IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WRIT PETITION (PIL) NO. 166 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE
MR. BHASKAR BHATTACHARYA
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?`
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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RAJENDRA N SHAH

Versus

UNION OF INDIA & ANR.

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Appearance:
MR KI SHAH with MR VISHWAS K SHAH with MR MASOOM K SHAH, ADVOCATE for the Applicant.
MR PS CHAMPANERI, ASST SOLICITOR GENERAL for the Opponent No. 1
MR PK JANI, GOVERNMENT PLEADER for the Opponent No. 2

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CORAM: **HONOURABLE THE CHIEF JUSTICE**

MR. BHASKAR BHATTACHARYA
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 22/04/2013

CAV JUDGEMNT

(PER : HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA)

1. By this Public Interest Litigation, the writ-petitioner has prayed for quashing of the Constitution [97th amendment] Act, 2011 introducing part IXB, as *ultra vires* the Constitution of India.

2. The case made out by the writ-petitioner is that the Constitution [97th amendment] Act, 2011 was passed by the Lok Sabha on 22nd December 2011 and the same was passed by the Rajya Sabha on 28th December 2011. The President of India bestowed assent to that amendment on 12th January 2012 and the said notification was published in the gazette of India of 13th January 2012 and the amendment came into force on 15th February 2012.

2.1 According to the petitioner, the power under Article 368 of the Constitution of India itself is the basic structure of the Constitution of India and the fact that by the impugned constitutional amendment, the procedure prescribed in the article 368(2) of the Constitution, which recognizes the federal structure of the Constitution as one of

the basic structures, has not been followed, is violative of the Constitution. The petitioner contends that the subject-matter "Co-operative Societies" does not fall in the 7th Schedule Entry 45 of List I of the Constitution and those are specifically excluded from entry no. 43 of List 1. Therefore, according to the petitioner, the State legislature is the only competent authority in law to enact the laws for the co-operative societies and on that ground, the proposed amendment should be set aside as violative of the Constitution of India as the consent of the majority of the State Legislatures was not received before presenting the Bill proposing the amendment to the President of India.

2.2 According to the petitioner, it is settled law that a constitutional authority cannot do something indirectly which it is not permitted to do directly and if there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adopting a subterfuge. By the impugned constitutional amendment, according to the petitioner, the Parliament, a creature of the Constitution, and not vice-a-versa, has violated the basic structure of the Constitution by not complying with the requirements of Article 368 (2) of the Constitution.

3. This Court issued notices upon the parties including the learned Attorney General of India, and in response to the notice, Mr. Champaneri, the learned Assistant Solicitor General of India, has

appeared. The submissions of the Union of India may be summarized thus:

(A). The only limitation on the Parliament in exercise of the constituent power to amend the Constitution in the matters enumerated in clauses (a), (b), (c), (d), and (e) of the proviso to sub-Article (2) of Article 368 is that, such amendment shall also require to be ratified by the Legislatures of not less than one half of the States by the resolution to that effect passed by those Legislatures before the bill making provision for such amendment is presented to the President for his assent.

(B). Sub-Article (1) of Article 368 has been inserted by the Constitution (24th amendment) Act, 1971 and the original Article 368 has been re-numbered as clause (2) of Article 368 whereas the words "specified in parts A & B of the First Schedule from the proviso were omitted by the Constitution [97th Amendment] Act, 1956.

(C). Sub-Article (3) provides that nothing in Article 13 shall apply to any amendment made under this Article. This clause is inserted by the Constitution (24th amendment) Act, 1971. Sub-Article (4) and Sub-Article (5) of Article 368 which had been inserted by the Constitution (42nd amendment) Act, 1976 have been declared to be invalid by the Constitution Bench of the

Supreme Court of India in the case of **MINERVA MILLS V. UNION OF INDIA**, reported in **AIR 1980 SC 1789** on the ground that these clauses which remove all limitation upon the power of the Parliament to amend the Constitution and precluded a judicial review of the Constitution Amendment Act, on any ground, sought to destroy an "essential feature" or "basic structure" of the Constitution.

