ of mandamus forbearing the 4th respondent from continuing to hold the post of Vice Chancellor of the Kerala University of Veterinary and Animal sciences.*
- iv) *To issue such other writs, orders or directions as this Hon'ble Court may deem fit and proper in the circumstances of the case."*

4. The petitioner in the Writ Petition pleads that the fourth respondent had only a degree in Veterinary Science known as 'B.V.Sc.' from the Kerala Agricultural University. Thereafter he was selected to the Indian Administrative Service. It is pleaded that the fourth respondent does not fulfill the qualification for appointment of the Vice Chancellor of the University. It is pleaded that the University Grants Commission has

issued a regulation dated 30.06.2010, namely, the UGC Regulations (on Minimum Qualifications for Appointment of Teachers, Other Academic Staff in Universities and Colleges and Other Measures for the Maintenance of Standards in Higher Education), 2010, (hereinafter referred to as 'the 2010 Regulations') which prescribe qualification for appointment of Vice Chancellor in paragraph 7.3.0, which requires that Vice Chancellor should have a minimum of ten years of experience as Professor in a University system. The fourth respondent having no experience, he does not fulfill the minimum eligibility qualification in the 2010 Regulations, hence, was not eligible. The State Government has adopted the UGC norms, hence, the fourth respondent could not have been appointed as Vice Chancellor of the University. The fourth respondent does not have any academic qualification and was not eligible for the office of Vice Chancellor. The post of Vice Chancellor can be

held only by a distinguished academician.

5. Counter affidavit has been filed by the fourth respondent refuting the pleadings in the Writ Petition. It is pleaded that the fourth respondent is fully qualified and eligible for appointment as Vice Chancellor under the 2010 Act. It is pleaded that the fourth respondent was appointed as Vice Chancellor on the recommendation of the Government in terms of Section 12(5) of the 2010 Act. The 2010 Act does not prescribe any qualification for appointment to the post of Vice Chancellor. The recommendation by the Government was made after considering all aspects, including merits of the candidates, who were empanelled. It is pleaded that the fourth respondent has been awarded Master's Degree in Political Science. He has published four books in different subjects. The fourth respondent has also worked as Director of the State Animal Husbandry Department and 'Jalanidhi' (a world Bank assisted Rural

water Supply Project) besides serving as District Collector. It is submitted that the 2010 Regulations can be applicable only to the teachers and academic staff and the University Grants Commission has no jurisdiction to lay down qualification for appointment of Vice Chancellor. It was pleaded that paragraph 7.3.0 of the Regulations, 2010 is still under consideration of the Ministry of Human Resource Development. The post of Vice Chancellor is outside the gamut of the teaching staff. The attack of the petitioner on the appointment of the fourth respondent as Vice Chancellor on the basis of paragraph 7.3.0 is premature.

6. Additional counter affidavit has been filed by the fourth respondent dated 26.11.2013 by which Note for the Council of Ministers and Note for Circulation to Governor for appointment on the post of Vice Chancellor obtained under the Right to Information Act have been annexed. Second additional counter affidavit

has also been filed by the fourth respondent, wherein the minutes of the 487th Meeting of the University Grants Commission held on 18th and 19th July, 2012 have been brought on record, in which, as per agenda No.2.06, the Commission decided to drop paragraph 7.3.0 from the Regulations, 2010.

7. Counter affidavit has been filed by the State. The State has pleaded that Regulations, 2010 cannot be made applicable to the appointment of Vice Chancellor of the University. Vice Chancellor does not fall in the category of teachers or other academic staff. The fourth respondent was appointed as Vice Chancellor under Section 12(5) of the 2010 Act. The fourth respondent, who was on deputation to the Central Government, had been repatriated and placed at the disposal of Animal Husbandry Department.

8. We have heard Sri.K.Ramakumar learned Senior Advocate appearing for the petitioner and

Sri.O.V.Radhakrishnan, Senior Advocate appearing for the fourth respondent. Smt.Girija Gopal, Special Government Pleader appeared for the State and Sri.Millu Dandapani appeared for the third respondent.

9. Sri.K.Ramakumar, Senior Counsel appearing for the petitioner contended that the appointment of the fourth respondent having been made in violation of paragraph 7.3.0 of the Regulations, 2010 framed by the University Grants Commission, writ of quo warranto is entitled to be issued. It is submitted that the fourth respondent being not an academician and having no teaching experience, the fourth respondent is not entitled to be appointed as Vice Chancellor of the University. He further submitted that the fourth respondent was only an IAS Officer. He was not competent to man the post of Vice Chancellor. It is submitted that the fourth respondent being working as Private Secretary to the Minister of State for Food and

Civil Supplies, Government of India used his position and got appointed as Vice Chancellor. The appointment of the fourth respondent is wholly void and unenforceable as he is not entitled to be appointed to the post of Vice Chancellor, a post earmarked for a person, who should be a distinguished academician with a minimum of ten years of experience as Professor, particularly in terms of the standards prescribed by the University Grants Commission. The High Court in exercise of power of Judicial Review can very well examine the appointment of the fourth respondent and annul the said appointment.

10. Sri.O.V.Radhakrishnan, Senior Advocate appearing for the fourth respondent, refuting the submission of learned counsel for the petitioner, submitted that the Writ Petition filed by the petitioner is not maintainable on the principle of constructive res judicata. It is contended that in W.P(C).No.28284 of

2011 filed by the fourth respondent the present petitioner was sixth respondent, which Writ Petition was although dismissed on 8.12.2011, W.A.No.347 of 2012 filed against the judgment of the learned Single Judge was allowed restoring the present fourth respondent on the post of Principal. The sixth respondent in that Writ Petition actually raised in his counter affidavit the plea of ineligibility of the present fourth respondent which was not specifically considered. The judgment dated 30.7.2012 shall operate as constructive res judicata in the present Writ Petition. The petitioner is precluded from raising the issue of appointment of the fourth respondent in the present Writ Petition. It is further submitted that another Writ Petition, W.P(C).No.18453 of 2012 was filed by the petitioner where again the very appointment of the fourth respondent was questioned, which Writ Petition was dismissed as withdrawn by judgment dated 17.8.2012 without obtaining leave of

the Court. W.P(C).No.18453 of 2012 having been dismissed as withdrawn without liberty to file a fresh Writ Petition, the petitioner is precluded from filing the present Writ Petition on the same cause of action. It is further submitted that the fourth respondent is fully eligible and competent to hold the post of Vice Chancellor of the University. He is having a Bachelor's Degree in Veterinary Science and Master's Degree in Political Science, including experience of working as Director of the State Animal Husbandry Department. It is submitted that paragraph 7.3.0 of the 2010 Regulations is not applicable, which paragraph has also been dropped subsequently by the University Grants Commission itself in its meeting dated 18th/19th July, 2012. It is further submitted that the 2010 Act was never amended to incorporate qualification for appointment of Vice Chancellor, hence 2010 Regulations cannot apply for appointment of Vice Chancellor. He

further submitted that by paragraph 7.4.0 the University/State Government were directed to modify the relevant Act and Statute within six months of adoption of the regulation and the appointment of the fourth respondent having been made within the period of six months, there is no question of applicability of the 2010 Regulations for appointment of the fourth respondent. It is submitted that in the appointment of the fourth respondent, there is no breach of any statutory provision. The appointment having been made in accordance with Section 12(5) of the 2010 Act, writ of quo warranto cannot be issued as prayed for by the petitioner.

