2021 INSC 340

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9108-9109 of 2014

UNION OF INDIA …APPELLANT

VERSUS

RAJENDRA N SHAH & ANR. …RESPONDENTS

WITH

CIVIL APPEAL NO. 2826 OF 2021
(@ SPECIAL LEAVE PETITION (CIVIL) NO.13329 OF 2018)

CIVIL APPEAL NO. 2825 OF 2021
(@ SPECIAL LEAVE PETITION (CIVIL) NO.13215 OF 2018)

CIVIL APPEAL NO.282 OF 2020

CIVIL APPEAL NO.281 OF 2020

CIVIL APPEAL NO. 2827 OF 2021
(@ SPECIAL LEAVE PETITION (CIVIL) NO.14227 OF 2020)

J U D G M E N T

R.F. Nariman, J.

1. Applications for intervention are allowed. Leave granted.

2. These appeals raise an important question as to the vires of the Constitution (Ninety Seventh Amendment) Act, 2011 **[**the **"Constitution 97th Amendment Act"]** which *inter alia* introduced

Part IXB under the chapter heading 'The Co-operative Societies'. The Constitution 97th Amendment Act was passed by the requisite majority of the Lok Sabha on 27.12.2011 and the Rajya Sabha on 28.12.2011. The Presidential assent to the aforesaid Amendment followed on 12.01.2012 and the said Amendment was published in the Official Gazette of India on 13.01.2012, coming into force with effect from 15.02.2012. The important question raised in these petitions and decided by a division bench of the Gujarat High Court by the impugned judgment dated 22.04.2013 is whether Part IXB is *non est* for want of ratification by half of the States under the proviso to Article 368(2). The impugned judgment of the High Court has declared that the said constitutional amendment inserting Part IXB is *ultra vires* the Constitution of India for want of the requisite ratification under Article 368(2) proviso, which however will not impact amendments that have been made in Article 19(1)(c) and in inserting Article 43B in the Constitution of India.

3. The co-operatives movement in India can be legislatively traced to two British Acts, namely, the Cooperative Societies Act, 1904 and the Co-operative Societies Act, 1912. Under the Government of India Act, 1919, the subject 'co-operative societies' was contained in

entry 13 of the Provincial list. This was continued by the Government of India Act, 1935, 'co-operative societies' being contained in entry 33 of the Provincial list. This was then further continued by the Constitution of India, this time the same entry falling within Schedule VII List II, i.e., the State List as a part of entry 32 thereof. It is therefore important at this stage to set out the constitutional scheme insofar as it applies to co-operative societies thus:

> **Art 19. Protection of certain rights regarding freedom of speech, etc.**—
>
> (1) All citizens shall have the right—
>
> xxx xxx xxx
>
> (c) to form associations or unions or co-operative societies;
>
> xxx xxx xxx
>
> **Art 43B. Promotion of co-operative societies**.—
>
> The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.

SEVENTH SCHEDULE

(Article 246)

List I—Union List

xxx xxx xxx

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and

financial corporations, but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not

confined to one State, but not including universities.

xxx xxx xxx

List II—State List

xxx xxx xxx

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies.

xxx xxx xxx

4. On 07.12.2004, a conference of ministers dealing with co-operatives in the various states resolved to amend the Constitution to ensure democratic, autonomous and professional functioning of co-operatives; to address key issues of empowerment of co-operatives through voluntary formation, autonomous functioning, democratic control and professional management; for regular and timely conduct of elections, general body meetings and professional audit. The meeting ended stating:

"The conference also noted that the central government has taken a laudable step by enacting the Multi-State Co-operative Societies Act, 2002, conforming to the thrust areas of reforms in co-operative legislation and has been widely appreciated. The conference while appreciating the initiative taken by the central government resolved that this subject too should be considered by the high power committee.

It was, therefore, resolved a high power committee would be constituted by the Central Government consisting of representatives of the State governments, concerned Ministries of the central government, eminent cooperators and other public officials to review the achievements during the last 100 years and challenges before it and to suggest ways and means to face them and to give a new direction to movement. The constitution of the Committee and terms of reference are to be decided by the Central Government."

5. Pursuant to these minutes, and after various consultations by the Centre with the State Governments, the Constitution (Ninety Seventh Amendment) Act, 2011 was passed. The Statement of Objects and Reasons for the aforesaid Constitution Amendment is important and is set out hereunder:

"STATEMENT OF OBJECTS AND REASONS

The co-operative sector, over the years, has made significant contribution to various sectors of national economy and has achieved voluminous growth. However, it has shown weaknesses in safeguarding the interests of the members and fulfillment of objects for which these institutions were organised. There have been instances where elections have been postponed indefinitely and nominated office bearers or administrators remaining in-

charge of these institutions for a long time. This reduces the accountability of the management of co-operative societies to their members. Inadequate professionalism in management in many of the co-operative institutions has led to poor services and low productivity. Co-operatives need to run on well established democratic principles and elections held on time and in a free and fair manner. Therefore, there is a need to initiate fundamental reforms to revitalize these institutions in order to ensure their contribution in the economic development of the country and to serve the interests of members and public at large and also to ensure their autonomy, democratic functioning and professional management.

2. The "co-operative societies" is a subject enumerated in Entry 32 of the State List of the Seventh Schedule of the Constitution and the State Legislatures have accordingly enacted legislations on co-operative societies. Within the framework of State Acts, growth of co-operatives on large scale was envisaged as part of the efforts for securing social and economic justice and equitable distribution of the fruits of development. It has, however, been experienced that in spite of considerable expansion of co-operatives, their performance in qualitative terms has not been up to the desired level. Considering the need for reforms in the Co-operative Societies Acts of the States, consultations with the State Governments have been held at several occasions and in the conferences of State Co-operative Ministers. A strong need has been felt for amending the Constitution so as to keep the co-operatives free from unnecessary outside interferences and also to ensure, their autonomous organisational set up and their democratic functioning.

3. The Central Government is committed to ensure that the co-operative societies in the country function in a democratic, professional, autonomous and economically sound manner. With a view to bring the necessary reforms, it is proposed to incorporate a new Part in the Constitution

so- as to provide for certain provisions covering the vital. aspects of working of co-operative societies like democratic, autonomous and professional functioning. A new article is also proposed to be inserted in Part IV of the Constitution (Directive Principles of State Policy) for the States to endeavor to promote voluntary formation, autonomous functioning, democratic control and professional management of cooperative societies. The proposed new Part in the Constitution, inter alia, seeks to empower the Parliament in respect of multi-State co-operative societies and the State Legislatures in case of other co-operative societies to make appropriate law, laying down the following matters, namely:-

(a) provisions for incorporation, regulation arid winding up of co-operative societies based on the principles of democratic member-control, member-economic participation and autonomous functioning;

(b) specifying the maximum number of directors of a co-operative society to be not exceeding twenty-one members;

(c) providing for a fixed term of five years from the date of election in respect of the elected members of the board and its office bearers;

(d) providing for a maximum time limit of six months during which a board of directors of co-operative society could be kept under supersession or suspension;

(e) providing for independent professional audit;

(f) providing for right of information to the members of the co-operative societies;

(g) empowering the State Governments to obtain periodic reports of activities and accounts of co-operative societies;

(h) providing for the reservation of one seat for the Scheduled Castes or the Scheduled Tribes and two seats for women on the board of every co-operative society, which have individuals as members from such categories;

(i) providing for offences relating to co-operative societies and penalties in respect of such offences.

4. It is expected that these provisions will not only ensure the autonomous and democratic functioning of co-operatives, but also ensure the accountability of management to the members and other stakeholders and shall provide for deterrence for violation of the provisions of the law.

5. The Bill seeks to achieve the above objectives."

(Emphasis supplied)

6. A new Part IXB was then inserted as follows:

PART IXB

THE CO-OPERATIVE SOCIETIES

243ZH. Definitions. —

In this Part, unless the context otherwise requires,—

(a) "authorised person" means a person referred to as such in article 243ZQ;

(b) "board" means the board of directors or the governing body of a co-operative society, by whatever name called, to which the direction and control of the management of the affairs of a society is entrusted to;

(c) “co-operative society” means a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(d) “multi-State co-operative society” means a society with objects not confined to one State and registered or deemed to be registered under any law for the time being in force relating to such cooperatives;

(e) “Office bearer” means a President, Vice-President, Chairperson, Vice-Chairperson, Secretary or Treasurer, of a co-operative society and includes any other person to be elected by the board of any co-operative society;

(f) “Registrar” means the Central Registrar appointed by the Central Government in relation to the multi-State co-operative societies and the Registrar for co-operative societies appointed by the State Government under the law made by the Legislature of a State in relation to co-operative societies;

(g) “State Act” means any law made by the Legislature of a State;

(h) “State level co-operative society” means a co-operative society having its area of operation extending to the whole of a State and defined as such in any law made by the Legislature of a State.

243ZI. Incorporation of co-operative societies. —

Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the incorporation, regulation and winding up of co-operative societies based on the principles of voluntary formation, democratic member-control, member-economic participation and autonomous functioning.

243ZJ. Number and term of members of board and its office bearers. —

(1) The board shall consist of such number of directors as may be provided by the Legislature of a State, by law:

Provided that the maximum number of directors of a co-operative society shall not exceed twenty-one:

Provided further that the Legislature of a State shall, by law, provide for the reservation of one seat for the Scheduled Castes or the Scheduled Tribes and two seats for women on board of every co-operative society consisting of individuals as members and having members from such class of category of persons.

(2) The term of office of elected members of the board and its office bearers shall be five years from the date of election and the term of office bearers shall be coterminous with the term of the board:

Provided that the board may fill a casual vacancy on the board by nomination out of the same class of members in respect of which the casual vacancy has arisen, if the term of office of the board is less than half of its original term.

(3) The Legislature of a State shall, by law, make provisions for co-option of persons to be members of the board having experience in the field of banking, management, finance or specialisation in any other field relating to the objects and activities undertaken by the co-operative society, as members of the board of such society:

Provided that the number of such co-opted members shall not exceed two in addition to twenty-one directors specified in the first proviso to clause (1):

Provided further that such co-opted members shall not have the right to vote in any election of the cooperative society in their capacity as such member or to be eligible to be elected as office bearers of the board:

Provided also that the functional directors of a co-operative society shall also be the members of the board and such members shall be excluded for the purpose of counting the total number of directors specified in the first proviso to clause (1).

243ZK. Election of members of board. —

(1) Notwithstanding anything contained in any law made by the Legislature of a State, the election of a board shall be conducted before the expiry of the term of the board so as to ensure that the newly elected members of the board assume office immediately on the expiry of the term of the office of members of the outgoing board. (2) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to a co-operative society shall vest in such an authority or body, as may be provided by the Legislature of a State, by law: Provided that the Legislature of a State may, by law, provide for the procedure and guidelines for the conduct of such elections.

243ZL. Supersession and suspension of board and interim management. —

(1) Notwithstanding anything contained in any law for the time being in force, no board shall be superseded or kept under supersession for a period exceeding six months:

Provided that the board may be superseded or kept under suspension in a case—

(i) of its persistent default; or

(ii) of negligence in the performance of its duties; or

(iii) the board has committed any act prejudicial to the interests of the co-operative society or its members; or

(iv) there is stalemate in the constitution or functions of the board; or

(v) the authority or body as provided by the Legislature of a State, by law, under clause (2) of article 243ZK, has failed to conduct elections in accordance with the provisions of the State Act:

Provided further that the board of any such co-operative society shall not be superseded or kept under suspension where there is no Government shareholding or loan or financial assistance or any guarantee by the Government:

Provided also that in case of a co-operative society carrying on the business of banking, the provisions of the Banking Regulation Act, 1949 shall also apply:

Provided also that in case of a co-operative society, other than a multi- State co-operative society, carrying on the business of banking, the provisions of this clause shall have the effect as if for the words “six months”, the words “one year” had been substituted.

(2) In case of supersession of a board, the administrator appointed to manage the affairs of such cooperative society shall arrange for conduct of elections within the period specified in clause (1) and hand over the management to the elected board.

(3) The Legislature of a State may, by law, make provisions for the conditions of service of the administrator.

243ZM. Audit of accounts of co-operative societies. —

(1) The Legislature of a State may, by law, make provisions with respect to the maintenance of accounts by the co-operative societies and the auditing of such accounts at least once in each financial year.

(2) The Legislature of a State shall, by law, lay down the minimum qualifications and experience of auditors and auditing firms that shall be eligible for auditing accounts of the co-operative societies.

(3) Every co-operative society shall cause to be audited by an auditor or auditing firms referred to in clause (2) appointed by the general body of the co-operative society:

Provided that such auditors or auditing firms shall be appointed from a panel approved by a State Government or an authority authorised by the State Government in this behalf.

(4) The accounts of every co-operative society shall be audited within six months of the close of the financial year to which such accounts relate.

(5) The audit report of the accounts of an apex co-operative society, as may be defined by the State Act, shall be laid before the State Legislature in the manner, as may be provided by the State Legislature, by law.

243ZN. Convening of general body meetings. —

The Legislature of a State may, by law, make provisions that the annual general body meeting of every co-operative society shall be convened within a period of six months of close of the financial year to transact the business as may be provided in such law.

243ZO. Right of a member to get information. —

(1) The Legislature of a State may, by law, provide for access to every member of a co-operative society to the books, information and accounts of the cooperative society kept in regular transaction of its business with such members.

(2) The Legislature of a State may, by law, make provisions to ensure the participation of members of the management of the co-operative society providing minimum requirement of attending meetings by the members and utilising the minimum level of services as may be provided in such law.

(3) The Legislature of a State may, by law, provide for co-operative education and training for its members.

243ZP. Returns. —

(1) Every co-operative society shall file returns, within six months of the close of every financial year, to the authority designated by the State Government including the following matters, namely: —

(a) annual report of its activities;

(b) its audited statement of accounts;

(c) plan for surplus disposal as approved by the general body of the co-operative society;

(d) list of amendments to the bye-laws of the co-operative society, if any;

(e) declaration regarding date of holding of its general body meeting and conduct of elections when due; and

(f) any other information required by the Registrar in pursuance of any of the provisions of the State Act.

243ZQ. Offences and penalties. —

(1) The Legislature of a State may, by law, make provisions for the offences relating to the co-operative societies and penalties for such offences.

(2) A law made by the Legislature of a State under clause (1) shall include the commission of the following act or omission as offences, namely:—

(a) a co-operative society or an officer or member thereof wilfully makes a false return or furnishes false information, or any person wilfully not furnishes any information required from him by a person authorised in this behalf under the provisions of the State Act;

(b) any person wilfully or without any reasonable excuse disobeys any summons, requisition or lawful written order issued under the provisions of the State Act;

(c) any employer who, without sufficient cause, fails to pay to a co-operative society amount deducted by him from its employee within a period of fourteen days from the date on which such deduction is made;

(d) any officer or custodian who wilfully fails to handover custody of books, accounts, documents, records, cash, security and other property belonging to a co-operative society of which he is an officer or custodian, to an authorised person; and

(e) whoever, before, during or after the election of members of the board or office bearers, adopts any corrupt practice.

243ZR. Application to multi-State co-operative societies. —

The provisions of this Part shall apply to the multi-State co-operative societies subject to the modification that any reference to “Legislature of a State”, “State Act” or State Government” shall be construed as a reference to “Parliament”, “Central Act” or “the Central Government” respectively.