(D). The Constitution lays down different modes of amendment of its various provisions, which are as under:

(i). A very large number of provisions are open to alteration by the Union Parliament, by simple majority like the matters referred to in Articles 2 – 4, 169 and 240.

(a). Creation of new States or reconstitution of existing States.

(b). Creation or abolition of upper chambers in the States.

(c). Administration of scheduled areas and Scheduled Tribes (Part VIII of the 5th Schedule and Part XXI of the 6th Schedule.

(ii). If, however, a matter is not covered by this Article, like cessation of territory to a foreign power, that can be effected only by enacting an Amendment Act under Article 368.

(iii). In the case of few matters relating to the federal structure of the Constitution, a special mode is prescribed, viz. that the Bill for amendment must be passed by two-third majority of the members of each House present and voting (such majority being more than 50% of the total membership of each House) and then ratified by the Legislatures by one-half of the States. Those matters are:

(a). The manner of election of President,

(b). Extent of Executive Powers of the Union and the States,

(c). The Supreme Court and the High Courts,

(d). Distribution of Legislative powers between the Union and the States,

(e). Representation of States in Parliament, and,

(f). The provisions of Articles 368 itself.

(E). Article 368 does not prescribe the form in which the amendments may be made and the arrangement may, therefore, add a provision to the Constitution without altering its existing text in view of the decision rendered by the Supreme Court in the case of **SHANKARIPRASAD vs. UNION OF INDIA** reported in **AIR 1951 SC 458**.

(F). In view of the aforesaid decision in the case of **Shankariprasad** [*supra*], the decision prevailing was that "no part of our Constitution is unamendable and that the Parliament may, by passing a Constitution Amendment Act, in compliance with the requirement of Article 368, amend any provision of the Constitution including the fundamental rights of Article 368 itself. However, in the case of **Golaknath** reported in **AIR 1967 SC 1643**, the majority of six Judges of a Special Bench of 11 Judges overruled the previous decision of the Supreme Court in the case of **Shankariprasad** and took a view that though there is no express provision from the ambit of the Article 368, the fundamental rights included in Part-III of the Constitution cannot, by their very nature, be subject to the process of amendment provided for in Article 368 and that if any of such rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.

(G). The majority decision on Golaknath's case was superseded by the Constitution (24th amendment) Act, 1971, by inserting clause (4) in Article 13 and clause (1) in Article 368 as a result of which an amendment of the Constitution, based in accordance with the Article 368, may not be a "law" within the meaning of Article 13 and the validity of the Constitution Amendment Act shall not be open to question on the ground

that it takes away or affects a fundamental right. This amendment has been held to be valid.

(H). The decision of Golaknath's case has been overruled by the latter Full Bench of the Supreme Court in the case of **Keshavnanad v. State of Kerala** reported in **AIR 1973 SC 1461**.

(I). Clauses (4) and (5) are inserted in Article 368 by the 42nd Amendment Act, 1976 and the insertion of the said clauses by 42nd Amendment Act, 1976 provides that:

(a). There is no limitation express or implied, upon the amendment power under Article 368 (1) which is a constituent power, and,

(b). A Constitution Amending Act would not, therefore, be subject to judicial review on any ground.

The said amendment, in turn, came to be superseded by the decision of a Constitution Bench of the Supreme Court in the case of **MINERVA MILLS** [*supra*]. The said clauses (4) and (5) of Article 368 has been invalidated by the Supreme Court in the said case on the ground that "these provisions introduced by the 42nd amendment Act, 1976, sought to exclude judicial review, which was one of the basic features of the Indian

Constitution, as held in the Kesavanand's case and so long as this decision stands, all the Constitution Amendment Acts shall be open to review by the Supreme Court to see whether it affected any of the basic features of the Constitution substantively or the procedural safeguards included in other clauses of Article 368.

(J). Thus, the power to amend Constitution is vested in the Parliament and while exercising the powers under Article 368, the Parliament would not be subject to the limitations which curb its Legislative powers to make laws under Articles 245-246 because the amending power conferred by Article 368 is "constituent" power as held by the Apex Court in the case of **SASANK vs. UNION OF INDIA** reported in **AIR 1981 SC 522**.