11. Smt.Girija Gopal, learned Special Government Pleader submitted that the appointment of the fourth respondent was made under Section 12(5) of the 2010 Act on the recommendation of the Governor, which is in accordance with the 2010 Act. It is further submitted

that paragraph 7.3.0 of the 2010 Regulations is not applicable with regard to appointment on the post of Vice Chancellor and 2010 Regulations are applicable only to teachers and other academic staff. The fourth respondent possessed the qualification of Master's Degree in Political Science and also a Bachelors Degree in Veterinary and Animal Sciences and his qualification and experience of two years as Director, Animal Husbandry Department were considered by the Government before recommending his name to the post of Vice Chancellor of the University.

12. Learned counsel for the parties have placed reliance on various judgments of the Supreme Court, which shall be referred to while considering the submissions in detail.

13. From the submissions raised by the learned counsel for the parties and pleadings on record, the following are the issues which arose for consideration in

this Writ Petition:

I. Whether the plea raised by the petitioner in this Writ Petition questioning the eligibility of respondent No.4 to be appointed as Vice Chancellor shall be barred by the principle of constructive res judicata in view of judgment of the Division Bench in W.A. No.347 of 2012 dated 30.07.2012 where the present petitioner was the sixth respondent?

II. Whether the subsequent Writ Petition, W.P (C).No.18453 of 2012 filed by the petitioner questioning the competence of the fourth respondent to be appointed as Vice Chancellor having been dismissed as withdrawn by judgment dated 17.8.2012, without obtaining leave to file fresh Writ Petition, this Writ Petition cannot be entertained?

III. Whether for appointment of the fourth respondent it was obligatory for the State to follow paragraph 7.3.0 of the 2010 Regulations framed by

the University Grants Commission and the fourth respondent, who does not fulfill the above qualification mentioned therein could not have been appointed as Vice Chancellor of the University?

IV. Whether the appointment of the fourth respondent as Vice Chancellor of the University has been validly made in accordance with Section 12(5) of the 2010 Act?

V. Whether the appointment of the fourth respondent deserves to be set aside in this Writ Petition even if paragraph 7.3.0 is not applicable for the appointment of Vice Chancellor on the ground that the fourth respondent was not competent or worthy for the post of Vice Chancellor of the University?

ISSUE NO.I

14. Whether the present Writ Petition filed by the petitioner questioning appointment of the 4th respondent is barred by the principle of constructive res

judicata in view of the fact that the plea that respondent No.4 did not fulfil the essential qualification for appointment as Vice Chancellor ought to have been raised as defence by the petitioner in W.P(C) No.28284 of 2011 and W.A. No.347 of 2012 the issue which might or ought to have been raised in the earlier Writ Petition shall be deemed to be barred by constructive res judicata? The first objection which has been raised by the learned counsel for the respondent is that the present Writ Petition is barred by the principle of constructive res judicata. It is submitted that the issue that respondent No.4 is not qualified for the appointment as Vice Chancellor ought to have been raised in W.A. No.347 of 2012 arising out of W.P(C) No.28284 of 2011 and the said issue cannot be allowed to be raised in the present Writ Petition. It is further submitted that in the counter affidavit filed by the petitioner who was one of the respondents in the Writ

Petition the plea that respondent No.4 is not qualified for appointment as Vice Chancellor was actually raised. For considering the said objection it is necessary to look into the relief claimed in W.P(C) No.28284 of 2011. The cause of action on the basis of which W.P(C) No.28284 of 2011 was filed, as noted above was that respondent No.4 was appointed as the Vice Chancellor of the University on 29.10.2012, he assumed charge and was functioning on the post of Vice Chancellor, an order dated 21.10.2011 was issued by the State Government recalling the respondent No.4 from the post of Vice Chancellor of the University on administrative reasons. Writ Petition No.28284 of 2011 was filed by respondent No.4 challenging the order of the State Government dated 21.10.2011. Cause of action for filing the Writ Petition was thus the order of the State Government dated 21.10.2011 by which he was recalled from the post of Vice Chancellor. Prayer made by respondent

No.4 in the Writ Petition was to set aside the order dated 21.10.2011 of the State Government and to restore him in the post of Vice Chancellor. In the said Writ Petition the present petitioner was the 6th respondent who has also filed a counter affidavit. In the counter affidavit it was pleaded that respondent No.4 can never be considered as eligible and qualified to be appointed as Vice Chancellor. In paragraph 8 it was reiterated that respondent No.4 does not have any of the qualifications fixed by the UGC under clause 7.3.0. As noted above, Writ Petition No.28284 of 2011 filed by the respondent No.4 was dismissed against which W.A. No.347 of 2012 was filed which Writ Appeal was allowed by the Division Bench. The Division Bench set aside the order of the State Government recalling respondent No.4 as arbitrary, mala fide, illegal and against public interest. The Division Bench by judgment dated 30.07.2012 (Ext.R4(b)) also has noted

the qualifications of respondent No.4 and his appointment as Vice Chancellor under Section 12(5) of the 2010 Act. The Division Bench did not enter into the eligibility of respondent No.4

15. It is well settled that the principles of res judicata as engrafted in Section 11 of the Code of Civil Procedure are fully applicable to the writ proceedings under Article 226 of the Constitution. It is relevant to note Section 11 and Explanation IV which are relevant for the present case and are quoted below:

“11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In the present case we are concerned with the rule of constructive res judicata. The rule of constructive res judicata provides that if a plea that could have been raised by a party in a proceeding between him and opponent, he could not be permitted to take that plea against the same party in a subsequent proceeding. That is, when any matter which might and ought to have been made as a defence or attack in a former proceeding but was not so made then such a matter in the eye of law to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and therefore is taken as decided.

16. One of the conditions for applicability of the principle of res judicata and to invoke the bar of res judicata is that the matters directly and substantially in issue should be same in both the suits. It is not enough to constitute the test of res judicata that it

was in issue in the former suit. The term directly has been used in contra distinction to collaterally or incidentally. Whether or not matter is directly and substantially in issue depends upon whether decision on such issue would materially affect the decision in the suit. It has been laid down by the Apex Court in **Pandit Ishwardas v. State of Madhya Pradesh and Others** ([1979] 4 SCC) 163 that for considering the question reference has to be made to the nature of the litigation and issues raised and have to be decided in the light of the plaint, written statement and evidence on record.