243ZS. Application to Union territories. —

The provisions of this Part shall apply to the Union territories and shall, in their application to a Union territory, having no Legislative Assembly as if the references to the Legislature of a State were a reference to the administrator thereof appointed under article 239 and, in relation to a Union territory having a Legislative Assembly, to that Legislative Assembly:

Provided that the President may, by notification in the Official Gazette, direct that the provisions of this Part shall not apply to any Union territory or part thereof as he may specify in the notification.

243ZT. Continuance of existing laws.—

Notwithstanding anything in this Part, any provision of any law relating to co-operative societies in force in a State immediately before the commencement of the Constitution (Ninety-seventh Amendment) Act, 2011, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is less.]

7. As stated hereinabove, in the public interest, a Writ Petition being WP No. 166 of 2012 filed before the Gujarat High Court succeeded vide the impugned judgment dated 22.04.2013, by which Part IXB was declared to *be ultra vires* for want of ratification by the State Legislatures under Article 368(2) proviso.

8. Shri K.K. Venugopal, the learned Attorney General for India, has submitted, relying upon the Statement of Objects and Reasons, that

the Constitution 97th Amendment Act sought to achieve vital social and economic objectives in regard to the functioning of co-operative societies in India, which is a sector that has made a significant contribution to the economy of the nation. He referred to and relied upon Article 243ZR to state that, in reality, Part IXB is in two separate parts – one dealing with multi-State co-operative societies which have ramifications beyond merely one State, and co-operative societies which exist and operate within a particular state. He argued that even though there was no challenge insofar as multi-State co-operative societies were concerned, the entirety of Part IXB has been struck down, throwing out the baby with the bath water. The same is true for Part IXB as applicable to Union territories which is clear from a reading of Article 243ZS. He then argued that as many as 17 out of 28 States have, after the 97th Amendment, already enacted legislative measures in conformity with Part IXB and that therefore more than half of the States had, in effect, accepted and applied the provisions of Part IXB. What is also of significance is that the Constitution 97th Amendment was preceded by a detailed consultation with the State Governments as

a result of which no State Government has come forward to challenge the same. The learned Attorney General, on a reading of several judgments of this Court dealing with ratification of constitutional amendments, argued that there is no change either directly or in effect to Article 246(3) of the Constitution of India, from which the legislative power of the States contained in List II of the 7th Schedule flows, or in Entry 32 of List II of the 7th Schedule. In point of fact, a reading of Part IXB would show that no additional legislative power has been given to the Union. All subject matters relating to co-operative societies fall solely within the legislative domain of the States. Apart from reading out passages in ***Sankari Prasad Singh Deo v. Union of India*****, 1952 SCR 89;** ***Sajjan Singh v. State of Rajasthan*****, (1965) 1 SCR 933** and ***Kihoto Hollohan v. Zachillhu*****, 1992 Supp (2) SCC 651**, the learned Attorney General relied strongly upon observations in the dissenting judgments of Wanchoo, J. Ramaswamy, J. and Bachawat, J. in ***Golak Nath v. State of Punjab*****, (1967) 2 SCR 762**. According to him, the examples given by Wanchoo, J. are apposite. On the other hand, ***Kihoto Hollohan's*** case (supra) is distinguishable in that, para 7 of

the 10th Schedule of the Constitution had the direct effect of curtailing the operation of Articles 136, 226 and 227 of the Constitution and, by barring the jurisdiction of all courts including the Supreme Court and the High Courts, in regard to all matters covered by the 10th Schedule, this Court held that ratification would be necessary. The learned Attorney General then argued that the additional finding of the Division Bench that the Constitutional Amendment violated the basic structure of the Constitution, in that it tinkered with the federal structure of the Constitution, was wholly uncalled for and unwarranted inasmuch as the real issue in this case is one and one only, as to whether ratification is or is not necessary. If it be held that ratification is necessary, then it is unnecessary to fall back upon basic structure. Likewise, if it is held that ratification would not be necessary, then the Constitutional Amendment, which in fact strengthens the basic structure of the Constitution in streamlining the co-operative movement, would belie the finding of the High Court.

9. He also argued that if the doctrine of severability is to be applied, then in the event of this Court finding that State co-operative societies cannot be impacted without following ratification, multi-

State co-operative societies, which have ramifications beyond one state can be held to be covered by Part IXB, as would Union territories, and that on applying the aforesaid doctrine, Part IXB ought to be upheld, at least insofar as the multi-State co-operative societies are concerned. He has cited a number of judgments to buttress his submissions which will be reflected in this judgment.

10. Shri Prakash Jani, learned senior advocate appearing on behalf of the Mehsana District Co-operative Milk Producers Union in Civil Appeal No. 282 of 2020 supported the arguments of the learned Attorney General. In addition, he argued that it must never be forgotten that while inserting Part IXB into the Constitution of India, Parliament has exercised its 'constituent' power and not 'legislative' power. Read with Article 245 of the Constitution of India, it would then be clear that since the legislative power of the States in Article 246(3) is subject to the provisions of the Constitution of India, the legislative head 'co-operative societies' contained in Entry 32, List II of the 7th Schedule is now being made subject to Part IXB which is a part of the Constitution of India. He argued that Parliament in its constituent capacity can deal with State subjects, and relied upon

the insertion of Article 21A by Constitution (Eighty Sixth Amendment) Act, 2002. He then argued that as a matter of fact, Part IXB read with Article 43B enhances the basic structure of the Constitution and relied strongly upon the judgment in ***Vipulbhai M. Chaudhary v. Gujarat Coop. Milk Mktg. Federation Ltd.*****, (2015) 8 SCC 1** to demonstrate that this judgment, though not dealing with the constitutional validity of the 97th Amendment, yet held that the said Amendment is a great step forward in bringing uniformity and order to the co-operatives movement in India.

11. Shri Masoom K. Shah, learned counsel appearing for the Respondent No.1 in Civil Appeal No. 9108-9109 of 2014, has made an impassioned plea that the donee of a limited amending power cannot do indirectly what it is not permitted to do directly. According to him, a coach-and-four is driven into the principle of federalism as understood by our Constitution, by curtailing/restricting the State's legislative powers contained in Entry 32 List 2, 7th Schedule. According to the learned counsel, a careful reading of Part IXB of the Constitution would show that the unfettered power of the State legislatures prior to the amendment has now been fettered by the provisions of Part IXB in several material particulars; for example,

the fixation of the maximum number of directors of co-operative societies; the reservation provision contained in 243ZJ; the duration of the term of office of elected members of the board of co-operative societies etc. In short, what has been done is to add exception after exception to Entry 32 thereby carving out of Entry 32 a number of matters which otherwise were exclusively within the domain of the State Legislatures. He relied strongly upon Articles 243ZI & 243ZT, making it clear that there is a direct assault on Entry 32, List II of the 7th Schedule inasmuch as after one year, all State legislations that are contrary to the provisions of Part IXB are of no effect, and that an affirmative obligation is cast upon the States to enact legislation only in accordance with the restrictions contained in Part IXB. He also strongly relied upon the very judgments cited by the learned Attorney General to argue that, in effect, as a direct inroad is made into Article 246(3) and Entry 32 List 2, such amendment would have to be struck down for want of ratification as it impacts a very important part of the Constitution, namely, the federal structure and the distribution of legislative powers between the Union and the States. He also placed strong reliance on ***Builders' Assn. of India***

***v. Union of India*, (1989) 2 SCC 645**, and a passage from Seervai's *Constitutional Law of India* to argue that even if no legislative power is transferred *qua* co-operative societies from the States to the Union, yet the curtailment (or expansion) of a legislative field which pertains exclusively to the States and which impacts federalism would certainly amount to a "change" both in Article 246(3) and in the legislative lists and would thus require ratification. For this purpose, he also strongly relied upon para 21 of ***K. Damodarasamy Naidu & Bros. v. State of T.N.*, (2000) 1 SCC 521**. He then countered the learned Attorney General's argument with reference to ***Cellular Operators Assn. of India v. TRAI*, (2016) 7 SCC 703** (para 57), to argue that even if 17 States thereafter amend their laws in furtherance of the Constitutional Amendment, this would make no difference to the constitutional position if in fact the requisite ratification under Article 368(2) proviso is lacking. The validity of a constitutional amendment does not depend upon whether a State government accepts it or whether a State government challenges it. He then went on to make two further arguments insofar as multi-State co-operative societies are

concerned. First and foremost, given the tests of severability, he argued that multi-State co-operative societies are inextricably entwined with co-operative societies and the 97th Constitution Amendment would never have been enacted for multi-State co-operative societies alone. Even otherwise, the challenge made in the Writ Petition was to the entirety of Part IXB and the part relating to multi-State co-operative societies, not being severable, the entirety of Part IXB has correctly been held to be unconstitutional by the impugned judgment. He also argued that if this Constitutional Amendment is allowed to pass constitutional muster without ratification, there would be no end to further amendments which would then indirectly rob the States of their legislative powers, changing a quasi-federal state into a unitary one.

12. He then argued a point that was neither raised in the pleadings nor in arguments in the High Court. He submitted that even qua Multi-State Co-operative Societies, since a change has been made in Entry 44 List I which contains the power to legislate qua Multi-State Co-operative Societies, the width of the Entry is curtailed by Part IXB of the Constitution, which would, therefore, in any case require ratification by the States. To this contention, the learned Attorney

General replied by submitting that it is only those Entries such as Entry 2A of List I (referred to in Entry 2 which is subject to Entry 2A) that would be covered by the proviso to Article 368(2) if one were to bear in mind that Article 368(2) proviso has been enacted with the object of preserving the quasi-federal structure of the Constitution.

13. Smt. Ritika Sinha, learned counsel appearing for the Intervenor in IA No. 3/2014 in CA Nos. 9108-9109/2014, stressed the language of Article 243ZI and 243ZT. According to her, these Articles make it clear that the States' legislative competence has expressly been made subject to the provisions of Part IXB, thereby engrafting an exception, directly, to Entry 32 of List II. Also, the *non-obstante* clause in Article 243ZT would make it clear that State legislation that has been enacted under a plenary power has now been edged out to make way for the provisions of Part IXB, which have to be compulsorily enacted by State legislatures in the place of earlier State legislations to the contrary. For this purpose, she relied upon paras 26 and 27 of ***Vipulbhai M. Chaudhary v. Gujarat Coop. Milk Mktg. Federation Ltd.*** (supra). She then relied upon passages in ***Sajjan Singh*** (supra) and Wanchoo, J's judgment in ***Golak Nath*** (supra) to argue that even if the stringent tests laid

down therein are to be applied, they would apply on the facts of this case, inasmuch as a direct and substantial inroad has been made into Entry 32 List II of the 7th Schedule. She concluded by relying upon ***D.C. Wadhwa v. State of Bihar*****, (1987) 1 SCC 378** (para 7), by submitting that what cannot be achieved directly cannot now be achieved indirectly by means of inserting Part IXB to the Constitution of India. Shri Maruthi Rao, learned counsel for the Intervenor in IA No. 4/2014 CA Nos. 9108-9109/2014, broadly supported the submissions made by Shri Shah and Ms. Sinha.

14. Having heard learned counsel for all the parties, it is first important to advert to the constitutional scheme of legislative relations between the Union of India and the States. This is laid down in Part IXB, Chapter I in Articles 245 and 246 as follows: -

PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I.—LEGISLATIVE RELATIONS

Distribution of Legislative Powers

245. Extent of laws made by Parliament and by the Legislatures of States. —

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.

246. Subject-matter of laws made by Parliament and by the Legislatures of States. —

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State 1*** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State] notwithstanding that such matter is a matter enumerated in the State List.

15. A cursory reading of these Articles would show that whereas Parliament may make laws for the whole or any part of the territory

of India, the legislation of a State may make laws for the whole or any part of the State. Article 246 then goes on to refer to laws with respect to any of the matters enumerated in 3 Lists contained in the 7th schedule to the Constitution of India. List I contains subjects or topics on which Parliament has exclusive power to make laws; List III in the Concurrent List contains topics on which both Legislatures may make laws; and List II, with which we are directly concerned, gives the States exclusive power to make laws for such State or part thereof with respect to any of the matters contained therein. So far as Union territories are concerned, Parliament is given power under Article 246(4) without constraint as to subject matter as it may also legislate with respect to topics covered by List II.

16. In a catena of judgments of this Court, it has been declared that whereas Article 246 contains the power to legislate, the topics of legislation contained in the three Lists are described as 'fields of legislation'. This is felicitously set out in ***Hoechst Pharmaceuticals Ltd. v. State of Bihar*, (1983) 3 SCR 130**:

> **"**It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution" (at pg. 184)

17. Dealing with the non-obstante clause contained in Articles 246(1) and 246(2) and the 'subject to' clause contained in Article 246(3), this Court, following Federal Court and Privy Council judgments, has held that these non-obstante and 'subject to' clauses lay down the doctrine of federal supremacy, which can be stated thus: topics in the State List have to give way to topics contained in the Union or Concurrent List in the event of an overlap between entries in these lists. Such overlap is not to be easily found – on the contrary, it is only in the case of an inevitable and irreconcilable conflict that the width of an entry in the State List can be curtailed by an overlap with an entry in either List 1 or List 3. Thus, in ***Kerala SEB v. Indian Aluminium Co. Ltd.*****, (1976) 1 SCC 466,** this Court held: -

> **"5.** In view of the provisions of Article 254, the power of Parliament to legislate in regard to matters in List III, which are dealt with by clause (2), is supreme the Parliament has exclusive power to legislate with respect to matters in List 1. The State Legislature has exclusive power to legislate with respect to matters in List II. But this is subject to the provisions of clause (1) [leaving out for the moment the reference to clause (2)]. The power of Parliament to legislate with respect to matters included in List I is supreme notwithstanding anything contained in clause (3) [again leaving out of consideration the provisions of clause (2)]. Now what is the meaning of the words "notwithstanding" in clause (1) and "subject to" in clause (3)? They mean that where an entry is in general terms in List II and part of that

entry is in specific terms in List I, the entry in List I takes effect notwithstanding the entry in List II. This is also on the principle that the "special" excludes the "general" and the general entry in List II is subject to the special entry in List 1. For instance, though house accommodation and rent control might fall within either the State list or the concurrent list, Entry 3 in List I of Seventh Schedule carves out the subject of rent control and house accommodation in Cantonments from the general subject of house accommodation and rent control (see *Indu Bhusan* v. *Sundari Devi* [(1969) 2 SCC 289]. Furthermore, the word "notwithstanding" in clause (1) also means that if it is not possible to reconcile the two entries the entry in List I will prevail. But before that happens attempt should be made to decide in which list a particular legislation falls. For deciding under which entry a particular legislation falls the theory of "pith and substance" has been evolved by the courts. If in pith and substance a legislation falls within one list or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching. These principles have been laid down in a number of decisions."