(K). By the amendment, by insertion of Chapter IXB, Article 19(1) (c) has been amended and now the co-operative societies have also been included in Part-III of the Constitution in Article 19(1) (c) and therefore, there is an addition in the fundamental rights so far as addition of fundamental rights guaranteed under 19(1) (c) has been extended to the Co-Operative Societies.

(L). Therefore, Article 368 (2) proviso has to be read in its strict sense and it is apparent that the amendment under challenge is not changing any of the matters enumerated in clauses (a) to

(e) of the provision.

(M). The Parliament has exercised its constituent powers, which is distinct from its legislative power and by the 97th amendment, the Parliament has not legislated on the subject, but in its constituent power has amended the Constitution by addition of guarantee of the fundamental rights in favour of the Co-Operative Societies. By this amendment, the Parliament has not attempted to change the basic features of the Constitution. The Principles of Federalism are also not altered. Therefore, the challenge to the 97th amendment in Constitution is misconceived and has no merits, and therefore, the writ-petition deserves to be dismissed.

4. The State Government, although has not filed any affidavit, Mr. Jani, the learned Government Pleader appearing on behalf of the State, has supported the contentions of Mr. Champaneri, and has prayed for rejection of the writ-application.

5. Therefore, the question that falls for determination before us is whether the impugned amendment violates any of the provisions of the Constitution of India.

6. In order to appreciate the aforesaid contention, it will be profitable to refer to part IXB of the Constitution of India containing

Articles 243ZH to 243ZT, which are quoted below:

> *"**243ZG. Bar to interference by courts in electoral matters.—**Notwithstanding anything in this Constitution,—*
>
> *(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court;*
>
> *(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.*
>
> ***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 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 co-operatives;*

[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-opeative 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 or 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 co-operative 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 election.

***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 suspension for a period exceeding six months:*

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

[i] of its persistent default;

[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 a stalement 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 [10 of 1949] shall also apply:

Provided also that in case of a co-operative society, other than a multi-State cooperative 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 co-operative society shall arrange for conduct of elections within the period specified in clause [1] and handover 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 any 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 co-operative society kept in regular transaction of its business with*

such member.

[2] The Legislature of a State may, by law, make provisions to ensure the participation of members in 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.--** 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 statements 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 willfully 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."*

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6.1 The enabling provision for amendment of the Constitution being Article 368 is also quoted below:

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 or article 241, 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."

7. After hearing the learned counsel for the parties and after going through the provisions quoted above and also the other provisions of the Constitution of India, it appears that only the State Legislature is authorized to enact law relating to "Co-Operative Societies" as would appear from the fact that it is placed at item No. 32 in List II-STATE LIST in the Seventh Schedule of the Constitution.

8. We do not dispute for a moment that by amending the provisions of the Constitution of India, the Parliament can bring the said item from List-II of the 7th Schedule to List I – UNION LIST or List III – CONCURRENT LIST and in such circumstances, the Parliament will also have right to legislate law relating to Co-Operative Societies. However, in order to bring such amendment for shifting an item from List-II of the 7th Schedule to List I – UNION LIST or List III – CONCURRENT LIST of the 7th Schedule, such amendment is required to be 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 the amendment and such amendment shall also be required 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.

9. In the case before us, admittedly the formality indicated in Article 368 (2) of the Constitution for taking ratification has not been complied with before presenting it to the President for assent. The Central Government, in its affidavit has stated that in the conference of the Ministers of the State, the Ministers approved such amendment and at the same time, there being no amendment of the List II of the 7th Schedule, Article 368(2) cannot have any application.

10. Mr. Champaneri, the learned Assistant Solicitor General of India, and Mr. Jani, the learned Government Pleader appearing for the State of Gujarat, have laboriously contended before us that by the amendment impugned, the power of the State Legislature to enact law relating to Co-Operative Societies has not been taken away, and thus, the provisions of Article 368(2) are not applicable.