17. Mulla on Code of Civil Procedure, Abridge 15th Edn. elaborately considering the matter “collaterally and incidentally” in issue has stated as follows:

“Every suit must involve a matter directly and substantially in issue. It may also involve a matter collaterally or incidentally in issue. To constitute a matter res judicata, it is necessary that it must be in issue directly and substantially in the suit under trial, and that it must have

been in issue also directly and substantially, as distinguished from collaterally or incidentally in a former suit.

A matter in respect of which no relief is claimed, but which is put in issue for the purpose of enabling the court to adjudicate on a matter in respect of which relief is claimed, may be directly and substantially in issue or it may be in issue, collaterally or incidentally. It would be a matter directly and substantially in issue if it was necessary to decide it in order to adjudicate on the principal issue and if it was in fact decided, and if the judgment was in fact based upon that decision, otherwise, it would be a matter collaterally or incidentally in issue."

The Apex Court in **Sayed v. Ummer** ([2000] 3 SCC 350) had considered the principle of res judicata and the concept of matters "directly and substantially in issue" and matters collaterally and incidentally in issue. Referring to treatise on CPC by Mulla, the following was observed in paragraphs 18 and 19 which are quoted below:

"18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says : a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter

is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls ? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh (AIR 1965 SC 948) and Syed Mohd. Salie Labbai v. Mohd. Hanifa (1976 (4) SCC 780 : AIR 1976 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105)

"It is not to be, assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is

whether the court considers the adjudication of the issue material and essential for its decision."

The Privy Council in **Asrar Ahmed v. Durgah Committee** (AIR 1947 PC 1) had occasion to consider as to what is the incidental issue in contradiction to issue directly and substantially. In the said case suit under Section 18 of the Religious Endowments Act, 1863 was filed by the President and one Member of Durgah Committee for removal of Ameer Ali, the Mutavwalli on the ground of maladministration. One of the issues was also as to whether nature of the office is hereditary or not. In the suit it was held that office was hereditary accepting the plea of defendant Mutawalli. The suit was decreed for removal of the Mutawalli. Again a suit was filed in the year 1980 against Nishar Ahammed, brother of the Muthawalli whom the Commissioner proposed as legal heir of Mutawalli thus treating the office as hereditary. The Durgah Committee claimed in the subsequent suit

that the office was not hereditary. Nishar Ahammed claimed that the office was hereditary and relied on the earlier decision. The suit was however abated. One Amir Ali, son then filed a suit claiming the office as hereditary. The suit was decreed by the District Judge but dismissed on appeal. Plaintiff filed appeal to the Privy Council where the question of res judicata was raised. The Privy Council rejected the plea of res judicata and held that the issue was as to hereditary nature of the office was irrelevant in the earlier suit and decision was only incidental and not substance of the earlier suit. It is useful to quote the observations of the Privy Council which are to the following effect:

“In his long and careful argument for the appellant counsel finally relied on the Act of 1936 urging that its provisions of were inconsistent with any other view that that the office of Mutawalli was hereditary and that there were a statutory recognition of the correctness of Mr.Lasalle's judgment. Their Lordships cannot accept this argument. If there was liberty to speculate upon such a matter, it might be supposed that the report made under the Act of 1863

had not been forgotten and that the assumption was made by the legislature that the right of appointment lay with the old Committee. But, however, this may be, it is noting their Lordships' view possible to extract from the language of the act any recognition of the hereditary right of the appellant or his family to the office of the Mutawalli. For these reasons which their Lordships in view of the importance of the case have thought fit to discuss at some length, though they have not referred to every incident which they have considered they will humbly advice His Majesty that this appeal should be dismissed with costs."

18. Shri O.V. Radhakrishnan, learned counsel for the respondent has placed reliance on a judgment of the Apex Court in **State of U.P. v. Nawab Hussain** (AIR 1977 SC 1680). In the above case the Apex Court had occasion to consider the principle of res judicata. The following was laid down by the Apex Court in paragraphs 3, 4 and 8:

"3.The principle of estoppel per res judicata is a rule of evidence. As has been stated in Marginson v. Blackburn Borough Council, (1939) 2 KB 426 at p. 437 it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) The finality and conclusiveness of judicial

decisions for the final termination of disputes in the general interest of community as a matter of public policy and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicat.

4. *But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell L. J., has answered it as follows in Greenhalgh v. Mallard, (1947) 2 All ER 255 at page 257:-*

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is

not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which in reality, is an aspect or amplification of the general principle.

8. *It is not in controversy before us that the respondent did not raise the plea, in the writ petition which had been filed in the High Court that by virtue of Cl. (1) of Art. 311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. It is also not in controversy that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contented himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle of constructive res judicata and the High Court*

erred in taking a contrary view.”

There cannot be any dispute to the proposition as laid down by the Apex Court in the above case. As noted above, for considering as to whether the plea of constructive res judicata is applicale or not, facts of each case has to be looked into including the cause of action and relevant claim.

19. In W.A. No.347 of 2012 arising out of W.P(C) No.282824 of 2011 filed by respondent, challenge was to the order of the State Government, Ext.P6 dated 21.10.2011 by which respondent No.4 was recalled from the post of Vice Chancellor. Thus cause of action for filing the Writ Petition by respondent No.4 was order of the State Government recalling/terminating him from the post of Vice Chancellor. Challenge in the Writ Petition was to the decision of the State Government. The issue as to whether respondent No.4 was eligible and qualified for the post of Vice Chancellor was only an

incidental issue and not an issue which was substantially and directly in issue in that Writ Petition. Cause of action for filing the Writ Petition was not his appointment but his termination from the post of Vice Chancellor. For granting relief to the petitioner (i.e., 4th respondent) it was not necessary to decide about the eligibility and qualification of respondent No.4 since order of recall/termination was issued on the premises that respondent No.4 was qualified for the post. It is true that the present petitioner has raised the issue of eligibility and qualification of respondent No.4 in that Writ Petition by filing a counter affidavit and taking specific plea. But as observed above, the said issue being only incidental, the decision in Writ Appeal No.347 of 2012 does not furnish any ground to respondent No.4 to raise the plea of constructive res judicata. Objection of respondent No.4 thus cannot be upheld.