18. In ***Hoechst Pharmaceuticals Ltd.*** (supra), this Court held: -

The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and

State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental.
(at page 165)

19. Likewise, in ***Goodricke Group Ltd. v. State of W.B.,*** **1995 Supp (1) SCC 707**, this Court reiterated this constitutional scheme as follows:

12. The scheme of the entries in the three lists in the Seventh Schedule is set out in the decision of this Court in *M.P.V. Sundararamier & Co.* v. *State of A.P.* [1958 SCR 1422] and needs no reiteration. Similarly, the proposition that the several entries are legislative heads and must be construed liberally is too well-settled to require any elaboration. It is equally well-recognised that where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation, the rule of pith and substance has to be applied to determine to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on

the field reserved to the other legislature is of no consequence. Of course, the extent of encroachment may be an element in determining whether the Act is a colourable piece of legislation. Yet another relevant principle is the one enunciated in *Union of India* v. *H.S. Dhillon* [(1971) 2 SCC 779] where the legislative competence of Parliament to enact a law is questioned, all that one has to ask is whether it relates to any of the entries in List II and if it does not, no further question need be asked and Parliament's legislative competence must be upheld. This decision also explains why did the Founding Fathers find it necessary to have three lists. In *International Tourist Corpn.* v. *State of Haryana* [(1981) 2 SCC 318] however, a caution has been administered that before exclusive legislative competence can be claimed for Parliament, the legislative incompetence of the State Legislature must be clearly established. In *S.R. Bommai* v. *Union of India* [(1994) 3 SCC 1] one of us (B.P. Jeevan Reddy, J.) cautioned that in our constitutional system, where all important legislative heads are assigned to Centre, the courts should be slow to adopt any interpretation which tends to deprive the States of the few powers assigned to them under the Constitution.

20. In ***Govt. of A.P. v. J.B. Educational Society*, (2005) 3 SCC 212,**

the aforesaid was reiterated as follows:

9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

10. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non obstante clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

21. In ***Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd.*****,**

(2007) 6 SCC 236, it was held**:**

92. The first three clauses of Article 246 of the Constitution relate to the demarcation of legislative powers between Parliament and the State Legislatures. Under clause (1), notwithstanding anything contained in clauses (2) and (3), Parliament has been given the exclusive power to make laws with respect to any of the matters enumerated in List I or the Union List in the Seventh Schedule. Clause (2) empowers Parliament and the State Legislatures subject to the power of Parliament under sub-clause (1), to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule described in the Constitution as the "Concurrent List" notwithstanding anything contained in sub-clause (3). Under clause (3) the State Legislatures have been given exclusive powers to make laws in respect of matters enumerated in List II in the Seventh Schedule described as the "State List" but subject to clauses (1) and (2). The three lists while enumerating in detail the legislative subjects carefully distribute the areas of legislative authority between Parliament (List I) and the State (List II). The supremacy of Parliament has been provided for by the non obstante clause in Article 246(1) and the words "subject to" in Articles 246(2) and (3). Therefore, under Article 246(1) if any of the entries in the three lists overlap, the entry in List I

will prevail. Additionally, some of the entries in the State List have been made expressly subject to the power of Parliament to legislate either under List I or under List III. Entries in the lists of the Seventh Schedule have been liberally interpreted; nevertheless courts have been wary of upsetting this balance by a process of interpretation so as to deprive any entry of its content and reduce it to "useless lumber". The use of the word "exclusive" in clause (3) denotes that within the legislative fields contained in List II, the State Legislatures exercise authority as plenary and ample as Parliament's.

(Emphasis supplied)

22. In ***State of W.B. v. Committee for Protection of Democratic Rights*****, (2010) 3 SCC 571,** this Court held:

25. The non obstante clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246(1). The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III (Concurrent List). The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State Legislature.

> **26.** Both Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between the Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an overlapping between Lists II and III, the latter shall prevail.
>
> **27.** Though, undoubtedly, the Constitution exhibits supremacy of Parliament over the State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the lists is not to confer powers; they merely demarcate the legislative field. But the issue we are called upon to determine is that when the scheme of the Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature, like public order, police, etc., can the third organ of the State viz. the judiciary, direct CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the State Government concerned?

23. So far as co-operative societies are concerned, it can be seen that it is entirely a matter for the States to legislate upon, being the last subject matter mentioned in Entry 32 List II. At this stage, it is

important to note that Entry 43 of List I, which deals with incorporation, regulation and winding up of trading corporations including banking, insurance and financial corporations expressly excludes co-operative societies from its ambit. Entry 44 List I, which is wider than Entry 43 in that it is not limited to trading corporations, speaks of corporations with objects not confined to one State. This Court has therefore held, on a reading of these entries, that when it comes to Multi State Co-operative Societies with objects not confined to one state, the legislative power would be that of the Union of India which is contained in Entry 44 List I. Thus, in ***Daman Singh v. State of Punjab*****, (1985) 2 SCC 670,** this Court laid down: -

> **7.** …. … According to Mr Ramamurthi the express exclusion of cooperative societies in Entry 43 of List I and the express inclusion of cooperative societies in Entry 32 of List II separately and apart from but along with corporations other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat cooperative societies as institutions distinct from corporations. On the other hand one would think that the very mention of cooperative societies both in Entry 43 of List I and Entry 32 of List II along with other corporations gave an indication that the Constitution makers were of the view that cooperative societies were of the same genus as other corporations and all were corporations. In fact the very express exclusion of cooperative societies from Entry 43 of

List I is indicative of the view that but for such exclusion, cooperative societies would be comprehended within the meaning of expression “corporations”.

24. Likewise, in ***Apex Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd. v. Maharashtra State Cooperative Bank Ltd.*****, (2003) 11 SCC 66**, this Court delineated the two separate spheres relating to multi-State co-operative societies and co-operative societies as follows: -

> **25.** Another aspect which must be noticed is that in the Constitution of India, the subject pertaining to cooperative societies is in the State List i.e. Entry 32 of List II of Schedule VII. The Union List has Entry 44 of List I of Schedule VII which deals with corporations. In this case we are not concerned with the validity of a Central legislation and thus do not deal with that aspect. For purpose of the judgment we will take it that a cooperative society with objects not confined to one State would fall within the term corporation, and thus a Central legislation may be saved. However, from the constitutional provisions it is clear that matters pertaining to cooperative societies are in the State List. Thus many States have enacted laws relating to cooperative societies. We have not seen other Acts. However, as this case concerns a society in Maharashtra, the Maharashtra Cooperative Societies Act was shown to us. Significantly, this law does not define a cooperative society. It did not need to, as a society registered under it would be automatically covered. The need to define a cooperative society arises only in a Central legislation which does not cover all cooperative societies and thus needs to indicate to which society it applies.

25. Likewise, in ***Thalappalam Service Coop. Bank Ltd. v. State of***

***Kerala*, (2013) 16 SCC 82**, this Court held:

> **26.** The cooperative society is a State subject under Schedule VII List II Entry 32 to the Constitution of India. Most of the States in India enacted their own Cooperative Societies Act with a view to provide for the orderly development of the cooperative sector in the State to achieve the objects of equity, social justice and economic development, as envisaged in the directive principles of State policy, enunciated in the Constitution of India. For cooperative societies working in more than one State, the Multi-State Cooperative Societies Act, 1984 was enacted by Parliament under Schedule VII List I Entry 44 of the Constitution. The cooperative society is essentially an association or an association of persons who have come together for a common purpose of economic development or for mutual help.

26. It may thus be seen that there is no overlap whatsoever so far as the subject 'co-operative societies' is concerned. Co-operative societies as a subject matter belongs wholly and exclusively to the State legislatures to legislate upon, whereas multi-State co-operative societies i.e., co-operative societies having objects not confined to one state alone, is exclusively within the ken of Parliament. This being the case, it may safely be concluded, on the facts of this case, that there is no overlap and hence, no need to apply the federal supremacy principle as laid down by the judgments of this court. What we are therefore left with is the

exclusive power to make laws, so far as co-operative societies are concerned, with the State Legislatures, which is contained in Article 246(3) read with Entry 32 of List II. In fact, in ***K. Damodarasamy Naidu & Bros. v. State of T.N.*****, (2000) 1 SCC 521**, this court held:

> **"21.** Parliament, when exercising the powers to amend the Constitution under Article 368, cannot and does not amend State Acts. There is no other provision in the Constitution which so permits and there is no judgment of this Court that so holds. The power to make laws for the States in respect of matters listed in List II in the Seventh Schedule is exclusively that of the State Legislatures. ….."
> (emphasis supplied)

27. At this stage it is important to refer to the power of amendment of the Constitution contained in Article 368 of the Constitution of India. Article 368 reads as follows: -

PART XX

AMENDMENT OF THE CONSTITUTION

> **368. Power of Parliament to amend the Constitution and procedure therefor.** —
>
> (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
>
> (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a

majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162, article 241 or article 279A or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

xxx xxx xxx

28. It may be seen that Article 368(1) refers to Parliament, which may exercise its “constituent power” to amend the constitution by way of addition, variation or repeal of any provision of the Constitution. This however has to be in accordance with the mandatory procedure laid down in the Article.

29. So far as amendments that are made to any of the provisions of the Constitution, save and except Articles like Article 4 which expressly state that though the Constitution may be amended, no such amendment shall be deemed to be an amendment of the Constitution for the purpose of Article 368, all other articles of the Constitution may be amended but only in accordance with the procedure laid down in Sub-Article (2). So far so good. However, we are concerned with the procedure when it comes to amending certain specified articles/provisions in the proviso to Article 368(2). Sub-clause (a) of the proviso refers to Articles 54 and 55 which deal with the President of India, Articles 73 and 162 which deal with the executive power of the Union and the State Governments, Article 241 which deals with High Courts for Union territories, and Article 279A which deals with the Goods and Services Tax Council. In this case, we are not directly concerned with Sub-clause (a) of the proviso.

30. Sub-clause (b) of the proviso is important and speaks of Chapter IV of Part V which deals with the Union Judiciary consisting of the Supreme Court of India, Chapter V of Part VI which deals with the High Courts in the States, and Chapter I of Part XI which deals with

legislative relations between the Union and the States. We are directly concerned with sub-clause (b) insofar as the impact of a constitutional amendment on Article 246, which is part of Chapter I of Part XI, is concerned.

31. Sub-clause (c) of the proviso then speaks of any change being made in any of the lists in the 7th Schedule, which would certainly include Entry 32 List 2 of the 7th Schedule, with which we are directly concerned. Sub-clauses (d) and (e) refer to the representation of the States in Parliament and a change to be made in the provisions of Article 368 itself respectively, with which we are not directly concerned.

32. If the subject matter of an amendment falls within the proviso, then the additional procedural requirement is that such amendment shall also be required to be ratified by the legislatures of not less than one half of the States by resolution to that effect passed by those legislatures before the bill making provision for such amendment is presented to the President for assent. Unlike the 73rd and 74th Constitution Amendments Acts, which inserted Part IX dealing with Panchayats and Part IXA dealing with Municipalities, which amendments were also ratified by not less than one half of the

States, the 97th Amendment which inserts the chapter dealing with co-operative societies has not been so ratified. The question which arises in this appeal is whether the addition of this chapter can be said to be void or *non est* for want of such ratification.

33. At this point, it is important to first deal with the ambit of Parliament's 'constituent power' referred to in Article 368(1). Several judgments of this Court have held that though an amendment of the Constitution is the exercise of constituent power which differs from ordinary legislative power, such constituent power does not convert Parliament into an original constituent assembly. Parliament being the donee of a limited power may only exercise such power in accordance with both the procedural and substantive limitations contained in the Constitution of India. The procedural limitations are contained in Sub-Article 2 of Article 368. The substantive limitation has been laid down by the celebrated decision of this Court in ***Kesavananda Bharati v. State of Kerala*****, (1973) 4 SCC 225**, by which a constitutional amendment can only pass muster if it does not damage the basic structure or essential features of the Constitution.

34. Thus, in ***M. Nagaraj v. Union of India*****, (2006) 8 SCC 212**, this

Court held:

> **103.** The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise. (See *Kihoto Hollohan* v. *Zachillhu* [1992 Supp (2) SCC 651].)

35. In ***I.R. Coelho v. State of T.N.*****, (2007) 2 SCC 1,** this Court held:

> **122.** The scope and content of the words "constituent power" expressly stated in the amended Article 368 came up for consideration in *Indira Gandhi case* [1975 Supp SCC 1]. Article 329-A(4) was struck down because it crossed the implied limitation of amending power, that it made the controlled Constitution uncontrolled, that it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19. (See also *Minerva Mills case* [(1980) 3 SCC 625].)
>
> **123.** It is *Kesavananda Bharati case* [(1973) 4 SCC 225] read with clarification of Khanna, J. in *Indira Gandhi case* [1975 Supp SCC 1] which takes us one step forward, namely, that fundamental rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with

Articles 16(4), (4-A), (4-B), etc. *Bharati* [(1973) 4 SCC 225] and *Indira Gandhi* [1975 Supp SCC 1] *cases* have to be read together and if so read the position in law is that the basic structure as reflected in the above articles provide a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

124. Since power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals of the Constitution. Secularism is one such fundamental, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Articles 14 and 15 or abrogate or en bloc eliminate these fundamental rights. To further illustrate the point, it may be noted that Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure.

125. The question can be looked at from yet another angle also. Can Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in *Kesavananda Bharati case* [(1973) 4 SCC 225] as a result of which secularism, separation of power, equality, etc., to cite a few examples, would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the rule of law, secularism,

etc. would fail. That is why Khanna, J. held that some of the fundamental rights like Article 15 form part of the basic structure.

xxx xxx xxx

137. In *Kesavananda Bharati case* [(1973) 4 SCC 225] the discussion was on the amending power conferred by unamended Article 368 which did not use the words "constituent power". We have already noted the difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words "constituent power" in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words "constituent power" are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to Parliament. It is on this premise that clauses (4) and (5) inserted in Article 368 by the 42nd Amendment were struck down in *Minerva Mills case* [(1980) 3 SCC 625].

36. A challenge to a constitutional amendment may, therefore, be on procedural or substantive grounds as stated hereinabove. The present case concerns itself with the procedural ground contained in Article 368(2) proviso.

37. For Article 368(2) proviso to apply, various tests have been laid down by this Court in some of its judgments. Since the tests laid down in ***Sankari Prasad Singh*** (supra) *and* ***Sajjan Singh*** (supra) are referred to in ***Kihoto Hollohan's*** case (supra), we can refer to this judgment in some detail.

38. The majority judgment of three learned Judges by Venkatachaliah, J. sets out Paragraph 7 of the 10th Schedule of the Constitution of India, which deals with disqualification on the ground of defection. The Court was concerned with the constitutional validity of the 10th Schedule on both substantive and procedural grounds. So far as the procedural ground is concerned, Paragraph 7, which barred the jurisdiction of all courts, was said to have required ratification by the States and the 10th Schedule, not having been ratified by the States, it was urged that the entire amendment would be infirm on this count. Paragraph 7 of the 10th Schedule is set out in para 16 of the judgment as follows: -

> "**7. *Bar of jurisdiction of courts***. — Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

39. In para 24, several questions were set out which were required to be answered by the Constitution Bench in that case. We are directly concerned with questions (B) to (D) which read as follows: -

> **24.** On the contentions raised and urged at the hearing the questions that fall for consideration are the following:
>
> xxx xxx xxx

(*B*) Having regard to the legislative history and evolution of the principles underlying the Tenth Schedule, Paragraph 7 thereof in terms and in effect, brings about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the Bill introducing the amendment attracts the proviso to Article 368(2) of the Constitution and would require to be ratified by the Legislature of the States before the Bill is presented for Presidential assent.

(*C*) In view of the admitted non-compliance with the proviso to Article 368(2) not only Paragraph 7 of the Tenth Schedule, but also the entire Bill resulting in the Constitution (Fifty-second Amendment) Act, 1985, stands vitiated and the purported amendment is abortive and does not in law bring about a valid amendment.

Or whether, the effect of such non-compliance invalidates Paragraph 7 alone and the other provisions which, by themselves, do not attract the proviso do not become invalid.