11. It appears from the provisions contained in Article 243.ZG to Article 243ZT introduced by way of the impugned amendment that though there is no amendment of List-II of the Constitution by taking

aid of Article 368(2) of the Constitution, by incorporating Chapter IXB starting from Article 243.ZG and ending with Article 243ZT, various restrictions have been imposed upon the State Legislatures while enacting law relating to Co-Operative Societies which was earlier unfettered prior to the incorporation of Chapter IXB. For instance, in Article 243ZI, it is said that 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 *but such law must be subject to the provisions of Part IXB.* In Article 243ZJ, a definite restriction has been imposed upon the State Legislatures regarding fixation of maximum number of Directors of a Co-Operative Society *which shall not exceed twenty-one*. Further, the State Legislatures have been asked to provide for 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 or category of persons. Similarly, in sub-Article [2] of Article 243ZJ, the duration of the term of office of the elected members of the board and its office bearers has been fixed to be five years and in sub-Article (3) thereof, a further direction has been given upon State Legislatures in the matter of enacting law relating to Co-Operative Societies regarding co-option of the member in the board of director and further provisions regarding the rights of such co-opted members have also

been made. Similarly in Article 243ZK, a further condition has been imposed that 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. In Article 243ZL, a further condition has been imposed that no board shall be suspended or kept under suspension for a period exceeding six months and has also provided various conditions under which a Board may be superseded or kept under suspension. In Article 243ZM, it is mandatorily prescribed that the account of every society should be audited within six months from the close of the financial year to which the accounts relate. Article 243ZP casts a duty upon the society to file return within the period fixed there in and there is no scope of ignoring the same. Article 243ZQ prescribes the acts which would be the offences relating to the co-operative societies and the State Legislature cannot deviate from those mandates.

12. If this Part IXB was not incorporated, the State Legislatures would have the absolute right to enact law on the above subjects according to the decision of such Legislatures whereas after the amendment, no option is given to the State Legislature to deviate from or ignore those provisions. Thus, by incorporation of Part IXB, various restrictions have been imposed relating to laws of Co-Operative Societies which have constrained the jurisdiction of the State Legislatures to enact any law relating to Co-operative Societies

on those aspects. In other words, in spite of the fact that the law relating to Co-Operative Societies is still in the List II of the 7th Schedule, without bringing the subject of Co-Operative Societies either into List I or List III, by way of this amendment, the Parliament has controlled the said power without complying with the provisions of Article 368 (2) of the Constitution by taking ratification of the majority of the State Legislatures. The object achieved by the amendment by way of incorporation of Part IXB could be easily achieved by bringing the subject of Co-Operative Societies in LIST 1 – UNION LIST or LIST III-CONCURRENT LIST but in that case, there would have been the necessity of such amendment being required to be 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 the amendment and *such amendment being required 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.* By way of the impugned amendment, instead of taking consent of the majority of the State Legislatures, by merely taking consent of the Ministers of the State, the purpose has been sought to be achieved.

13. In other words, what could not be achieved except by complying with the provisions of Article 368 (2) of the Constitution, the selfsame purpose has been sought to be achieved by the

amendment impugned in this writ-application without complying with the provisions of Article 368 (2) of the Constitution.

14. In the case of **Builders Association of India & others etc.etc. v. Union of India and others etc.etc.,** reported in **AIR 1989 SC 1371,** a Constitutional Bench [five judges] of the Supreme Court was considering whether the Constitution [46th Amendment] Act, 1982 was passed after proper ratification as required under Article 368[2] and whether the State was bound to follow Article 286 and Central Sales Tax Act while levying tax under Article 366. In the said case, in Schedule VII List II Entry No. 54, the scope was expanded. The plenary power of the State government was expanded by interfering with its exclusive power under Article 246 by the said amendment. The Supreme Court, for the purpose of considering the question inquired whether ratification process of Article 368[2] was complied with and thereafter, upheld the validity. In this connection, we may profitably record the following observation of the Supreme Court appearing in para-29 at page 1386:

> *"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."