ISSUE NO.II

20. Whether Writ Petition No.18453 of 2012 filed by the petitioner where appointment of respondent No.4 as Vice Chancellor was also in question having been dismissed as withdrawn without obtaining liberty from the Court to file a fresh Writ Petition, the present Writ Petition, can be entertained? As noted above, petitioner had filed the first Writ Petition, W.P(C) No.37830 of 2010 challenging the appointment of respondent No.4 as Vice Chancellor which Writ Petition was closed on 20.12.2011 after the State Government recalled/terminated respondent No.4 from the post of Vice Chancellor. Learned Single Judge observed that by removal of Dr.B.Ashok from the post of Vice Chancellor, the subject matter of the Writ Petition no longer survives to be considered on merits. The said judgment does not bar raising of the issue subsequently since at the time when the Writ

Petitioner taken up for hearing, the said issue had become academic and had come to an end.

21. W.P(C) No.18453 of 2012 was filed by the petitioner after the Division Bench judgment dated 30.07.2012 directed the State Government to restore respondent No.4 in the post of Vice Chancellor. Writ Petition was filed before respondent No.4 was actually restored to the post. In the Writ Petition issue of ineligibility of respondent No.4 was also raised by the petitioner. However, when the Writ Petition was taken up for hearing learned Government Pleader stated that the Government have already issued restoration order to respondent No.4. Petitioner sought permission to withdraw the Writ Petition with liberty to move again. Prayer of the petitioner to grant liberty was opposed. However, the court refrained from going into various issues and dismissed the Writ Petition as withdrawn by the following order on 17.08.2012:

“I refrain from going into the respective pleas. It is up to the petitioner to avail the remedy if he is aggrieved by the order passed by the Government, i.e., G.O(Rt.) No.6740/2012/GAD dated 07.08.2012 and the respondents are free to raise all objections. It is made clear that I have not expressed anything on the merits of the matter.”

22. Learned counsel for the respondents submitted that once a Writ Petition is withdrawn without taking liberty of the court to file another Writ Petition, the second Writ Petition, i.e., the present Writ Petition cannot be filed seeking the same relief.

23. Although parties have not brought on record prayers made by the petitioner in the earlier Writ Petition No.18453 of 2012. It is clear that the said Writ Petition was filed after 30.07.2012 when the Division Bench directed restoration of respondent No.4 to the post. Petitioner sought to oppose the restoration on the ground that respondent No.4 is ineligible to occupy the post. Writ Petition was taken after respondent No.4 was already restored on the post of Vice Chancellor hence

liberty was sought to withdraw the Writ Petition which was granted and the petition dismissed as withdrawn. From the order dated 17.06.2012 it is clear that the petitioner prayed for a liberty to move again. But it was opposed by the respondents. Court, however, refrained from expressing any opinion on the aforesaid. But permitted the petitioner to avail the remedy if he is aggrieved by the Government Order, respondents were also permitted to raise all objections. Court has also not expressed any opinion on the merits of the matter.

24. The principle that once a Writ Petition on the same subject is dismissed as withdrawn, a second petition on the same subject cannot be permitted has been laid down as a principle of public policy and not as a principle of res judicata. The Apex Court has reiterated the said principle in **Sarguja Transports v. STAT** ([1987] 1 SCC 5).

25. Learned counsel for respondent No.4 has placed reliance on the judgment of the Apex Court in **V.D. Barot v. State of Gujrat** ([2002] 10 SCC 668). In the above case petitioner had filed the Writ Petition challenging his discharge from service by order dated 25.8.1999. Appellant sought withdrawal of the petition enabling to make a representation against the discharge. That request was allowed. Subsequently, representation of the appellant was rejected. He filed a second petition which was dismissed on the ground that the withdrawal was unconditional hence the appellant cannot adjudicate the same. The High Court held that appellant had amended the Writ Petition at the first instance and hence the discharge has become final. The Apex Court disapproved the view of the High Court and observed the following in paragraph 4:

“4. We cannot subscribe to the view expressed by the High Court in the Order under appeal. In the first place the High Court ought to have examined whether the

rejection of the representation was justified in the circumstances set forth in the order impugned in the High Court. Secondly, the matter had not been abandoned as such but to enable the appellant to make representation in the matter, the petition had been withdrawn. That course of action does not amount to abandonment of the matter. Moreover, such a matter should not be dealt with in a hypertechnical manner but on the totality of the circumstances arising in the case of the appellant. Hence, we set aside the order of the High Court and remit the Writ Petition to the High Court of fresh disposal of on merits in accordance with law. The appeal is allowed accordingly."

26. The proposition laid down in the above case support the case of the petitioner. In the judgment dated 17.08.2012 liberty was prayed for by the petitioner and the court observed that against the order of the State restoring respondent No.4 he may avail his remedy. Thus petitioner was clearly granted liberty to challenge the order of restoration. Petitioner thus raised the issue of ineligibility and incompetency of respondent No.4 to hold the post of Vice Chancellor. In view of the above we are of the view that this Writ

Petition cannot be thrown on the ground that earlier Writ Petition No.18453 of 2012 was dismissed as withdrawn. Thus the above objection of respondent No.4 is also overruled.

ISSUE NOS.III, IV & V

27. These issues being interconnected are taken together. Before entering into the above issues it is relevant to note the statutory provisions governing the appointment in the post of Vice Chancellor of the University. As noted above, the University was established by Act 3 of the 2010 Act. Section 11 of the Act enumerates Officers of the University in which Vice Chancellor is one of the Officers of the University. Section 11 is quoted below:

“11. Officers of the University.- (1) The following shall be the officers of the University, namely.-

- (i) the Vice Chancellor;*
- (ii) the Registrar;*
- (iii) the Finance Officer;*
- (iv) the Director of Academics and Research;*

(v) *the Director of entrepreneurship'*

Section 12 deals with Vice Chancellor. Section 12(1), (2), (3), (4) and deals with the procedure for appointment of the Vice Chancellor which are relevant for the present case are quoted below:

12. The Vice-Chancellor.—(1) The Vice-Chancellor shall be responsible for the duties allotted to him specifically by the Chancellor with the approval of the Board of Management or under this Act or Statutes and he shall preside over the meetings of the authorities of the University in the absence of the Chancellor.

(2) The Vice-Chancellor shall be appointed by the chancellor from among the panel of names recommended by the Search Committee consisting of the following members, namely:—

- (i) One member nominated by the Chancellor ;*
- (ii) One member nominated by the Government ;*
- (iii) Director General, Indian Council of Agricultural Research or his nominee ;*
- (iv) President, Veterinary Council of India ;*

The Chancellor shall appoint one of the members of the Committee to be the Chairman.

(3) If the Chancellor does not approve any of the persons so recommended by the committee, he may call for fresh recommendation from the committee.

(4) The committee shall submit a panel to the Chancellor, within such period as he may specify. The Chancellor shall with the concurrence of the Government, appoint one person as the Vice-Chancellor. If the Committee fails to submit a panel within the period so specified, the Chancellor may appoint any person whom he deems fit to be the Vice-Chancellor on the advice of the Government.