(*D*) That even if the effect of non-ratification by the Legislature of the States is to invalidate Paragraph 7 alone, the whole of the Tenth Schedule fails for non-severability. Doctrine of severability, as applied to ordinary statutes to promote their constitutionality, is inapplicable to constitutional amendments. Even otherwise, having regard to legislative intent and scheme of the Tenth Schedule, the other provisions of the Tenth Schedule, after the severance and excision of Paragraph 7, become truncated, and unworkable and cannot stand and operate independently. The Legislature would not have enacted the Tenth Schedule without Paragraph 7 which forms its heart and core.

xxx xxx xxx

40. In dealing with whether Paragraph 7 would require ratification by the States, this Court dealt with ***Sankari Prasad Singh*** (supra) *and*

Sajjan Singh (supra) as follows: -

58. In *Sankari Prasad case* [1952 SCR 89], the question was whether the amendment introducing Articles 31-A and 31-B in the Constitution required ratification under the said proviso. Repelling this contention it was observed: (SCR p. 108)

> "It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while Article 31-B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs 'for the enforcement of any of the rights conferred by Part III' or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases."

59. In *Sajjan Singh case* [(1965) 1 SCR 933] a similar contention was raised against the validity of the Constitution (Seventeenth Amendment) Act, 1964 by which Article 31-A was again amended and 44 statutes were added to the Ninth Schedule to the Constitution. The question again was whether the amendment required ratification under the proviso to Article 368. This Court noticed the question thus: (SCR p. 940)

> "The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected?"

60. Negativing the challenge to the amendment on the ground of non-ratification, it was held: (SCR p. 944)

> "… Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained."

61. The propositions that fell for consideration in *Sankari Prasad Singh* [1952 SCR 89] and *Sajjan Singh cases* [(1965) 1 SCR 933] are indeed different. There the jurisdiction and power of the courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either "in terms or in effect", since the very rights which could be adjudicated under and enforced by the courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the courts to operate upon. Matters are entirely different in the context of Paragraph 7. Indeed the aforesaid cases, by necessary implication support the point urged for the petitioners. The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by

the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is 'in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in *Sajjan Singh case* [(1965) 1 SCR 933] where it was observed: (SCR p. 944)

> "If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise."

62. In the present case, though the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Articles 136, 226 and 227 within the meaning of clause (*b*) of the proviso to Article 368(2). Paragraph 7, therefore, attracts the proviso and ratification was necessary. Accordingly, on Point (B), we hold:

"That having regard to the background and evolution of the principles underlying the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-article (2) of Article 368 of the Constitution of India."

41. Even the minority judgments of two learned Judges by Verma,J.

and Sharma,J., declared Paragraph 7 and indeed the entire 10th Schedule to be constitutionally infirm as follows: -

> **156.** Prima facie it would appear that Paragraph 7 does seek to make a change in Articles 136, 226 and 227 of the Constitution inasmuch as without Paragraph 7 in the Tenth Schedule a decision of the Speaker/Chairman would be amenable to the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 as in the case of decisions as to other disqualifications provided in clause (1) of Article 102 or 191 by the President/Governor under Article 103 or 192 in accordance with the opinion of the Election Commission which was the scheme under the two earlier Bills which lapsed. However, some learned counsel contended placing reliance on *Sankari Prasad Singh Deo* v. *Union of India* [1952 SCR 89] and *Sajjan Singh* v. *State of Rajasthan* [(1965) 1 SCR 933] that the effect of such total exclusion of the jurisdiction of the Supreme Court and the High Courts does not make a change in Articles 136, 226 and 227. A close reading of these decisions indicates that instead of supporting this contention, they do in fact negative it.
>
> **157.** In *Sankari Prasad* [1952 SCR 89] the challenge was to Articles 31-A and 31 2DB inserted in the Constitution by the Constitution (First Amendment) Act, 1951. One of the objections was based on absence of ratification under Article 368. While rejecting this argument, the Constitution Bench held as under: (SCR p. 108)
>
> > "It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while Article 31-B purports to validate certain specified Acts and

> Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs 'for the enforcement of any of the rights conferred by Part III' or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their powers in such cases."

158. The test applied was whether the impugned provisions inserted by the constitutional amendment did 'either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136'. Thus the change may be either in terms i.e. explicit or in effect in these articles to require ratification. The ground for rejection of the argument therein was that the remedy in the courts remained unimpaired and unaffected by the change and the change was really by extinction of the right to seek the remedy. In other words, the change was in the right and not the remedy of approaching the court since there was no occasion to invoke the remedy, the right itself being taken away. To the same effect is the decision in *Sajjan Singh* [(1965) 1 SCR 933], wherein *Sankari Prasad* [1952 SCR 89] was followed stating clearly that there was no justification for reconsidering *Sankari Prasad* [1952 SCR 89].

159. Distinction has to be drawn between the abridgement or extinction of a right and restriction of the remedy for enforcement of the right. If there is an abridgement or extinction of the right which results in the disappearance of the cause of action which enables invoking the remedy and in the absence of which there is no occasion to make a

grievance and invoke the subsisting remedy, then the change brought about is in the right and not the remedy. To this situation, *Sankari Prasad* [1952 SCR 89] and *Sajjan Singh* [(1965) 1 SCR 933] apply. On the other hand, if the right remains untouched so that a grievance based thereon can arise and, therefore, the cause of action subsists, but the remedy is curtailed or extinguished so that the cause of action cannot be enforced for want of that remedy, then the change made is in the remedy and not in the subsisting right. To this latter category, *Sankari Prasad* [1952 SCR 89] and *Sajjan Singh* [(1965) 1 SCR 933] have no application. This is clear from the above quoted passage in *Sankari Prasad* [1952 SCR 89] which clearly brings out this distinction between a change in the right and a change in the remedy.

160. The present case, in unequivocal terms, is that of destroying the remedy by enacting Paragraph 7 in the Tenth Schedule making a total exclusion of judicial review including that by the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution. But for Paragraph 7 which deals with the remedy and not the right, the jurisdiction of the Supreme Court under Article 136 and that of the High Courts under Articles 226 and 227 would remain unimpaired to challenge the decision under Paragraph 6, as in the case of decisions relating to other disqualifications specified in clause (1) of Articles 102 and 191, which remedy continues to subsist. Thus, this extinction of the remedy alone without curtailing the right, since the question of disqualification of a Member on the ground of defection under the Tenth Schedule does require adjudication on enacted principles, results in making a change in Article 136 in Chapter IV in Part V and Articles 226 and 227 in Chapter V in Part VI of the Constitution.

161. On this conclusion, it is undisputed that the proviso to clause (2) of Article 368 is attracted requiring ratification by the specified number of State Legislatures before

presentation of the Bill seeking to make the constitutional amendment to the President for his assent.

42. In a recent decision, namely, ***Dr. Jaishri Laxmanrao Patil v. Chief Minister and Ors.,*** **2021 SCC OnLine SC 362**, this court considered the validity of the Constitution (102nd Amendment) Act, 2018 which, *inter alia,* inserted Articles 366(26C) and 342A. As a result of this amendment, the President alone, to the exclusion of all other authorities, is empowered to identify Socially and Economically Backward Classes (SEBCs) and include them in a list to be published under Article 342A(1), which shall be deemed to include SEBCs in relation to each State and Union territory for the purposes of the Constitution.

43. This 102nd Amendment Act was challenged, *inter alia,* on the ground that not being ratified by at least half of the States, the Constitutional Amendment was infirm. Six questions were framed before a Constitution Bench of this Court. We are concerned here with questions 4 to 6 insofar as the 102nd Amendment Act is concerned, which are set out in paragraph 10 of Justice Ashok Bhushan's judgment as follows:

> 4. Whether the Constitution One Hundred and Second Amendment deprives the State Legislature of its power to

enact a legislation determining the socially and economically backward classes and conferring the benefits on the said community under its enabling power?

5. Whether, States' power to legislate in relation to "any backward class" under Articles 15(4) and 16(4) is anyway abridged by Article 342(A) read with Article 366(26c) of the Constitution of India?

6. Whether, Article 342A of the Constitution abrogates States' power to legislate or classify in respect of "any backward class of citizens" and thereby affects the federal policy/structure of the Constitution of India?"

44. Justice Bhushan dismissed the challenge to the Constitution 102nd Amendment Act as follows:

448. We do not find any merit in the challenge to the Constitution 102nd Amendment. The Constitution 102nd Amendment does not violate any basic feature of the Constitution. The argument of the learned counsel for the petitioner is that Article 368 has not been followed since the Constitution 102nd Amendment was not ratified by the necessary majority of the State. The Parliament never intended to take the rights of the State regarding identification of backward classes, the Constitution 102nd Amendment was not covered by Proviso to Article 368 sub-clause (2), hence, the same did not require any ratification. The argument of procedural violation in passing the 102nd Constitutional Amendment cannot also be accepted. We uphold the Constitution 102nd Amendment interpreted in the manner as above.

45. This was re-stated in conclusions 27 and 32 found in paragraph 450 by Bhushan, J., and concurred with by Nazeer, J., as follows: -

450. From our foregoing discussion and finding we arrive at following conclusions:

xxx xxx xxx

(27) It is, thus, clear as sun light that Parliamentary intention discernible from Select Committee report and statement of Minister of Social Justice and Empowerment is that the intention of the Parliament for bringing Constitutional amendment was not to take away the power of the State to identify backward class in the State.

xxx xxx xxx

(32) The Constitution 102nd Amendment Act, 2018 does not violate any basic feature of the Constitution. We uphold the constitutional validity of Constitution (One Hundred and second Amendment) Act, 2018.

46. However, Justice Ravindra Bhat differed from Justices Bhushan and Nazeer and was joined by Justice L. Nageswara Rao and Justice Hemant Gupta (see paras 455 and 481 of the judgment).

47. After setting out the amendments made to the Constitution by the 102nd Amendment Act, Justice Bhat held:

669. This Court is also of the opinion that the change brought about by the 102nd Amendment, especially Article 342A is only with respect to the process of identification of SEBCs and their list. Necessarily, the power to frame policies and legislation with regard to all other matters, i.e. the welfare schemes for SEBCs, setting up of institutions, grants, scholarships, extent of reservations and special provisions under Article 15(4), 15(5) and 16(4) are entirely with by the State Government in relation to its institutions and its public services (including services under agencies

and corporations and companies controlled by the State Government). In other words, the extent of reservations, the kind of benefits, the quantum of scholarships, the number of schools which are to be specially provided under Article 15(4) or any other beneficial or welfare scheme which is conceivable under Article 15(4) can all be achieved by the State through its legislative and executive powers. This power would include making suggestions and collecting data - if necessary, through statutory commissions, for making recommendations towards inclusion or exclusion of castes and communities to the President on the aid and advice of the Union Council of Ministers under Article 342A. This will accord with the spirit of the Constitution under Article 338B and the principle of cooperative federalism which guides the interpretation of this Constitution.

48. After setting out extracts from the judgments in ***Sajjan Singh*** (supra) and ***Kihoto Hollohan*** (supra), the learned Judge concluded as follows:

> **682.** By these parameters, the alteration of the content of state legislative power in an oblique and peripheral manner would not constitute a violation of the concept of federalism. It is only if the amendment takes away the very essence of federalism or effectively divests the federal content of the constitution, and denudes the states of their effective power to legislate or frame executive policies (co-extensive with legislative power) that the amendment would take away an essential feature or violate the basic structure of the Constitution. Applying such a benchmark, this court is of the opinion that the power of identification of SEBCs hitherto exercised by the states and now shifted to the domain of the President (and for its modification, to Parliament) by virtue of Article 342A does not in any manner violate the essential features or basic structure of the Constitution. The 102nd

Amendment is also not contrary to or violative of proviso to Article 368(2) of the Constitution of India. As a result, it is held that the writ petition is without merit; it is dismissed.

(emphasis in original)

49. And under the heading “conclusions”, it was held:

188. xxx xxx xxx

(5) Re. Point No. 5 - Whether, States' power to legislate in relation to “any backward class” under Articles 15(4) and 16(4) is anyway abridged by Article 342(A) read with Article 366(26c) of the Constitution of India. On these two interrelated points of reference, my conclusions are as follows:

xxx xxx xxx

(v) The states' power to make reservations, in favour of particular communities or castes, the quantum of reservations, the nature of benefits and the kind of reservations, and all other matters falling within the ambit of Articles 15 and 16 - except with respect to identification of SEBCs, remains undisturbed.

xxx xxx xxx

(6) Re Point No. 6: Article 342A of the Constitution by denuding States power to legislate or classify in respect of “any backward class of citizens” does not affect or damage the federal polity and does not violate the basic structure of the Constitution of India.

50. However, Shri Venugopal, learned Attorney General, strongly relied upon the judgments of Wanchoo, J. Ramaswamy, J. and Bachawat,

J. in ***Golak Nath*** (supra). Though these judgments are minority judgments in that case, Shri Venugopal argued that there is nothing in the majority judgments against what is stated in these judgments insofar as ratification is concerned, and that therefore these judgments would have considerable persuasive value in determining whether ratification is or is not required under Article 368(2) proviso.

51. Wanchoo, J. in ***Golak Nath*** (supra) deals with this subject at some length. He states: -

> "If there is no actual change directly in the entrenched provision, no ratification is required, even if any amendment of any other provision of the Constitution may have some effect indirectly on the entrenched provisions mentioned in the proviso." (at page 843)

52. He goes on to discuss what was decided in ***Sajjan Singh's*** case (supra) and then goes on to give two examples of alterations made in what he describes as "an unentrenched Article" which would necessitate amendment of an entrenched Article and that it is only if "Parliament takes the incredible course of amending only the unentrenched Article and not amending the entrenched Article, courts can say that ratification is necessary even for amending the unentrenched Article, for it directly necessitates a change in an

entrenched Article. But short of that we are of opinion that merely because there is some effect indirectly on an entrenched Article by amendment of an unentrenched Article it is not necessary that there should be ratification in such circumstances also". (see pages 844-845)

53. If by this, the learned Judge intended to constrict the test laid down in ***Sajjan Singh's*** case (supra) by introducing a further test, namely, necessitating amendment of "an entrenched Article", it is clear that this judgment cannot be considered to be good law especially after the judgments of both the majority and minority in ***Kihoto Hollohan*** (supra). The same goes for Bachawat, J's minority judgment in ***Golak Nath*** (supra) in which the learned Judge held:

> The contention that the constitutional amendments of Part III had the effect of changing Articles 226 and 245 and could not be passed without complying with the proviso to Article 368 is not tenable. A constitutional amendment which does not profess to amend Article 226 directly or by inserting or striking words therein cannot be regarded as seeking to make any change in it and thus falling within the constitutional inhibition of the proviso. Article 226 gives power to the High Court throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority within those territories directions, orders and writs for the enforcement of any of the rights conferred by Part III and for any other purpose. The Seventeenth Amendment made no direct change in Article 226. It made changes in Part III and abridged or took away some of the rights

> conferred by that Part. As a result of the changes, some of those rights no longer exist and as the High Court cannot issue writs for the enforcement of those rights its power under Article 226 is affected incidentally. But an alteration in the area of its territories or in the number of persons or authorities within those territories or in the number of enforceable rights under Part III or other rights incidentally affecting the power of the High Court under Article 226 cannot be regarded as an amendment of that article.
>
> (at page 919)

54. This passage again is at variance with the test laid down in ***Sankari Prasad Singh Deo*** (supra) and the judgment in ***Kihoto Hollohan*** (supra) which make it clear that any impact on "an entrenched Article" would require ratification if such impact is not insignificant – i.e., that in effect, there is a change in an "entrenched Article" which significantly impacts the content of the said Article including constitutional principles contained therein.