14.1 By relying upon the aforesaid decision, Mr. Shah impressed upon us that whenever even the case of expansion of scope of a particular entry in the list is taken up for consideration, it is the duty of the Constitution Court to see that the constitutional procedures for ratification in Article 368[2] are complied with and according to him, in the case before us, the scope of Entry No. 32 of List II having been restricted by interfering with its exclusive power under Article 246 and ratification procedure prescribed in Article 368[2] not having been complied with, 97th Amendment is unconstitutional. We find that Mr. Shah is substantially correct in his submission.

15. In the case of **Kihoto Holohan v. Zachillhu and others, reported in 1992 Supp [2] Supreme Court Cases 651**, a five-judge-bench of the Supreme Court was considering whether Schedule X introduced by Constitution [52nd Amendment] Act, 1985 was constitutionally valid or not, inasmuch as para-7 of the Schedule X took away the powers of judicial review. It appears from the said

judgment that one of the questions raised before the Supreme Court was, having regard to the legislative history and evolution of the principles underlying the Tenth Schedule, Paragraph 7 thereof in terms and in effect, brought 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 attracted 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. Ultimately, in para-62 of the judgment the Supreme Court made the following observations:

> *"**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."

15.1 By relying upon the aforesaid decision, Mr. Shah rightly submitted before us that although in the said case, in effect, there was no change in the language of the articles mentioned in Clauses [a] to [e], even then, ratification envisaged under Article 368[2] proviso was required to be complied with.

16. In the case of **S.R. Bommai and others v. Union of India and others,** reported in **[1994] 3 SCC 1,** a nine-judge-bench of the Supreme Court was considering whether the presidential proclamation under Article 356 of the Constitution was subject to judicial review and if the answer was in affirmative, then, to what extent.

16.1 It appears that six different judgments were delivered. Pandian, J. was of the view that it is subject to review but in rare cases. Ahmadi, J. was of the view that only on the limited ground of *mala fide* and *vires*, the same can be subject to judicial review. On the other hand, Verma and Dayal, JJ were of the view that such interference should be very narrow. Sawant and Singh, JJ, however, held that the entire judicial review was applicable. Ramaswamy J, on the other hand, restricted His Lordship's observations that on legal *mala fide* and high irrationality, it can be reviewed and traditional

parameters and proportionality of judicial review was not applicable. Reddy and Agarwal, JJ were of the view that it is entirely subject to judicial review.

16.2 By relying upon the above decision, Mr. Shah, in our opinion, was justified in contending that we should interfere in these cases as the basic structure of federalism which was the subject matter in the case of **S.R. Bommai** (*supra*), was ignored.

17. In the case of **M. Nagaraj and others, v. Union of India and others, reported in [2006] 8 SCC 212,** challenge was whether Constitution [85th Amendment] Act, 2011 inserting Article 16[4A] was constitutionally valid. It appears that the Supreme Court upheld the constitutional validity on the ground that it complied with Width Test and the Test of Identity. By relying upon the said decision, Mr. Shah, in our opinion, was right in submitting that constitutional amendment is to be tested on its width and one has to examine the identity.

18. In the case of **I.R. Coelho [dead] by L.Rs. v. State of T.N., reported in [2007] 2 SCC 1,** a nine-judge-bench of the Supreme Court, returned its unanimous verdict through Sabharwal, CJI. In the said case, the question was whether the Laws placed under Schedule IX inserted by Article 31B were immuned from the judicial review. Sabharwal, CJI, answered the question by holding that it is not immuned and was subject to judicial review. The observations made

in para-151 at page 111 are quoted below:

> *"**151. In conclusion, we hold that:***
>
> *[i] A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of the law, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.*
>
> *[ii] The majority judgment in Kesavananda Bharati case read with Indira Gandhi case requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.*
>
> *[iii] All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.*
>
> *[iv] Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional*

adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the articles in Part III as held in Indira Gandhi case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law[s] will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide order dated 14-9-1999 in I.R. Coelho v. State of T.N.

[v] If the validity of any Ninth Schedule law was already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

[vi] Action taken and transaction finalized as a result of the impugned Acts shall not be open to challenge."

18.1 By relying upon the said decision, Mr. Shah, in our view, was right in submitting that the contention of Mr. Champaneri or Mr. Jani that we cannot look into the question whether formalities of ratification have been complied with or not or whether basic structure of the Constitution has been hit is not tenable.