(5) Notwithstanding anything contained in sub-section (4), the first Vice-Chancellor shall be appointed by the Chancellor on the recommendation of the Government.”

A perusal of sub-section (5) indicate that the said provision begins with a non-obstante clause “notwithstanding anything contained in Section 12(4) the first Vice Chancellor shall be appointed by the Chancellor on the recommendation of the Government. Thus the first Vice Chancellor was required to be appointed by the Chancellor on the recommendation of the Government. In the Writ Petition along with additional counter affidavit filed by respondent No.4 a note for the Council of Ministers with regard to appointment of the Vice Chancellor of the University has

been brought on record as Ext.R4(f). Note for the Council of Ministers indicate that name of three persons, namely, Dr.B.Ashok, IAS, Dr.John Joseph and Dr.T.V.Anil Kumar came up for consideration. Details of three persons along with their qualification were mentioned. In the note which was placed before the Council of Ministers. The following has been noted:

“A.Dr.B.Ashok IAS

Educational Qualification

a. Master in Political Science - University of Turin, Italy, 2008.

b. Bachelor of Veterinary and Animal Sciences, Kerala Agricultural University, 1996.

Date of Birth 27.2.1973.

He has got overseas training in Project Appraisal and Management, Duke University North Carolina, Corporate Governance Course, Commonwealth Association for Corporate governance and Incident Command System Basic Course, USAID. He has won the India Social Science Research Award in 2009.

He had worked as

1. Deputy Director, LBS National Academy Administration, Mussorie, India (2006-2009)

2. District Collector, Government of Kerala, 2006

3. *Director, Department of Animal Husbandry, Kerala (2004-05)*

4. *Executive Director, Rural Water and Sanitation Agency, Kerala (2001-2004).*

5. *Sub Collector and Sub Divisional Magistrate, Government of Kerala (1998-2001)*

He is a creative writer for newspaper and journals and his writings were published. He is now working as Private Secretary to Minister for State of Agriculture, Food and Civil Supplies and Animal Husbandry, Government of India."

The Government sent recommendation before the Chancellor for consideration for the post of Vice Chancellor of the University. Note before the Chancellor stated that Dr.B.Ashok the presently working as Private Secretary, Ministry of Food and Civil Supplies be considered for the post of Vice Chancellor. Reference to the Cabinet decision taken on 30.11.2010 to that effect was also mentioned in the note. The Governor approved the said recommendation on 8.12.2010. Appointment of respondent No.4 was thus clearly made in accordance with Section 12(5) of the 2010 Act.

28. Principal challenge raised by Shri K.Ramakumar, learned Senior Advocate appearing for the petitioner against the appointment of respondent No.4 as Vice Chancellor of the University is based on the 2010 Regulations framed by the UGC. Regulations have been framed by the UGC clauses (e) and (g) of Section 26 of the 1956 Act. Regulations dated 30.06.2010 has been published in the Gazette dated 18.09.2010. Reliance has been placed on Regulation 7.3.0. Regulation 7.3.0 relates to Vice Chancellor which is quoted below:

7.3.0.VICE CHANCELLOR:

i. Persons of the highest level of competence, integrity, morals and institutional commitment are to be appointed as Vice-Chancellors. The Vice-Chancellor to be appointed should be a distinguished academician, with a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and/or academic administrative organisation.

ii. The selection of Vice-Chancellor should be through proper identification of a Panel of 3-5 names by a

Search Committee through a public Notification or nomination or a talent search process or in combination. The members of the above Search Committee shall be persons of eminence in the sphere of higher education and shall not be connected in any manner with the University concerned or its colleges. While preparing the pannel, the Search Committee must give proper weightage to academic excellence, exposure to the higher education system in the country and abroad, an adequate experience in academic and administrative governance to be given in writing along with the panel to be submitted to the Visitor/Chancellor. In respect of State and Central Universities, the following shall be the constitution of the Search Committee.

a. a nominee of the Visitor/Chancellor, who should be the Chairperson of committee.

b. a nominee of the Chairman, University Grants Commission.

c. a nominee of the Syndicate/Executive Council/Board of Management of University.

iii. The Visitor/Chancellor shall appoint the Vice Chancellor out of the Panel of names recommended by the Search Committee.

iv. The conditions of service of the Vice Chancellor shall be prescribed in the Statute of the Universities concerned in conformity with these Regulations.

v. The term of office of the Vice Chancellor shall form part of the service period of incumbent concerned making him/her eligible for all service related benefits."

29. It is submitted that the UGC has to make Regulations for maintenance of standards of education which are binding on the State Government and Universities. It is submitted that Regulation 7.3.0 having required appointment of Vice Chancellor of distinguished academicians with minimum of 10 years experience as Professor in University or 10 years experience in an equivalent position in a reputed research and/or academic administrative Organization, Respondent No.4 having not possessing the above qualification is ineligible. It is submitted that the State Government has adopted the Regulation by its order dated 10.12.2010 Ext.P4. The appointment of respondent No.4 could not have been made in disregard to Regulation 7.3.0. It is submitted that Regulation 7.3.0 is the statutory provision governing appointment of Vice Chancellor of the University, appointment of respondent No.4 having made in breach

of the said regulation, petitioner is entitled for relief of issue of writ of quo warranto. The 2010 Regulations were forwarded to the State Government by letter dated 23.11.2010 of the UGC for information and necessary action. Paragraph 5 of the order dated 10.12.2010 (Ext.P4) directed as follows:

“5. All the Universities shall incorporate the UGC Regulations in their Statutes and Regulations within one month from the date of this order. Government will initiate steps to amend the Acts of the University, if required to implement the Regulations. Government will also initiate steps to amend the Special Rules to give effect to the stipulations of the UGC Regulations.”

Paragraph 5 as noted above directed the Universities to implement the Regulations within one month from the date of the order. It was further stated that the Government will initiate steps to amend the Acts of the University, if required to implement the Regulations. The 2010 Act was never amended incorporating minimum qualification of Vice Chancellor in Section 12

of the 2010 Act. In this context it is relevant to note Regulation 7.4.0 of the 2010 Regulations which is to the following effect:

“7.4.0 The Universities/State Governments shall modify or amend the relevant Act/Statutes the Universities concerned within 6 months of adoption of these Regulations.”

30. Thus the 2010 Regulations itself contemplates amendment in the Statute of the University within six months of adoption of the Regulations. Even it is accepted that Regulations were adopted by the State Government by Ext.P4 dated 10.12.2010, still in accordance with Regulation 7.4.0. time to implement the Regulation was till 9th June, 2011. Even the order dated 10.12.2010 contemplates amendment by the University Statute within one month from the issue of the order. Although Government did not prescribe any time for amendment of the Act taking clue from the Regulation 7.4.0 according to the UGC Regulations time

to amend the 2010 Act was there till 9.6.2011.