55. Likewise, Ramaswamy, J's minority judgment at pages 943 to 945 expressing similar views again cannot hold water in view of what has been stated in ***Sajjan Singh*** (supra) and both the majority and minority judgments in ***Kihoto Hollohan*** (supra).

56. A reading of the aforesaid judgments would indicate that the "change" spoken about by Article 368 (2) proviso in any provision of the Constitution need not be direct in the sense of adding, subtracting, or modifying the language of the particular Article or

provision spoken of in the proviso. The judgments above referred to speak of a 'change-in effect' which would mean a change which, though not in the language of any provision of the Constitution, would yet be a change which would impact a particular article and the principle contained therein in some significant way.

57. There can be no doubt that our Constitution has been described as quasi-federal in that, so far as legislative powers are concerned, though there is a tilt in favour of the Centre vis-à-vis the States given the federal supremacy principle outlined hereinabove, yet within their own sphere, the States have exclusive power to legislate on topics reserved exclusively to them (see ***Bhim Singh v. Union of India*, (2010) 5 SCC 538** at paras 45, 46 and 48; ***B.P. Singhal v. Union of India*, (2010) 6 SCC 331** at paras 40-42).

58. There can be no doubt whatsoever that Article 246(3) read with List II of the 7th Schedule of the Constitution of India reflects an important constitutional principle that can be said to form part of the basic structure of the Constitution, namely, the fact that the Constitution is not unitary but quasi-federal in character. The question that arises before us is as to whether this principle can be said to have been infracted by inserting Part IXB into the

Constitution of India so that the States' legislative powers contained in Article 246(3) read with Entry 32 List II of the 7th Schedule can be said to have been affected in a significant manner. At this juncture, it is also important to have a look at the judgment of this Court in ***Builders' Assn. of India v. Union of India*** (supra). In this judgment, apart from a challenge made on substantive grounds, the Constitution (46th Amendment Act), 1982 was challenged on the ground that the proviso to Article 368(2) had not been followed inasmuch as the ambit of Entry 54 List II dealing with a tax on sale of goods had been expanded by inserting a definition contained in Article 366 (29A), in which the concept of sale of goods contained in Entry 54 was greatly enlarged. To be noted, Entry 54 List II itself was not the subject matter of amendment. The question was as to the effect of the Constitution 46th Amendment Act on Entry 54 List II in introducing Sub-Article 29A by way of a definition clause contained in Article 366, thus expanding the scope of Entry 54 List II. This Court repelled the aforesaid contention holding that, in point of fact, ratification had been obtained, as follows:

> **28.** The first contention raised before us regarding the constitutionality of the 46th Amendment need not detain us

long. This contention was based on the assumption that the legislatures of not less than one-half of the States which were in existence during the relevant period had not ratified the Bill which ultimately became the 46th Amendment before the President gave his assent. It was argued that such ratification was necessary since the provisions contained in the 46th Amendment had the effect of enlarging the scope of Entry 54 of List II of the Seventh Schedule to the Constitution by empowering the legislatures of States to levy sales tax on the turnover relating to the transactions referred to in sub-clauses (*a*) to (*f*) of clause (29-A) of Article 366 of the Constitution which they could not have done before the 46th Amendment. It was contended that irrespective of the fact whether the amendment of an entry in any of the lists of the Seventh Schedule to the Constitution had the effect of either curtailing or enlarging the powers of Parliament or the legislatures of States, a Bill making provision for such amendment had to be ratified by legislatures of not less than one-half of the States by resolutions passed to that effect before such a Bill was presented to the President for assent in view of the express provisions contained in clause (*c*) of the proviso to Article 368(2) of the Constitution.

29. At the hearing of the above case the learned Attorney General for India produced before us the Memorandum dated 31-1-1982 signed by the Secretary General of the Rajya Sabha which reads thus:

> "RAJYA SABHA SECRETARIAT PARLIAMENT HOUSE, NEW DELHI
>
> No. Rs. 1/21/S1-B
>
> Dated: 31-1-1982
>
> Memorandum
>
> In pursuance of Article 368 of the Constitution of India, the assent copy of the Constitution (Forty-sixth Amendment) Bill, is presented to the President. This Bill has been passed by the Houses of Parliament and has

been also ratified by the legislatures of not less than one-half of the States in accordance with the provision of the proviso to clause (2) of Article 368 of the Constitution. Legislatures of the following States have passed resolutions ratifying the amendments:

(1) Haryana
(2) Himachal Pradesh
(3) Karnataka
(4) Madhya Pradesh
(5) Maharashtra
(6) Manipur
(7) Meghalaya
(8) Orissa
(9) Punjab
(10) Rajasthan
(11) Sikkim
(12) Tamil Nadu

A copy each of the letters received from these legislatures is placed below.

sd/-
(Sudarshan Agarwal)
Secretary General

To
The Secretary to the President,
(Through the Secretary, Ministry of Law)"

The Attorney General has also produced before us the file containing the resolutions passed by the legislatures of the 12 States referred to in the Memorandum, set out above. We are satisfied that there has been due compliance of the provisions contained in the proviso to Article 368(2) of the Constitution. We, therefore, reject the first contention. Before proceeding further, we should observe that there would have been no occasion for an argument of this type being urged in court if at the commencement of the Act, it

had been stated that the Bill in question had been presented to the President for his assent after it had been duly ratified by the required number of legislatures of States. We hope that this suggestion will be followed by the Central Secretariat hereafter since we found that even the Attorney General was not quite sure till the case was taken up for hearing that the Bill which had become the 46th Amendment had been duly ratified by the required number of States.

59. Indeed, H.M. Seervai, in his celebrated commentary *'Constitutional Law of India' (4th Edition)* at page 3156, has this to say:

> "Articles 245 and 246 are in Chapter1, Part XI of the Constitution, which is one of the matters mentioned in cl. (b) of the proviso, and the legislative lists are mentioned in cl. (c) of the proviso. Changes can be made in the legislative lists by addition, variation, or repeal of an entry, or by transposing an entry from one list to another, but the lists themselves cannot be repealed."
>
> (Emphasis supplied)

60. A reading of ***Builders' Assn. of India v. Union of India*** (supra) and the aforesaid extract from Seervai's commentary would show that any significant addition or curtailment of a field of legislation which is contained in an Entry in List II of the 7th Schedule of the Constitution would also amount to a 'change' so as to attract the proviso to Article 368(2). It is not necessary, as has been contended by the learned Attorney General, that a change referred to in the proviso to Article 368(2) would only be if some part of a subject

matter given to the States were transferred to Parliament or *vice versa*. Even without such transfer, if there is enlargement or curtailment of the subject matter contained in a field of legislation exclusively reserved to the States, then in effect a change has been made to an entry in a legislative list, which change, if significant, would attract the proviso to Article 368(2) and therefore require ratification.

61. It is always important to remember that in matters affecting the Constitution of India, form always gives way to substance. There can be no manner of doubt that had exceptions been provided in Entry 32 List II itself, such amendment to Entry 32 List II would require ratification. There can also be no doubt that in effect if the subject matter “co-operative societies” had been either expanded or curtailed by adding a definition clause in Article 366 of the Constitution of India, such expansion or curtailment would also require ratification as significant changes have been made <u>in effect</u> in Entry 32 List II of the Constitution of India. Likewise, if a separate part is added in the Constitution of India, the direct effect of adding such part being to curtail the width of Entry 32 List II in a significant manner, again, <u>in effect</u> Entry 32 List II is directly impacted, again

requiring ratification. It is of no moment that one method is chosen or preferred to another so long as Entry 32 List II is curtailed either by adding or deleting words in Entry 32 itself or by doing so through an indirect methodology, namely, adding a new definition clause in Article 366 or adding a new part to the Constitution of India.

62. Judged by these principles, it is now necessary to analyse Part IXB of the Constitution of India, as inserted by the Constitution 97th Amendment Act. As the Statement of Objects and Reasons of the Constitution 97th Amendment Act shows, it is acknowledged that the subject 'co-operative societies' is exclusively allotted to the State legislature under Entry 32 of the State List, as a result of which, considering the need for reform in the Co-operative Societies Acts of the States, consultations with the State governments have been held. After this it is stated that the Central government is committed to ensure that co-operative societies in the country function in a democratic, professional, autonomous and economically sound manner. It is then stated that the new part to be inserted in the Constitution would contain provisions which would drastically curtail the powers of the State legislatures in that such legislations by the States would now have to conform to the newly inserted part.

63. Part IX B of the Constitution consists of Articles 243ZH to 243ZT.

64. Article 243ZH is the definition Article which defines co-operative societies in sub-clause (c) as meaning society registered or deemed to be registered under a State law, as opposed to a multi-State co-operative society defined in sub-clause (d), which is a society with objects not confined to one State and registered under a law for the time being in force relating to such co-operatives. By Article 243ZI, it is made clear that the legislature of a State may only make law insofar as it applies to incorporation, regulation and winding up of a co-operative society, subject to the provisions of Part IXB. The restrictions contained in Part IXB may now be set out *seriatim*.

I. Under Article 243ZI, the legislature of a State may make laws affecting co-operative societies only if such laws follow the principles of voluntary formation, democratic member control, member economic participation and autonomous functioning.

II. Under Article 243ZJ(1), the maximum number of directors of a co-operative society cannot exceed twenty one. Further, the State law must compulsorily provide for reservation of one seat for scheduled castes or scheduled tribes and two seats for women on the board of every co-operative society which consists of individuals as members.

III. Under Article 243ZJ(2), the term of office of elected members shall be five years from the date of election.

IV. The State Legislature under Article 243ZJ(3) is bound to make provisions for co-option of members to the board having experience in the field of banking, management, finance or specialization in any other field relating to the objects and activities undertaken by the co-operative society, the number of such co-opted members being restricted to two, as also the fact that such co-opted members shall not have the right to vote.

V. Under Article 243ZK(1), the non-obstante clause contained therein makes it clear that the State legislature has to lay down that the election of a board shall be conducted before the expiry of the term of the board.

VI. Under Article 243ZL, a State legislature can only supersede a board for a period not exceeding 6 months, if certain enumerated conditions alone are satisfied.

VII. Under Article 243ZM, minimum qualifications and experience of auditors and auditing firms have to be laid down by a State Legislature, and co-operatives societies have to be audited only by such persons or firms.

VIII. Under Article 243ZN, the Legislature of a State must provide

that the annual general body meeting of every co-operative society shall be convened within a period of six months of the close of the financial year.

IX. Under Article 243ZP, every co-operative society is to file returns within the specified period of six months of the close of every financial year, indicating the list of matters set out in the said provision.

X. Under Article 243ZQ, the Legislature of a State may make provisions for offences relating to co-operative societies and penalties for such offences, provided that under sub-clause (2), in respect of five separate subject matters, the Legislature of a State must mandatorily include such subject matters.

65. From all the above, it is clear that the exclusive legislative power that is contained in Entry 32 List II has been significantly and substantially impacted in that such exclusive power is now subjected to a large number of curtailments. Indeed, Article 243ZI specifically mandates that the exclusive legislative power contained in Entry 32 List II of the State Legislature is now severely curtailed as it can only be exercised subject to the provisions of Part IXB; and further, Article 243ZT makes it clear that all State laws which do not conform to the restrictions mentioned in Part IXB automatically

come to an end on the expiration of one year from the commencement of the Constitution 97th Amendment Act.

66. Indeed, this Court in ***Vipulbhai M. Chaudhary v. Gujarat Coop. Milk Mktg. Federation Ltd.*** (supra), referred to the effect of Article 243ZT as follows:

> **27.** Article 243-ZT of the Constitution requires the laws relating to cooperative societies in force in the States prior to the commencement of the Amendment Act to be in tune with and in terms of the constitutional concept and set-up of cooperative societies. In fact, a period of one year has been provided in the Constitution from the commencement of the Amendment for the required amendment or repeal by the competent legislature or by the competent authority, of laws which are inconsistent with Part IX-B. As a corollary, the Constitution enables the competent legislature or authority to suitably amend the existing provisions in their laws in tune with the constitutional mandate. Thereafter, in case there continues to be silence in the Act or bye-laws, the court will have to read the constitutional requirements into the existing provisions. It is essentially a process of purposive construction of the available provisions as held by this Court in Pratap Chandra Mehta case [(2011) 9 SCC 573].

67. The aforesaid analysis of Part IXB of the Constitution leads to the result that though Article 246(3) and Entry 32, List II of the 7th Schedule have not been 'changed' in letter, yet the impact upon the aforesaid articles cannot be said to be insignificant. On the contrary,

it is clear that by curtailing the width of Entry 32, List II of the 7th Schedule, Part IXB seeks to effect a significant change in Article 246(3) read with Entry 32 List II of the 7th Schedule inasmuch as the State's exclusive power to make laws with regard to the subject of co-operative societies is significantly curtailed thereby directly impacting the quasi-federal principle contained therein. Quite clearly, therefore, Part IXB, insofar as it applies to co-operative societies which operate within a State, would therefore require ratification under both sub-clauses (b) and (c) of the proviso to Article 368(2) of the Constitution of India.

68. It is interesting to note that Part IX of the Constitution of India which was inserted into the Constitution by the Constitution (73rd Amendment) Act, 1992 and Part IXA inserted into the Constitution by the Constitution (74th Amendment) Act, 1992 made similar provisions qua Panchayats and Municipalities. Entry 5 of List II, 7th Schedule which deals with the subject matter of legislation so far as Panchayats and Municipalities are concerned, is set out as follows: -

List II—State List

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

69. Both the Constitution 73rd and 74th Amendments were sent for ratification and were ratified by Legislatures of more than half the States. The reason is not far to see – like Part IXB, several restrictions are laid down before the States can legislate on Panchayats and Municipalities. Like Part IXB, such legislation is subject to Parts IX and IXA – see Article 243C and Article 243R. Again, like Article 243ZT in Part IXB, Articles 243N and 243ZF provide that State laws which are inconsistent with the provisions of Parts IX and IXA respectively will automatically cease after the expiration of one year from the commencement of the two Constitutional Amendments. In addition to these provisions, Parts IX and IXA also contain Article 243O and Article 243ZG ousting the jurisdiction of the courts and thereby, in effect, curtailing the provisions of Articles 136, 226 and 227 of the Constitution of India. Ratification of the Constitution 72nd and 73rd Amendments was

therefore necessary both under clauses (b) and (c) of the proviso to Article 368(2) in that Article 136 was in effect curtailed (Article 136 occurring in Chapter IV of Part V of the Constitution of India); Articles 226 and 227 were in effect curtailed (which occur in Chapter V of Part VI of the Constitution of India); Article 246(3) was in effect curtailed (which forms part of the Chapter I of Part XI of the Constitution of India); and Entry 5 List 2, 7th Schedule was also in effect curtailed, which is referrable to sub-clause (c) of the proviso to Article 368(2) of the Constitution of India. It is clear therefore that even previous constitutional practice of Parliament acting in its constituent capacity *qua* similar subject matters reinforces the submission of the respondent that, like the 73rd and 74th Amendments, the Constitution 97th Amendment Act also required ratification.

70. Shri Jani, however, argued that the constituent power that is exercised in enacting the 97th Amendment cannot be assimilated with legislative power, and that once the Constitution stands amended by insertion of Part IXB, Article 245 mandates that all legislation made under Article 246 read with Lists in the 7th Schedule to the Constitution of India is subject to the provisions of

the Constitution, so that legislation made under Article 246(3) read with Entry 32 List II becomes subject to the provisions of Part IXB which is now a part of the Constitution of India.