31. Appointment of respondent No.4 was made on the recommendation of the State Government as contemplated by the provision for appointment of first Vice Chancellor under Section 12(5) of the 2010 Act. As noted above, in the additional counter affidavit notes for Council of Ministers and notes for circulation to Governor have been filed as Exhibits R4(f) and (g). The Governor had approved the appointment on 08.12.2010 although notification appointing respondent No.4 by the Government was issued on 29.12.2010. In any view of the matter before the 2010 Regulations was required to be implemented by Regulation 7.4.0. as well as by the State Government Order Ext.P4 dated 10.12.2010 appointment of respondent No.4 was made. The 2010 Act was never amended to incorporate the said Regulation. As noted above, appointment of respondent No.4 was made in accordance with the

Statutory provision of Section 12(5) of the 2010 Act as first Vice Chancellor of the University. 2010 Act does not prescribe any qualification for appointment to the post of Vice Chancellor. Hence on the strength of Regulation 7.3.0 appointment of respondent No.4 cannot be invalidated since Regulations were not implemented by the State Government by that time and still there was time as per the 2010 Regulations to implement the 2010 Regulations. It is further relevant to note that Regulation 7.3.0 was subsequently dropped by the UGC itself by its resolution dated 18./19.07.2012 which document has been brought on record as Ext.R4(h) along with the additional counter affidavit of respondent No.4. By the resolution following was resolved:

“To consider and approve the recommendations of the Committee to revisit UGC Regulation (Minimum qualifications for appointment of teachers and other academic staff in universities and colleges and measures for the maintenance of standards in higher education), 2010.

The Commission decided to drop clause 7.3.0. from

the Regulations Minimum qualifications for appointment of teachers and other academic staff in universities and colleges and measures for the maintenance of standards in higher education), 2010.”

32. In the above view of the matter we are of the view that appointment of respondent No.4 cannot be impugned on the ground of breach of Regulation 7.3.0.

33. Shri K. Ramakumar, learned Senior Advocate further contended that respondent No.4 was a not a person who could have been appointed as Vice Chancellor, he being only an IAS Officer. It is submitted that the only degree which was obtained by respondent No.4 is B.Vsc. He submitted that Vice Chancellor of the University is a pivotal post for the administration of the University and unless a person is distinguished academician he is not competent to hold such a high post. It is submitted that this Court in exercise of its power of judicial review can declare the appointment of respondent No.4 as invalid. It is submitted that even in

cases where the statute does not prescribe a qualification for appointment of a high office, person who could be appointed to the said high post should be a person of eminence and possessing higher qualifications. Learned Senior Advocate in support of his submissions placed reliance on three judgments of the Apex Court, i.e., in **Centre For PIL v. Union of India** ([2011] 4 SCC 1), **Rajesh Awasthi v. Nand Lal Jaiswal** ([2013] 1 SCC 501) and **State of Punjab v. Salil Sabhlok and Others** ([2013] 5 SCC 1).

34. Before we proceed to examine the above judgments relied on by the learned counsel for the petitioner, it is relevant to note the scope of a writ of quo warranto. In the present Writ Petition petitioner has prayed for issue of writ of quo warranto calling upon respondent No.4, to show cause before this Court under what authority he is holding the office of Vice Chancellor. Further to quash Ext.P8 by which the State

Government has restored respondent No.4 in the post of Vice Chancellor in obedience of the judgment of the Division Bench dated 30.07.2012 in W.A. No.347 of 2012. The Constitution Bench of the Apex Court in **University of Mysore v. Govinda Rao** (AIR 1965 SC 491) had occasion to consider the scope of writ of quo warranto. In the above case respondent Govinda Rao had filed a Writ Petition in the High Court under Article 226 of the Constitution praying for issue of a writ of quo warranto calling one Niya Gowda (respondent in the Writ Petition) to show cause as to under what authority he was holding the post of Research Reader in English in the Central College, Bangalore. High Court held that appointment of Niya Gowda was invalid. Appeal was filed by the University. The Constitution Bench examined the content and scope of writ of quo warranto and following was laid down in paragraph 6 and 7:

“6. The judgment of the High Court does not indicate

that the attention of the High Court was drawn to the technical nature of the writ of quo warranto which was claimed by the respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.

7. As Halsbury has observed:*

"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a

result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.”

35. In **Centre For PIL and another (supra)**, with regard to writ of quo warranto the following was laid down in paragraph 51 which is to the following effect:

“51. The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the Court inter - alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority.”

Thus writ of quo warranto is for a judicial enquiry in which a person holding public office is called upon to show by what right he holds the said office. If the enquiry reaches to the finding that the holder of the office has no valid title the issue of writ of quo warranto will oust him from that office. Court in the proceedings can enquire as to whether appointment of defendant is made contrary to the statutory provisions.

36. The Apex Court in **Rajesh Awasthi (supra)** has laid down the following in paragraph 19:

“19. A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. This Court in Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana, 2002 (6) SCC 269 held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In B. Srinivasa Reddy (supra), this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in Hari Bans Lal (supra) wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary

to the statutory rules.”

37. Now we proceed to examine the further submissions of learned Senior Advocate on the basis of the three judgments of the Apex Court as noted above.

38. Learned Senior Advocate submitted that this Court cannot refuse to exercise its judicial review when it has been brought to the notice of this Court that a person who is unfit for the office of Vice Chancellor is occupying the said post. He has relied on the judgment of the Apex Court in **Centre For PIL and another (supra)**. It is submitted that in the said case appointment of Chief Vigilance Commissioner was quashed by the Supreme Court. In the Writ Petition although there was no ground that the incumbent does not possess qualification for appointment as Chief Vigilance Commission. In the above case the court examined the appointment of Central Vigilance Commissioner under the Central Vigilance Commission

Act, 2003. Under Section 4 of the the said Act the appointment of Central Vigilance Commissioner was to be made after obtaining recommendation of a Committee consisting of the Prime Minister, Minister of Home Affairs and the Leader of the Opposition in the House of the People. The Apex Court held that while making recommendation the High Power Committee performs a statutory duty. The Apex Court has noticed in the said case that the High Power Committee failed to take into consideration the pendency of a criminal case against the incumbent where sanction was also accorded by the State Government for prosecution. On the above background the court held that recommendation of the High Power Committee are vitiated. In this context it is relevant to quote paragraphs 35, 47 and 49 which are to the following effect:

“35. Section 4 refers to appointment of Central Vigilance Commissioner and Vigilance Commissioners.