71. This argument is a classic instance of putting the cart before the horse. Nobody doubts that had the amendment been ratified under Article 368(2) proviso as held by us above, it would then operate, as a result of which legislation under Article 246(3) read with Entry 32 List II of the 7th Schedule would then become subject to Part IXB. In the present case, ratification not having been effected, the Amendment is *non est*. This argument is therefore rejected.

72. Shri Venugopal then argued that 17 out of 28 States had enacted legislations incorporating provisions of Part IXB, and that, therefore, they had impliedly accepted the restrictions laid down in the said Part. This argument need not detain us inasmuch as the procedure laid down in Article 368(2) proviso requires ratification of legislatures of one half of the States by resolutions to that effect. This has admittedly not been done in the present case. Also, the argument that no State has come forward to challenge the 97th Constitution Amendment does not take the matter any further. When a citizen of India challenges a constitutional amendment as being procedurally

infirm, it is the duty of the court to examine such challenge on merits as the Constitution of India is a national charter of governance affecting persons, citizens and institutions alike.

73. It was then argued by Shri Venugopal, learned Attorney General for India, that the impugned judgment's finding that one of the basic features of the Constitution, the principle of federalism has been affected was a finding that was unnecessary once it was found that the Amendment fell foul of Article 368(2) proviso. Shri Venugopal is right that there was no argument made that even *de hors* ratification, Part IXB otherwise falls foul of the basic structure doctrine as laid down in ***Kesavananda Bharati's*** case (supra). We reiterate that our judgment is confined to the procedural aspect of Article 368(2) proviso, there being no substantive challenge to Part IXB on the ground that it violates the basic structure doctrine as laid down in ***Kesavananda Bharati's*** case (supra).

74. We now come to an important argument made by Shri Venugopal that even if it be held that Part IXB is constitutionally infirm qua co-operative societies operating within a State, it would yet operate qua multi-State co-operative societies and in Union territories which are not States.

75. This necessarily brings us to whether the part dealing with multi-

State co-operative societies in Part IXB can be severed from the part dealing with co-operative societies operating only within a State. Reverting to ***Kihoto Hollohan's*** case (supra), it may be noted that the majority and minority judgments therein were sharply divided on whether Paragraph 7 of the 10th Schedule could be said to be severable from the rest of the 10th Schedule so that the 10th Schedule could operate without Paragraph 7. The majority judgment held that it could be so severed and that the rest of the 10th Schedule would therefore operate. This was held by the majority as follows: -

> **68.** The doctrine of severability has been applied by this Court in cases of challenge to the validity of an amendment on the ground of disregard of the substantive limitations on the amending power, namely, alteration of the basic structure. But only the offending part of the amendment which had the effect of altering the basic structure was struck down while the rest of the amendment was upheld. [See *Kesavananda Bharati* v. *State of Kerala* [(1973) 4 SCC 225], *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625], *P. Sambamurthy* v. *State of A.P.* [(1987) 1 SCC 362]].
>
> **69.** Is there anything in the procedural limitations imposed by sub-article (2) of Article 368 which excludes the doctrine of severability in respect of a law which violates the said limitations? Such a violation may arise when there is a composite Bill or what is in statutory context or jargon called a 'Rag-Bag' measure seeking amendments to several statutes under one amending measure which seeks to

amend various provisions of the Constitution some of which may attract clauses (*a*) to (*e*) of the proviso to Article 368(2) and the Bill, though passed by the requisite majority in both the Houses of Parliament has received the assent of the President without it being sent to States for ratification or having been so sent fails to receive such ratification from not less than half the States before the Bill is presented for assent. Such an Amendment Act is within the competence of Parliament insofar as it relates to provisions other than those mentioned in clauses (*a*) to (*e*) of proviso to Article 368(2) but in respect of the amendments introduced in provisions referred to in clauses (*a*) to (*e*) of proviso to Article 368(2), Parliament alone is not competent to make such amendments on account of some constitutionally recognised federal principle being invoked. If the doctrine of severability can be applied it can be upheld as valid in respect of the amendments within the competence of Parliament and only the amendments which Parliament alone was not competent to make could be declared invalid.

xxx xxx xxx

71. The proviso to Article 368(2) appears to have been introduced with a view to giving effect to the federal principle. In the matter of amendment of provisions specified in clauses (*a*) to (*e*) relating to legislative and executive powers of the States vis-a-vis the Union, the Judiciary, the election of the President and the amending power itself, which have a bearing on the States, the proviso imposes an additional requirement of ratification of the amendment which seeks to effect a change in those provisions before the Bill is presented for the assent of the President. It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Article 368(2). An amendment which otherwise fulfils the requirements of Article 368(2) and is outside the specified cases which require ratification cannot be denied legitimacy on the ground alone of the

company it keeps. The main part of Article 368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied — even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall *also* require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to in clauses (*a*) to (*e*) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. Indeed the following observations of this Court in *Sajjan Singh case* [(1965) 1 SCR 933 : AIR 1965 SC 845] are apposite: (SCR p. 940)

> "In our opinion, the two parts of Article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged."

72. During the arguments reliance was placed on the words "before the Bill making provision for such amendment is presented to the President for assent" to sustain the argument that these words imply that the ratification of the Bill by not less than one-half of the States is a condition precedent for the presentation of the Bill for the assent of the President. It is further argued that a Bill which seeks to make a change in the provisions referred to in clauses (*a*) to (*e*) of the proviso cannot be presented before the President for his assent without such ratification and if assent is given

by the President in the absence of such ratification, the amending Act would be void and ineffective in its entirety.

73. A similar situation can arise in the context of the main part of Article 368(2) which provides: “when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the President”. Here also a condition is imposed that the Bill shall be presented to the President for his assent only after it has been passed in each House by the prescribed special majority. An amendment in the First and Fourth Schedules referable to Article 4 can be introduced by Parliament by an ordinary law passed by simple majority. There may be a Bill which may contain amendments made in the First and Fourth Schedules as well as amendments in other provisions of the Constitution excluding those referred to in the proviso which can be amended only by a special majority under Article 368(2) and the Bill after having been passed only by an ordinary majority instead of a special majority has received the assent of the President. The amendments which are made in the First and Fourth Schedules by the said Amendment Act were validly made in view of Article 4 but the amendments in other provisions were in disregard to Article 368(2) which requires a special majority. Is not the doctrine of severability applicable to such an amendment so that amendments made in the First and Fourth Schedules may be upheld while declaring the amendments in the other provisions as ineffective? A contrary view excluding the doctrine of severability would result in elevating a procedural limitation on the amending power to a level higher than the substantive limitations.

xxx xxx xxx

75. ….The same principle would, therefore, apply while considering the validity of a composite amendment which makes alterations in the First and Fourth Schedules as well

as in other provisions of the Constitution requiring special majority under Article 368(2) and such a law, even though passed by the simple majority and not by special majority, may be upheld in respect of the amendments made in the First and Fourth Schedules. There is really no difference in principle between the condition requiring passing of the Bill by a special majority before its presentation to the President for assent contained in Article 368(2) and the condition for ratification of the amendment by the legislatures of not less than one-half of the States before the Bill is presented to the President for assent contained in the proviso. The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

76. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body politic. The ouster of jurisdiction of courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the

Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions.

77. We accordingly hold on contentions (C) and (D):

That there is nothing in the said proviso to Article 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that 'thereupon the Constitution shall stand amended' the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.

That accordingly, the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal-sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (Fifty-second Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368(2) was not so ratified.

That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable

part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7.

76. Article 243ZR of Part IXB makes it clear that all the provisions of this Part which apply to multi-State co-operative societies would apply subject to the modification that any reference to a "Legislature of a State, State Act or State Government" shall be construed as a reference to "Parliament, Central Act or the Central Government" respectively. The learned Attorney General therefore argued that instead of having two separate parts within Part IXB, one dealing with State co-operative societies and one dealing with multi-State co-operative societies, the well-known legislative device of "reference" to existing provisions was instead utilised by Article 243ZR and that therefore we should view the matter as if a separate part within Part IXB has been enacted insofar as multi-State co-operative societies are concerned.

77. There is substance in this argument. In ***Kihoto Hollohan*** (supra), it was held that a composite amendment that was presented to the President for his assent, one part of the amendment requiring ratification from the States and the other not requiring ratification,

was severable, as a result of which Paragraph 7 alone of the 10th Schedule of the Constitution was struck down for want of ratification by the States. There can be no doubt that in its application to multi-State co-operative societies, neither Article 246(3) nor Entry 32 List II of the 7th Schedule would be attracted. Equally, the test of severability laid down in ***Kihoto Hollohan*** (supra) which required the court in that case to ascertain whether the legislature would at all have enacted the law if the severed part was not part of the law cannot be said to apply in a case like the present where, had the amendment dealing with multi-State co-operative societies been in a separate part of Part IXB, such test would be inapplicable. The Statement of Objects and Reasons for the Constitution 97th Amendment Act makes this clear. It states:

> "The proposed new Part in the Constitution, inter alia, seeks to empower the Parliament in respect of multi-State cooperative societies and the State Legislatures in cases of other co-operative societies to make appropriate law, laying down the following matters, namely:-"
>
> (Emphasis supplied)

It is clear, therefore, that the Scheme qua multi-State cooperative societies is separate from the Scheme dealing with "other cooperative societies", Parliament being empowered, so far as multi-State

cooperative societies are concerned, and the State legislatures having to make appropriate laws laying down certain matters so far as “other cooperative societies” are concerned. The effect of Article 246ZR is as if multi-State co-operative societies are separately dealt with in a separate sub-chapter contained within Part IXB, as is correctly contended by the learned Attorney General. Also, there is no doubt that after severance what survives can and does stand independently and is workable. It was faintly suggested by learned counsel for the Respondents that the consequence of this Court holding that the Constitution 97th Amendment Act is void for want of ratification would render the entire amendment still-born, as a result of which no part of the amendment can survive. We reject this argument for two reasons. If the doctrine of severability were not to apply for the afore-stated reason, then the majority judgment in ***Kihoto Hollohan*** (supra) would be incorrect. This very reasoning would then render the entire Constitution 52nd Amendment, which inserted the Tenth Schedule to the Constitution of India, constitutionally infirm as then the entirety of the amendment would have to be declared void for want of ratification, which would be in the teeth of the majority judgment in ***Kihoto***

Hollohan (supra). Further, on this reasoning, the amendments made in Article 19 and the addition of Article 43B would also have to be struck down, which was not pleaded or argued before either the High Court or before us. This being the case, we declare that Part IXB of the Constitution of India is operative insofar as multi-State co-operative societies are concerned.

78. The other argument of the learned Attorney General that under Article 243ZS in its application to Union territories the same situation would prevail as the application of Article 243ZR is not quite correct. There can be no doubt that Article 246(3) does not apply to Union territories. Instead, Article 246(4) applies to Union territories, by means of which Parliament can use the State List also to legislate insofar as the Union territories are concerned. However, given the truncation of Entry 32 List II of the 7th Schedule by Part IXB, what would operate in Union territories is Part IXB only insofar as it applies to multi-State co-operative societies. So far as co-operative societies within a Union territory are concerned, the same infirmity as is found in the main part of the judgment continues insofar as the legislative subject “co-operative societies” is concerned under Entry 32 List II. Therefore, for co-operative

societies which have no ramifications outside the Union territory itself, Part IXB will have no application.

79. We now come to the argument of Shri Shah that even so far as multi-State co-operative societies are concerned, since Entry 44 List I gets truncated in the same manner as Entry 32 List II, the Constitutional Amendment would require ratification so far as multi-State co-operative societies are concerned since a change in effect is made in List I, which would be covered by clause (c) of the proviso to Article 368 of the Constitution. On a reading of the writ petition filed before the High Court, no such ground has been raised. On the contrary, all the grounds raised have reference to infraction of the federal principle and the fact that the subject "co-operative societies" is affected by the amendment needing ratification. Though the prayer to the writ petition may be to strike down the entirety of Part IXB, no ground having been raised and no argument either having been raised on this score before the High Court, we need not deal with this argument of Shri Shah.

80. The judgment of the High Court is upheld except to the extent that it strikes down the entirety of Part IXB of the Constitution of India. As held by us above, it is declared that Part IXB of the Constitution

of India is operative only insofar as it concerns multi-State co-operative societies both within the various States and in the Union territories of India. The appeals are accordingly disposed of.

……J.
(R. F. Nariman)

……J.
(B.R. Gavai)

New Delhi,
July 20, 2021.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 9108-9109 OF 2014

UNION OF INDIA ... APPELLANT(S)

VERSUS

RAJENDRA N. SHAH AND ANOTHER ... RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 281 OF 2020

CIVIL APPEAL NO(S). 282 OF 2020

CIVIL APPEAL NO. 2826 OF 2021
SPECIAL LEAVE PETITION (CIVIL) NO(S). 13329 OF 2018

CIVIL APPEAL NO. 2825 OF 2021
SPECIAL LEAVE PETITION (CIVIL) NO(S). 13215 OF 2018

CIVIL APPEAL NO. 2827 OF 2021
SPECIAL LEAVE PETITION (CIVIL) NO(S). 14227 OF 2020

J U D G M E N T

K.M. JOSEPH, J.

1. **I have gone through the draft Judgment authored by my learned and esteemed Brother Justice Rohinton Fali Nariman.**

2. **I am in complete agreement with the reasoning and conclusion in regard to the provisions relating to Article 240ZI to Article 243ZQ and Article 243ZT, being unconstitutional for non-compliance, with the mandate of the *proviso* to Article 368(2) of the Constitution of India. However, I regret my inability to concur with the view taken that the Doctrine of Severability will apply to sustain Article 243ZR and Article 243ZS to the multistate cooperative societies operating in the Union Territories, and that, it would not apply to cooperative societies confined to the territories of the Union Territories.**

3. **Part IXB of the Constitution of India came to be inserted by the Ninety-Seventh Amendment to the Constitution.**

4. **The High Court has found the Articles 243ZH to 243ZT unconstitutional. The other parts of the Ninety-Seventh Amendment were found not to be affected. The ground was essentially that there was no ratification as required under the *proviso* to Article 368(2). It is also found to be in breach of the basic structure of the Constitution. In three of**

the Appeals, the writ petitioners challenged Show Cause Notices and subsequent decision based on the same and the Writ Petitions were filed based on the Ninety-Seventh Amendment. It is necessary to refer to Part IXB:

> **"PART IXB**
> **THE CO-OPERATIVE SOCIETIES**
>
> **243ZH. Definitions.—In this Part, unless the context otherwise requires,—**
> **(a) "authorised person" means a person referred to as such in article 243ZQ;**
> **(b) "board" means the board of directors or the governing body of a co-operative society, by whatever name called, to which the direction and control of the management of the affairs of a society is entrusted to;**
> **(c) "co-operative society" means a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;**
> **(d) "multi-State co-operative society" means a society with objects not confined to one State and registered or deemed to be registered under any law for the time being in force relating to such cooperatives;**
> **(e) "Office bearer" means a President, Vice-President, Chairperson, Vice-Chairperson, Secretary or Treasurer, of a co-operative society and includes any other person to be elected by the board of any cooperative society;**
> **(f) "Registrar" means the Central Registrar appointed by the Central Government in relation to the multi-State co-operative societies and the Registrar**

for co-operative societies appointed by the State Government under the law made by the Legislature of a State in relation to co-operative societies;

(g) "State Act" means any law made by the Legislature of a State;

(h) "State level co-operative society" means a co-operative society having its area of operation extending to the whole of a State and defined as such in any law made by the Legislature of a State.

243ZI. Incorporation of co-operative societies.—Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the incorporation, regulation and winding up of co-operative societies based on the principles of voluntary formation, democratic member-control, member-economic participation and autonomous functioning.

243ZJ. Number and term of members of board and its office bearers.—(1) The board shall consist of such number of directors as may be provided by the Legislature of a State, by law:

Provided that the maximum number of directors of a co-operative society shall not exceed twenty-one:

Provided further that the Legislature of a State shall, by law, provide for the reservation of one seat for the Scheduled Castes or the Scheduled Tribes and two seats for women on board of every co-operative society consisting of individuals as members and having members from such class of category of persons.

(2) The term of office of elected members of the board and its office bearers shall be five years from the date of election

and the term of office bearers shall be coterminous with the term of the board:

Provided that the board may fill a casual vacancy on the board by nomination out of the same class of members in respect of which the casual vacancy has arisen, if the term of office of the board is less than half of its original term.

(3) The Legislature of a State shall, by law, make provisions for co-option of persons to be members of the board having experience in the field of banking, management, finance or specialisation in any other field relating to the objects and activities undertaken by the co-operative society, as members of the board of such society:

Provided that the number of such co-opted members shall not exceed two in addition to twenty-one directors specified in the first proviso to clause (1):

Provided further that such co-opted members shall not have the right to vote in any election of the cooperative society in their capacity as such member or to be eligible to be elected as office bearers of the board:

Provided also that the functional directors of a co-operative society shall also be the members of the board and such members shall be excluded for the purpose of counting the total number of directors specified in the first proviso to clause (1).

243ZK. Election of members of board.—(1) Notwithstanding anything contained in any law made by the Legislature of a State, the election of a board shall be conducted before the expiry of the term of the board so as to ensure that the newly

elected members of the board assume office immediately on the expiry of the term of the office of members of the outgoing board.

(2) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to a co-operative society shall vest in such an authority or body, as may be provided by the Legislature of a State, by law: Provided that the Legislature of a State may, by law, provide for the procedure and guidelines for the conduct of such elections.

243ZL. Supersession and suspension of board and interim management.—(1) Notwithstanding anything contained in any law for the time being in force, no board shall be superseded or kept under supersession for a period exceeding six months:

Provided that the board may be superseded or kept under suspension in a case—

(i) of its persistent default; or

(ii) of negligence in the performance of its duties; or

(iii) the board has committed any act prejudicial to the interests of the co-operative society or its members; or

(iv) there is stalemate in the constitution or functions of the board; or

(iv) the authority or body as provided by the Legislature of a State, by law, under clause (2) of article 243ZK, has failed to conduct elections in accordance with the provisions of the State Act:

Provided further that the board of any such co-operative society shall not be superseded or kept under suspension where there is no Government shareholding or loan or financial assistance or any guarantee by the Government:

Provided also that in case of a co-operative society carrying on the business of banking, the provisions of the Banking Regulation Act, 1949 shall also apply:

Provided also that in case of a co-operative society, other than a multi- State co-operative society, carrying on the business of banking, the provisions of this clause shall have the effect as if for the words "six months", the words "one year" had been substituted.

(2) In case of supersession of a board, the administrator appointed to manage the affairs of such cooperative society shall arrange for conduct of elections within the period specified in clause (1) and hand over the management to the elected board.

(3) The Legislature of a State may, by law, make provisions for the conditions of service of the administrator.

243ZM. Audit of accounts of co-operative societies.—(1) The Legislature of a State may, by law, make provisions with respect to the maintenance of accounts by the co-operative societies and the auditing of such accounts at least once in each financial year.

(2) The Legislature of a State shall, by law, lay down the minimum qualifications and experience of auditors and auditing firms that shall be eligible for auditing accounts of the co-operative societies.

(3) Every co-operative society shall cause to be audited by an auditor or auditing firms referred to in clause (2) appointed by the general body of the co-operative society: Provided that such auditors or auditing firms shall be appointed from a panel approved by a State Government or an authority authorised by the State Government in this behalf.

(4) The accounts of every co-operative society shall be audited within six months of the close of the financial year to which such accounts relate.

(5) The audit report of the accounts of an apex co-operative society, as may be defined by the State Act, shall be laid before the State Legislature in the manner, as may be provided by the State Legislature, by law.

243ZN. Convening of general body meetings.—The Legislature of a State may, by law, make provisions that the annual general body meeting of every co-operative society shall be convened within a period of six months of close of the financial year to transact the business as may be provided in such law.

243ZO. Right of a member to get information.—(1) The Legislature of a State may, by law, provide for access

to every member of a co-operative society to the books, information and accounts of the cooperative society kept in regular transaction of its business with such members.

(2) The Legislature of a State may, by law, make provisions to ensure the participation of members of the management of the co-operative society providing minimum requirement of attending meetings by the members and utilising the minimum level of services as may be provided in such law.

(3) The Legislature of a State may, by law, provide for co-operative education and training for its members.

243ZP. Returns.—(1) Every co-operative society shall file returns, within six months of the close of every financial year, to the authority designated by the State Government including the following matters, namely:—

(a) annual report of its activities;

(b) its audited statement of accounts;

(c) plan for surplus disposal as approved by the general body of the co-operative society;

(d) list of amendments to the bye-laws of the co-operative society, if any;

(e) declaration regarding date of holding of its general body meeting and conduct of elections when due; and

(f) any other information required by the Registrar in pursuance of any of the provisions of the State Act.

243ZQ. Offences and penalties.—(1) The Legislature of a State may, by law, make provisions for the offences relating to the co-operative societies and penalties for such offences.

(2) A law made by the Legislature of a State under clause (1) shall include the commission of the following act or omission as offences, namely:—

(a) a co-operative society or an officer or member thereof wilfully makes a false return or furnishes false information, or any person wilfully not furnishes any information required from him by a person authorised in this behalf under the provisions of the State Act;

(b) any person wilfully or without any reasonable excuse disobeys any summons, requisition or lawful written order issued under the provisions of the State Act;

(c) any employer who, without sufficient cause, fails to pay to a co-operative society amount deducted by him from its employee within a period of fourteen days from the date on which such deduction is made;

(d) any officer or custodian who wilfully fails to handover custody of books, accounts, documents, records, cash, security and other property belonging to a co-operative society of which he is an officer or custodian, to an authorised person; and

(e) whoever, before, during or after the election of members of the board

or office bearers, adopts any corrupt practice.

243ZR. Application to multi-State co-operative societies.—The provisions of this Part shall apply to the multi-State co-operative societies subject to the modification that any reference to "Legislature of a State", "State Act or State Government" shall be construed as a reference to "Parliament", "Central Act" or "the Central Government" respectively.

243ZS. Application to Union territories.—The provisions of this Part shall apply to the Union territories and shall, in their application to a Union territory, having no Legislative Assembly as if the references to the Legislature of a State were a reference to the administrator thereof appointed under article 239 and, in relation to a Union territory having a Legislative Assembly, to that Legislative Assembly:

Provided that the President may, by notification in the Official Gazette, direct that the provisions of this Part shall not apply to any Union territory or part thereof as he may specify in the notification.

243ZT. Continuance of existing laws.—Notwithstanding anything in this Part, any provision of any law relating to co-operative societies in force in a State immediately before the commencement of the Constitution (Ninety-seventh Amendment) Act, 2011, which is inconsistent with the provisions of this Part, shall

continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is less."

5. **Article 243ZH is the definition clause. It is clear that the provisions contained in Articles 243ZI to 243ZQ and Article 243ZT are all meant to apply in regard to cooperative societies, which are born under laws made by the State Legislature. It is beyond the pale of doubt that the legislative powers of the State Legislature, in regard to "cooperative societies", falling in Entry 32 of List II of the Seventh Schedule, has been conditioned, cribbed and confined, though no change, as such, is made in the Entry 32. It is clear that what is relevant is, whether by direct or indirect means, there is a substantive impact on the provisions covered by the *proviso* to Article 368(2). There is also a clear impact on Article 246(3), which deals with the exclusive powers of the State Legislature and, therefore, there is a change brought about in regard to the provisions contained in Chapter I of Part XI**

of the Constitution, which is contained in clause (b) to the *proviso* of Article 368(2).

6. **Having found that these provisions cannot survive, the question arises whether Article 243ZR and 243ZS, can continue to exist. What is pressed into service, however, in this regard, by learned Attorney General, is that the Doctrine of Severability would apply.**

7. **The learned Attorney General has contended that Parliament, vide Article 243ZR, has dealt with multistate cooperative societies, in regard to which, it has exclusive legislative competence and, instead of duplicating the provisions, the device of reference is utilised and Article 243ZR really manifests Parliaments resolve to apply the very same provisions as was intended for cooperative societies covered by Entry 32 of List II, *viz.*, cooperative societies made under a law passed by the State Legislature. It would be no different, if, instead of words used in Article 243ZR and 243ZS, the entire provisions, were repeated all over again. The Principle of Legislation by Adoption is pressed into service by the learned Attorney General.**

8. **The learned Counsel appearing on behalf of the Respondent No. 1, Shri Massoom K. Shah, and also, Ms. Ritika Sinha, for the Intervenors, would point out, having regard to the arrangement of the provisions and the wording used in Article 243ZR and Article 243ZS, there can be no scope for applying the Doctrine of Severability.**

9. **It is the case of Shri P.K. Jani, learned Senior Counsel for the appellant in one of the cases that the amendment was preceded by a very elaborate exercise, which is that, there was a meet of Ministers of Cooperation of various States and resolutions were passed [These Resolutions are not to be mistaken for the Resolutions to be passed by the State Legislatures, as contemplated in the *proviso* to Article 368(2)]. It is contended on behalf of the Respondent No. 1 and the learned Counsel for the Intervenors that it may have been different, if the substantial provisions, as contained in Article 243ZI to 243ZQ, which related to cooperative societies, embraced by Entry 32 of List II, were expressly enacted to apply to multistate cooperative societies and to the cooperative societies operating in the**

Union Territory, and thereafter, such provisions were also made to apply to cooperative societies operating under laws made by the State Legislatures but this is not the position.

10. **The Doctrine of Severability came up for consideration in *R.M.D. Chamarbaugwalla and another v. Union of India and another*[1]. Therein, this Court has laid down certain Rules in this regard. They read as follows:**

> **"22. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of "prize competition" in Section 2(*d*) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:**
>
> ***1*. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest**

1 **AIR 1957 SC 628**

of the statute was invalid. Vide *Corpus Juris Secundum*, Vol. 82, p. 156; *Sutherland on Statutory Construction*, Vol. 2 pp. 176-177.

***2*. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide *Cooley's Constitutional Limitations*, Vol. I at pp. 360-361; *Crawford on Statutory Construction*, pp. 217-218.**

***3*. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide *Crawford on Statutory Construction*, pp. 218-219.**

***4*. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.**

***5*. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections;**

(Vide *Cooley's Constitutional Limitations*, Vol. I, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

***6*. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide *Sutherland on Statutory Construction*, Vol. 2, p. 194.**

***7*. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide *Sutherland on Statutory Construction*, Vol. 2, pp. 177-178."**

11. **We are, in this case, concerned with a case of an amendment to the Constitution, which has been carried out under Article 368. Article 368 reads as follows:**

"368. Power of Parliament to amend the Constitution and procedure therefor.—
(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
(2) An amendment of this Constitution may be initiated only by the introduction of a

Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162, article 241 or article 279A or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent

power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

12. **Article 368 has provided for the procedure to be followed by Parliament, when it purports to amend the Constitution. There are two limitations broadly on the power of Parliament to amend the Constitution:**

(i) Parliament must scrupulously follow the procedure provided in Article 368;

(ii) There is also the substantive limitation on power of the Parliament to amend the Constitution, which is far too well established to require support from case law, *viz*., that Parliament cannot amend the Constitution by breaching its basic features.

13. **In this case, the provisions of Article 243ZI to 243ZQ and Article 243ZT are undoubtedly afflicted with the vice of non-compliance with the procedure, which is mandatory. Resultantly, the said provisions must be treated as still born. These provisions are void in law. The definition clause Article 243ZH clearly would have no meaning and would cease to be workable. The only question, which, therefore, arises is when provisions of the amendment to the**

Constitution are found to be void, for the reason that the mandate of the *proviso* to Article 368(2) has not been complied with, whether the Doctrine of Severability could be applied to sustain the other provisions, which may not require Parliament to follow the procedure under the *proviso* to Article 368(2).

14. **This question is not *res integra* as it has been considered by the Constitution Bench of this Court in *Kihoto Hollohan v. Zachillhu and others*[2]. The Court in the said case, was dealing with a challenge to the Tenth Schedule to the Constitution. Parliament, by virtue of the Tenth Schedule purported to deal with the evil of defection. After providing for various aspects, it also purported to oust the jurisdiction of all courts by virtue of paragraph-7, which reads as follow:**

> **"7. Bar of jurisdiction of courts: Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of the Member of a House under this Schedule."**

---

2 **(1992) Suppl.2 SCC 651**

15. The Court proceeded to uphold the provisions of the Tenth Schedule except paragraph-7. In doing so, this Court invoked the theory of Severability. It is, in this context, necessary to notice the following discussion:

> **"66. While examining the constitutional validity of laws the principle that is applied is that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part. This is done by applying the doctrine of severability. The rationale of this doctrine has been explained by Cooley in the following words: [Cooley: *Constitutional Limitations*, (8th edn.) Vol. I pp. 359-60.]**
>
> **"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the Constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute**

must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the Constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional."

xxx xxx xxx

68. The doctrine of severability has been applied by this Court in cases of challenge to the validity of an amendment on the ground of disregard of the substantive limitations on the amending power, namely, alteration of the basic structure. But only the offending part of the amendment which had the effect of altering the basic structure was struck down while the rest of the amendment was upheld. [See *Kesavananda Bharati* v. *State*

of Kerala **[(1973) 4 SCC 225 : 1973 Supp SCR 1] , *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625 : (1981) 1 SCR 206] , *P. Sambamurthy* v. *State of A.P.* [(1987) 1 SCC 362 : (1987) 2 ATC 502 : (1987) 1 SCR 879]].**

69. Is there anything in the procedural limitations imposed by sub-article (2) of Article 368 which excludes the doctrine of severability in respect of a law which violates the said limitations? Such a violation may arise when there is a composite Bill or what is in statutory context or jargon called a 'Rag-Bag' measure seeking amendments to several statutes under one amending measure which seeks to amend various provisions of the Constitution some of which may attract clauses (*a*) to (*e*) of the proviso to Article 368(2) and the Bill, though passed by the requisite majority in both the Houses of Parliament has received the assent of the President without it being sent to States for ratification or having been so sent fails to receive such ratification from not less than half the States before the Bill is presented for assent. Such an Amendment Act is within the competence of Parliament insofar as it relates to provisions other than those mentioned in clauses (*a*) to (*e*) of proviso to Article 368(2) but in respect of the amendments introduced in provisions referred to in clauses (*a*) to (*e*) of proviso to Article 368(2), Parliament alone is not competent to make such amendments on account of some

constitutionally recognised federal principle being invoked. If the doctrine of severability can be applied it can be upheld as valid in respect of the amendments within the competence of Parliament and only the amendments which Parliament alone was not competent to make could be declared invalid.