Under S.4(1) they are to be appointed by the President by warrant under her hand and seal. S.4(1) indicates the importance of the post. S.4(1) has a proviso. Every appointment under S.4(1) is to be made after obtaining the recommendation of a committee consisting of -

- (a) The Prime Minister -- Chairperson;*
- (b) The Minister of Home Affairs -- Member;*
- (c) The Leader of the Opposition in the House of the People -- Member.*

47. We may reiterate that institution is more important than an individual. This is the test laid down in para 93 of N. Kannadasan's case (supra). In the present case, the HPC has failed to take this test into consideration. The recommendation dated 3rd September, 2010 of HPC is entirely premised on the blanket clearance given by CVC on 6th October, 2008 and on the fact of respondent No. 2 being appointed as Chief Secretary of Kerala on 18th September, 2007; his appointment as Secretary of Parliamentary Affairs and his subsequent appointment as Secretary, Telecom. In the process, the HPC, for whatever reasons, has failed to take into consideration the pendency of Palmolein case before the Special Judge, Thiruvananthapuram being case CC 6 of 2003; the sanction accorded by the Government of Kerala on 30th November, 1999 under S.197 Cr.P.C. for prosecuting inter alia Shri P.J. Thomas for having committed alleged offence under S.120 - B IPC read with S.13(1)(d) of the Prevention of Corruption Act; the judgment of the Supreme Court dated 29th March, 2000 in the case of K.

Karunakaran v. State of Kerala and Another in which this Court observed that, 'the registration of the FIR against Shri Karunakaran and others cannot be held to be the result of malafides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities and in such cases probes conducted are required to be determined on facts and in accordance with law'. Further, even the judgment of the Kerala High Court in Criminal Revision Petition No. 430 of 2001 has not been considered.

49. For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non - est in law."

The above case was on facts of that case and it was held that recommendation made by the High Power Committee were non-est since pendency of a criminal case against the incumbent was not noticed. Present is not a case where any such argument has been raised. Thus the above case is clearly distinguishable. In the above case the Court has also clearly noticed that there is difference between "judicial review" and "merit review". In the above case the Court relied on an earlier judgment of the Apex Court in **R.K. Jain v.**

Union of India ([1993] 4 SCC 119). The following was laid down in paragraphs 58, 59 and 64:

“58. In R. K. Jain v. Union of India, 1993 KHC 979 : 1993 (4) SCC 119 : 1993 SCC (L&S) 1128 : 1993 (25) ATC 464 : AIR 1993 SC 1769 Shri Harish Chandra was a Senior Vice - President when the question of filling up the vacancy of the President came up for consideration. He was qualified for the post under the Rules. No challenge was made on that account. Under R.10(1) the Central Government was conferred the power to appoint one of the members to be the President. The validity of the Rule was not questioned. Thus, the Central Government was entitled to appoint Shri Harish Chandra as the President. It was stated that the track record of Shri Harish Chandra was poor. He was hardly fit to hold the post of the President. It was averred that Shri Harish Chandra has been in the past proposed for appointment as a Judge of the Delhi High Court. His appointment, however, did not materialize due to certain adverse reports.

59. It was held by this Court that judicial review is concerned with whether the incumbent possessed requisite qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable. When a candidate was found qualified and eligible and is accordingly appointed by the executive to hold an office as a Member or Vice President or President of a Tribunal, in judicial review the Court cannot sit over the choice of the selection. It is for the executive to

select the personnel as per law or procedure. Shri Harish Chandra was the Senior Vice President at the relevant time. The question of comparative merit which was the key contention of the petitioner could not be gone into in a PIL; that the writ petition was not a writ of quo warranto and in the circumstances the writ petition came to be dismissed.

64. Even in R.K. Jain's case (supra), this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made or whether procedure adopted was fair, just and reasonable. We reiterate that Government is not accountable to the Courts for the choice made but Government is accountable to the Courts in respect of the lawfulness / legality of its decisions when impugned under the judicial review jurisdiction. We do not wish to multiply the authorities on this point. Appointment of Central Vigilance Commissioner at the President's discretion."

In essence in the present case what is asked by the learned counsel for the petitioner is "merit review" of the appointment of respondent No.4. As noted above, when the appointment does not breach any statutory provision and the present incumbent does not suffer from any disqualification, the choice of the incumbent

has to be left to the authority and Court will not sit in appeal over the decision of the competent authority regarding appointment.

39. The next case relied on by the learned counsel is **State of Punjab v. Salil Sabhlok and Others (supra)**. In the above case challenge was made to the appointment of the Chairman of the PSC. Public Interest Litigation was filed challenging the appointment in the High Court. High Court in the Writ Petition has quashed the appointment and also has laid down the procedure for appointment of Chairman. The State of Punjab filed an appeal. The Apex Court in the said case laid down that High Court normally in exercise of its power under Article 226 should not interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission but in an exceptional case if it is shown that relevant factors implied from the very

nature of the duties entrusted to Public Service Commission have not been considered, Court can invoke its power. The following was laid down in paragraph 52:

“52. Therefore, I hold that the High Court should not normally, in exercise of its power under Art.226 of the Constitution, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission, but in an exceptional case if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions under Art.320 of the Constitution have not been considered by the State Government in selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extra - ordinary powers under Art.226 of the Constitution and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution.

The Apex Court noticing the Bio-data of the candidate who was appointed and referring to Article 320 observed as follows in paragraph 54:

“54. Besides the aforesaid bio - data, there is a certificate dated 06.07.2011 given by the Speaker, Punjab

Vidhan Sabha, certifying that Mr. Harish Rai Dhanda, MLA, has resigned from the membership of the 13th Punjab Legislative Assembly with effect from 06.07.2011 and that his resignation has been accepted by the Speaker. The aforesaid materials indicate that Mr. Harish Dhanda had B.A. and LL.B Degrees and was practicing as an Advocate at the District Courts in Ludhiana and had been elected as the President of the District Bar Association, Ludhiana for seven terms and has been member of the Legislative Assembly. These materials do not indicate that Mr. Harish Dhanda had any knowledge or experience whatsoever either in administration or in recruitment nor do these materials indicate that Mr. Harish Dhanda had the qualities to perform the duties as the Chairman of the State Public Service Commission under Art.320 of the Constitution which I have discussed in this judgment. No other information through affidavit has also been placed on record before us to show that Mr. Harish Dhanda has the positive qualities to perform the duties of the office of the Chairman of the State Pubic Service Commission under Art.320 of the Constitution. The decision of the State Government to appoint Mr. Harish Dhanda as the Chairman of the Punjab Public Service Commission was thus invalid for non - consideration of relevant factors implied from the very nature of the duties entrusted to the Public Service Commissions under Art.320 of the Constitution.”