70. Is there anything compelling in the proviso to Article 368(2) requiring it to be construed as excluding the doctrine of severability to such an amendment? It is settled rule of statutory construction that "the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case" and that where "the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms". [See: *Madras & Southern Mahratta Railway Company Ltd.* v. *Bezwada Municipality* [(1944) 71 IA 113, 122 : AIR 1944 PC 71 : 48 CWN 618] , *CIT* v. *Indo-Mercantile Bank Ltd.* [1959 Supp 2 SCR 256, 266 : AIR 1959 SC 713 : (1959) 36 ITR 1]

71. The proviso to Article 368(2) appears to have been introduced with a view to giving effect to the federal principle. In the matter of amendment of provisions specified in clauses (*a*) to (*e*) relating to legislative and executive

powers of the States vis-a-vis the Union, the Judiciary, the election of the President and the amending power itself, which have a bearing on the States, the proviso imposes an additional requirement of ratification of the amendment which seeks to effect a change in those provisions before the Bill is presented for the assent of the President. It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Article 368(2). An amendment which otherwise fulfils the requirements of Article 368(2) and is outside the specified cases which require ratification cannot be denied legitimacy on the ground alone of the company it keeps. The main part of Article 368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied – even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall *also* require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to in clauses (*a*)

to (*e*) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. Indeed the following observations of this Court in *Sajjan Singh case* [(1965) 1 SCR 933 : AIR 1965 SC 845] are apposite: (SCR p. 940)

"In our opinion, the two parts of Article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged."

xxx xxx xxx

73. A similar situation can arise in the context of the main part of Article 368(2) which provides: "when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the President". Here also a condition is imposed that the Bill shall be presented to the President for his assent only after it has been passed in each House by the prescribed special majority. An amendment in the First and Fourth Schedules referable to Article 4 can be introduced by Parliament by an ordinary law passed by simple majority. There may be a Bill which may contain amendments made in the First and Fourth Schedules as well as amendments in other

provisions of the Constitution excluding those referred to in the proviso which can be amended only by a special majority under Article 368(2) and the Bill after having been passed only by an ordinary majority instead of a special majority has received the assent of the President. The amendments which are made in the First and Fourth Schedules by the said Amendment Act were validly made in view of Article 4 but the amendments in other provisions were in disregard to Article 368(2) which requires a special majority. Is not the doctrine of severability applicable to such an amendment so that amendments made in the First and Fourth Schedules may be upheld while declaring the amendments in the other provisions as ineffective? A contrary view excluding the doctrine of severability would result in elevating a procedural limitation on the amending power to a level higher than the substantive limitations.

xxx xxx xxx

75. In that case, it was found that Section 41 of the Bribery Amendment Act, 1958 made a provision for appointment of a panel by the Governor-General on the advice of the Minister of Justice for selecting members of the Bribery Tribunal while Section 55 of the Constitution vested the appointment, transfer, dismissal and disciplinary control of judicial officers in the Judicial Service Commission. It was held that the legislature had purported to pass a law which, being in conflict with Section 55

of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers and could only be made by laws which comply with the special legislative procedure laid down in Section 29(4). Since there was nothing to show that the Bribery Amendment Act, 1951 was passed by the necessary two-thirds majority, it was held that "any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires". Applying the doctrine of severability the Judicial Committee, however, struck down the offending provision, i.e. Section 41 alone. In other words passing of the Bill by a special majority was the condition precedent for presentation of the Bill for the assent. Disregard of such a condition precedent for presenting a Bill for assent did not result in the entire enactment being vitiated and the law being declared invalid in its entirety but it only had the effect of invalidation of a particular provision which offended against the limitation on the amending power. A comparison of the language used in clause (4) of Section 29 with that of Article 368(2) would show that both the provisions bear a general similarity of purpose and both the provisions require the passing of the Bill by special majority before it was presented for assent. The same principle would, therefore, apply while considering the validity of a composite amendment

which makes alterations in the First and Fourth Schedules as well as in other provisions of the Constitution requiring special majority under Article 368(2) and such a law, even though passed by the simple majority and not by special majority, may be upheld in respect of the amendments made in the First and Fourth Schedules. There is really no difference in principle between the condition requiring passing of the Bill by a special majority before its presentation to the President for assent contained in Article 368(2) and the condition for ratification of the amendment by the legislatures of not less than one-half of the States before the Bill is presented to the President for assent contained in the proviso. The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

76. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part

of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body politic. The ouster of jurisdiction of courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions."

(Emphasis supplied)

16. The first Rule laid down in *R.M.D. Chamarbaugwalla* (supra) is that, it is the intention of the Legislature, that is the determining factor. The test is also laid down that the question to be

asked is, whether the Legislature would have enacted the valid Part, if it had known that the rest of the Statute was invalid. It is apposite to read another Rule, which is laid down, which is Rule No.7. In determining the legislative intent, it will be legitimate to take into account, the history of the legislation and its objects, *inter-alia*. The Statement of Objects and Reasons for the Ninety-Seventh Amendment, reads as follows:

> **"<u>STATEMENT OF OBJECTS AND REASONS</u>**
>
> **The co-operative sector, over the years, has made significant contribution to various sectors of national economy and has achieved voluminous growth. However, it has shown weaknesses in safeguarding the interests of the members and fulfilment of objects for which these institutions were organised. There have been instances where elections have been postponed indefinitely and nominated office bearers or administrators remaining in-charge of these institutions for a long time. This reduces the accountability of the management of co-operative societies to their members. Inadequate professionalism in management in many of the co-operative institutions has led to poor services and low productivity. Co-operatives need to run on well-established democratic principles and elections held on time and in a free and fair manner.**

Therefore, there is a need to initiate fundamental reforms to revitalize these institutions in order to ensure their contribution in the economic development of the country and to serve the interests of members and public at large and also to ensure their autonomy, democratic functioning and professional management.

2. The "co-operative societies" is a subject enumerated in Entry 32 of the State List of the Seventh Schedule of the Constitution and the State Legislatures have accordingly enacted legislations on co-operative societies. Within the framework of State Acts, growth of co-operatives on large scale was envisaged as part of the efforts for securing social and economic justice and equitable distribution of the fruits of development. It has, however, been experienced that in spite of considerable expansion of co-operatives, their performance in qualitative terms has not been up to the desired level. Considering the need for reforms in the Co-operative Societies Acts of the States, consultations with the State Governments have been held at several occasions and in the conferences of State Co-operative Ministers. A strong need has been felt for amending the Constitution so as to keep the co-operatives free from unnecessary outside interferences and also to ensure, their autonomous organisational set up and their democratic functioning.

3. The Central Government is committed to ensure that the co-operative societies in the country function in a democratic, professional, autonomous and economically sound manner. With a view to bring the necessary reforms, it is proposed to incorporate a new Part in the Constitution so as to provide for certain provisions covering the vital. aspects of working of co-operative societies like democratic, autonomous and professional functioning. A new article is also proposed to be inserted in Part IV of the Constitution (Directive Principles of State Policy) for the States to endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of cooperative societies. The proposed new Part in the Constitution, inter alia, seeks to empower the Parliament in respect of multi-State co-operative societies and the State Legislatures in case of other co-operative societies to make appropriate law, laying down the following matters, namely:-

(a) provisions for incorporation, regulation arid winding up of co-operative societies based on the principles of democratic member-control, member-economic participation and autonomous functioning;

(b) specifying the maximum number of directors of a co-operative society to be not exceeding twenty-one members;

(c) providing for a fixed term of five years from the date of election in respect of the elected members of the board and its office bearers;

(d) providing for a maximum time limit of six months during which a board of directors of co-operative society could be kept under supersession or suspension;
(e) providing for independent professional audit;
(f) providing for right of information to the members of the co-operative societies;
(g) empowering the State Governments to obtain periodic reports of activities and accounts of co-operative societies;
(h) providing for the reservation of one seat for the Scheduled Castes or the Scheduled Tribes and two seats for women on the board of every co-operative society, which have individuals as members from such categories; (i) providing for offences relating to co-operative societies and penalties in respect of such offences.

4. It is expected that these provisions will not only ensure the autonomous and democratic functioning of co-operatives, but also ensure the accountability of management to the members and other stakeholders and shall provide for deterrence for violation of the provisions of the law.

5. The Bill seeks to achieve the above objectives."

(Emphasis supplied)

17. From the Statement Objects and Reasons, the following is discernible.

18. There were weaknesses found in safeguarding the interests of the members of the cooperative

societies. Elections were being postponed indefinitely. There was inadequate professionalism in management. It was found that cooperatives needed to be run on well-established democratic principles and elections had to be held on time and in a free and fair manner. It was further noted that "cooperative societies" is a subject enumerated in Entry 32 of the State List of the Seventh Schedule. That laws were made by the State Legislatures, were noticed. Reforms, were in short, found necessary in the Cooperative Society Acts of the States. Consultation with the State Governments were held several times. The Central Government was committed, it is stated to ensure that the cooperative societies, in the country, were to function in a democratic, professional, autonomous and economically sound manner. It is in this connection that Part IXB was inserted to empower Parliament in respect of multistate cooperative societies, and State Legislatures, in case of other cooperative societies, to make appropriate law.

19. The intention, therefore, discernible was that Parliament intended to provide a uniform set of

legislative norms and create rights, liabilities and powers across the board through the length and breadth of the country. In fact, it was to inform all cooperative societies, whether they were governed by laws made by the State Legislatures, falling under Entry 32 of List II of Seventh Schedule, or the appropriate Entry under List I.

20. In other words, homogeneity was sought to be introduced without any discrimination between cooperative societies falling within the legislative domain of State Legislatures and of Parliament. The setting and the manner, in which the Articles have been ordered in Part IXB, would go to show that the substantive provisions, which actually conditioned the legislative power, among other things, was directed against the State Legislatures.

21. The second Rule laid down in *R.M.D. Chamarbaugwalla* (supra) is to enquire whether the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another. It is further declared that if the seemingly valid provisions are so distinct and separate, that after declaring the other set of provisions as

invalid, the remaining provisions would remain a complete Code, independent of the rest, then, the distinct and separate provisions, which manifests a complete Code, can become enforceable.

22. The third Rule provides that even if they (the provisions) are distinct and separate, if they all form part of a single scheme, which is intended to be operative as a whole, then, also the invalidity of a part, will result in failure of a whole. In *Kihoto Hollohan* (supra), this Court, after bearing in mind the Rules, apparently laid down in *R.M.D. Chamarbaugwalla* (supra), has proceeded to clearly articulate (in paragraph-76) the test, *inter-alia*, *viz.*, as to whether, after severance, what survives, can stand independently and is workable.

23. In this regard, it is plain from the Statement of Objects and Reasons, that Parliament was fully aware that Entry 32 clothed the Legislatures of the State with exclusive legislative power to make laws in regard to cooperative societies, which were not multistate cooperative societies. Parliament was fully aware that laws had already been made by State Legislatures, but yet, the object was to usher in

reforms by the legislative route, and what is more, a Constitutional Amendment, which clearly involved, a change in regard to the entrenched provisions. The Ninety-Seventh Amendment was passed in 2012, several years after the decision in *Kihoto Hollohan* (supra). It is clear that the law was laid down by the Constitution Bench of this Court in *Kihoto Hollohan* (supra), that having regard to the sublime purpose behind the *proviso* to Article 368(2), which was to foster and secure the federal nature of the Constitution, what mattered was the substance and not the form. It appears to be further clear that an effort was made to take the States on board by holding several meetings between the States, and what is more, Resolutions were passed apparently at the meet of State Cooperative Ministers. All of this appears to point out that, having regard to the law holding the field and the relevant principles in question, it appears that Parliament would not have made the amendment, had it known that the provisions contained in Articles 243ZI to 243ZQ would not pass muster. The object was clearly to have identical

provisions in place to govern cooperative societies. Uniformity and, in fact, identical treatment for all cooperative societies whether they are created under State Law or by Parliament, was the goal.

24. It is true that what the *proviso* to Article 368(2) contemplates is, that the ratification by the requisite number of States is done before the Bill is presented to the President of India for assent.

25. It is the duty of the Court to strive to uphold the law made by the Legislature. When it comes to an amendment to the Constitution, this presumption of constitutionality, and also the duty of the Court, becomes even more pronounced. If, indeed, on the Doctrine of Severability, the provisions contained in Article 243QR and Article 243QS, can be sustained, I would agree that the law must survive rather than perish. The question, however, is on the terms of the provisions in question (Articles 243QR and 243QS), and bearing in mind the principles, can they survive on their own, after the invalidation of Article 243ZH to Article 243ZQ and Article 243ZT.

26. In *Kihoto Hollohan* (supra), it must be noticed that the court in the said case came to the rescue of Parliament by applying the Doctrine of Severability

and found no difficulty in sustaining the provisions of the Tenth Schedule, even after jettisoning the provisions of paragraph-7. It was found that pronouncing the said provision as infirm had no impact on the workability of the other provisions which related to and provided for remedies against the evil of defection.

27. The question boils down to this. Are the provisions of Article 243ZR and 243ZS independent provisions and workable? For the sake of clarity, the provisions are referred in question namely Article 243ZR and 243ZS.

> **"243ZR. Application to multi-State co-operative societies. – <u>The provisions of this Part shall apply to the multi-State co-operative societies subject to the modification that any reference to "Legislature of a State", "State Act" or "State Government" shall be construed as a reference to "Parliament", "Central Act" or "the Central Government" respectively.</u>**
>
> **243ZS. Application to Union territories. – <u>The provisions of this Part shall apply to the Union territories and shall, in their application to a Union territory, having no Legislative Assembly as if the references to the Legislature of a State were a reference to the administrator thereof appointed under article 239 and</u>**

in, relation to a Union territory having a Legislative Assembly, to that Legislative Assembly:

Provided that the President may, by notification in the Official Gazette, direct that the provisions of this Part shall not apply to any Union territory or part thereof as he may specify in the notification."

28. Both these provisions are entirely dependent upon the provisions contained in Article 243ZI to 243ZQ. This is for the reason that both these provisions expressly provide that the 'provisions of this part', which clearly means the foregoing provisions, which are contained in Article 243ZI to 243ZQ, are to apply in regard to multistate cooperative societies and to Union Territories with the modifications, which are indicated therein. There can be application and modifications of something which exists. There cannot be either, when the elaborate provisions are to be treated as not born.

29. Are these provisions independent and workable? I will proceed on the basis that Parliament intended to produce homogeneity in regard to certain legislative value judgments which would be cast in stone in a

manner of speaking by having those values declared in the grundnorm itself. It would appear to be that these values were to apply, across the board, to cooperative societies born under laws made by the State Legislatures, as also, to those made by Parliament.

30. More importantly, once the Court has painted the relevant provisions, which are the substantial provisions (Article 243ZI to 243ZQ), with the brush of unconstitutionality, rendering those provisions, still born, it would appear that the provisions contained in Article 243ZR and Article 243ZS would not have the crutches without which these provisions cease to be workable and are impossible to sustain. The unconstitutional part, which is to be an integral part of Article 243ZR and Article 243ZS, must continue to exist, if the provisions', in question, are to bear life. In other words, to sustain these provisions the court would have to resurrect the dead provisions contained in Article 243ZI to 243ZQ and Article 243ZT. The Doctrine of Severability must apply on surer foundations. It is my view that unless the provisions, which have been found

unconstitutional, are kept alive, Articles 243R and 243ZQ are plainly unworkable.

31. In this view of the matter, I respectfully disagree with the view taken by my learned and esteemed Brother in regard to the application of the Doctrine of Severability.

32. In this view of the matter, the Appeals are dismissed.

……J.
[K.M. JOSEPH]

NEW DELHI;
DATED: JULY 20, 2021.