Justice Madan B.Lokur, delivering a concurring judgment

had issued a word of caution in paragraph 153:

“153. In the view that I have taken, there is a need for a word of caution to the High Courts. There is a likelihood of comparable challenges being made by trigger - happy litigants to appointments made to constitutional positions where no eligibility criterion or procedure has been laid down. The High Courts will do well to be extremely circumspect in even entertaining such petitions. It is necessary to keep in mind that sufficient elbow room must be given to the Executive to make constitutional appointments as long as the constitutional, functional and institutional requirements are met and the appointments are in conformity with the indicators given by this Court from time to time.”

40. Another case relevant to be noted is **Rajesh Awasthi (supra)**. In the aforesaid case appointment of appellant as Chairperson of the U.P. State Electricity Commission was challenged in the High Court by means of Writ Petition. High Court quashed the appointment holding it to be in violation of statutory provisions of Electricity Act, 2003. Appeal was filed by the candidate. Appointment of Chairperson of the State Regulatory Commission is to be in accordance with Section 85 of

the Electricity Act, 2003. Section 85(5) provides as follows:

“85(5). Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his function as Chairperson or Member, as the case may be.”

In the above case, Selection Committee while making recommendation did not make any recommendation in accordance with Section 85(5) and allowed the matter to be considered by the State Government which is noted by the Apex Court in paragraphs 16, 18 and 20 which are quoted below:

“16. Illustrative bio - data of some of the candidates would indicate their academic qualifications, professional experience including the area of specialization. Appellant's qualification, experience and the fact that he was the Joint President of J.P. Power Ventures Ltd., was also indicated. The Selection Committee has put an asterisk against his name and then left it to the government to ensure the compliance of sub-section (5) of S.85 of the Act.

18. We are clear in our mind about the language

used in sub-section (5) of S.85 of the Act, which calls for no interpretation. Words are crystal clear, unambiguous and when read literally, we have no doubt that the powers conferred under sub-section (5) of S.85 of the Act has to be exercised by the Selection Committee and the Committee alone and not by the Government. Some of the words used in sub-section (5) of S.85 are of considerable importance, hence, we give some emphasis to those words such as "before recommending", "the Selection Committee shall satisfy" and "itself". The Legislature has emphasized the fact that 'the Selection Committee itself has to satisfy', meaning thereby, it is not the satisfaction of the government what is envisaged in sub-section (5) of S.85 of the Act, but the satisfaction of the Selection Committee. The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to affect prejudicially his functions as Chairperson, is a matter which depends upon the satisfaction of the Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to the State Government. The government could exercise its powers only after getting the recommendations of the Selection Committee after due compliance of sub-section (5) of S.85 of the Act. The Selection Committee has given a complete go - by to that provision and entrusted that function to the State Government which is legally impermissible. The State Government also, without application of mind and overlooking that statutory provision,

appointed the appellant.

20. We are of the view that the principle laid down by this Court in the above - mentioned judgment squarely applies to the facts of this case. The appointment of the first respondent, in our considered view, is in clear violation of sub-section (5) of S.85 of the Act. Consequently, he has no authority to hold the post of Chairperson of the U.P. State Electricity Regulatory Commission.”

Thus the Apex Court in the above case arrived at the ultimate conclusion that there has been non-compliance of the provisions of Section 85(5) by the Selection Committee, in the appointment of the appellant. Hence the order of the High Court was sustained. In paragraph 53 the following was observed:

“53. In view of the aforesaid analysis, I conclude that there has been total non - compliance of the statutory provision by the Selection Committee which makes the decision making process vulnerable warranting interference by the constitutional courts and, therefore, the High Court is justified in holding that the appointment is non est in law.”

The above case is also clearly distinguishable since in the present case no statutory violation could be proved.

41. Learned Senior Advocate also referred to a

Division Bench judgment of the Madras High Court in Writ Petition (MD) Nos.11350 of 2012 and 3318 of 2013 **(K.V.Jeyraj and another v. The Chancellor of Universities, Chennai and Others)** where a Public Interest Litigation was filed questioning the appointment of the Vice Chancellor of the Madura Kamaraj University. The Division Bench of the Madras High Court referring to and relying on Regulation 7.3.0 of the 2010 Regulations held that even if there is conflict with State Statute and Regulation 2010, the Court has to uphold the Regulation. Appointment of the Vice Chancellor was set aside. Against the judgment of the Madras High Court the matter was taken in the Supreme Court and the Supreme Court vide its judgment in **Kalyani Mathivanan v. K.V. Jeyaraj** (AIR 2015 SC 1875) set aside the judgment of the Apex Court and upheld the appointment of the Vice Chancellor. Considering Regulation 7.3.0 the Apex Court held that Regulations

are directory on the Universities which are the under the State Government. In paragraph 43 of the judgment it was held that Regulation 7.3.0 has to be treated as recommendatory in nature in so far as Universities and College in the State are concerned. Paragraph 43 is quoted below:

“43. We do not agree with the finding of the Bombay High Court that Regulation 7.3.0 of the UGC Regulations, 2010 is not traceable to clause (e) or (g) of Section 26(1) of UGC Act, 1956. We also refuse to agree that Regulation 7.3.0 of the UGC Regulations, 2010 being a subordinate legislation under the Act of Parliament cannot override the preliminary legislation enacted by the State Legislature. However, the finding of the Bombay High Court that Regulation 7.3.0 has to be treated as recommendatory in nature is upheld. In so far as it relates to Universities and Colleges under the State legislation.”

42. Learned Senior Advocate submitted that the various observations made by the Division Bench of the Madras High Court were not overturned which can be still be relied on. We are afraid that the said judgment having set aside by the Supreme Court it is not

desirable to rely on any of the observations made by the Division Bench.

43. Submission of the learned counsel that respondent No.4 is unsuitable and incompetent to hold the post of the Vice Chancellor cannot be accepted. The submission that he being the only B.Vsc. could not be appointed as Vice Chancellor also does not commend us. Credential of respondent No.4 have already been noted by the State Government which is clear from the notes for Council of Ministers extracted above. Degree in B.V.Sc. and Master Degree as well as his postings as Deputy Director, LBS National Academy Administration, Mussorie, India, Director, Department of Animal Husbandry, Kerala and Executive Director, Rural Water and Sanitation Agency, Kerala have already been noted and on that basis Government found him suitable to recommend as the first Vice Chancellor of the University. The said recommendation has been

accepted and Governor has appointed respondent No.4 as the Vice Chancellor. We see no reason to sit in appeal over the said decision. As observed above, the petitioner in essence is asking a merit review of the appointment of respondent No.4 which is wholly impermissible. We thus answer Issue Nos.III, IV & V in favour of respondent No.4 and against the petitioner.

In the result, the Writ Petition is dismissed.

Parties shall bear their costs.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**

vgs/vsv