19. Mr. Shah also placed strong reliance upon the decision of the

Supreme Court in the case of **D.C. Wadhwa v. State of Bihar, reported in [1987] 1 SCC 625.** In the said decision, the question was whether by promulgating the ordinances from time to time on a massive scale in a routine manner under Article 213 by Governor and without replacing them by Act of Legislature, the constitutional provisions were infringed. In this connection, Mr. Shah strongly placed reliance upon para-7 at page 393 of the said decision, wherein, it was observed by Bhagawati, CJI that a constitutional authority cannot do indirectly what it is not permitted to directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, His Lordship proceeded, such provision cannot be allowed to be defeated by adoption of any subterfuge and that it would be clearly a fraud on the constitutional provision.

19.1 By relying upon the said decision, Mr. Shah strenuously contended that the object of the amendment before us is to overcome the provision contained in Article 368[2] by taking ratification of majority of the State Legislatures and thus, we should strike down the said provision.

20. We also find substance in the contentions of Mr. Shah that by the amendment impugned in this writ-application, one of the basic structures of the Constitution, viz. the principles of federalism has been affected. There is no dispute that federalism is one of the basic structure of our Constitution. Once the subject of Co-Operative

Societies is in the List II of the 7th Schedule, by depriving the State Legislatures of their free exercise of right to enact on the said subject and by curtailment of their right over the subject matter to abide by the newly enacted provision of the Constitution without following the requirement of ratification as provided in Article 368(2), the doctrine of federalism which is one of the basic features of the Constitution has been infringed.

21. At this stage, we may profitably refer to the following observations of the nine-bench-decision of the Supreme Court in the case of **I.R. Coelho [dead] by L.Rs. v. State of T.N. (supra)**:-

> *"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 the Parliament. It is on this premise that clauses 4 and 5 inserted in Article 368 by 42nd Amendment were struck down in Minerva Mills case."*

22. Thus, the amendment is violating the basic structure of the Constitution so long as the subject of "Co-Operative Societies" is in the List II of the 7th Schedule and at the same time, the provisions of Article 368(2) has not been complied with. The Constitution has not permitted curtailment of the power of the State Legislatures over the

subject mentioned in List II without taking recourse to Article 368 (2).

23. We now propose to deal with the decisions cited by Mr. Champaneri, the learned Assistant Solicitor General of India, appearing for the Union of India.

24. In the case of **Sasanka vs. Union of India** reported in **AIR 1981 SC 522**, the question that had arisen before a five-judge-bench of the Supreme Court was whether the provisions of Chapter IIB of the West Bengal Land Reforms -Act, 1955 (Act X of 1956) inserted by the West Bengal Land Reforms (Amendment) Act, 1971 (President's Act III of 1971), and replaced by the West Bengal Land Reforms (Amendment) Act, 1972 (Act XII of l972) with retrospective effect from February 12, 1971, which provide for a fixation of ceiling on agricultural holdings and for matters ancillary thereto, were violative of the second provision to Art. 31A (1) of the Constitution. In that context, the Supreme Court in paragraph 35 of the judgment made the following observations upon which Mr. Champaneri has placed strong reliance:

> *"35. As regards the submission that Parliament cannot in exercise of its constituent power under Art. 368 validate a State law, it seems to us that the entire submission proceeds on a misconception arising from failure to distinguish between a law made in exercise of the legislative power and the law made in exercise of the constituent power. When Art. 31-B was*

introduced in the Constitution by the Constitution (First Amendment) Act 1951, it validated retrospectively 13 Acts specified in the Ninth Schedule, which, but for this provision, were liable to be impugned under Art. 13 (2).Article 31-B conferred constitutional immunity to such laws (all being enactments of State Legislatures) and Parliament alone could have done so by inserting the said Article in the Constitution in exercise of its constituent power under Art. 368. In substance and reality it was a constitutional device employed to protect State laws from becoming void under Art. 13 (2). It will appear clear that the language in Art. 31-B is virtually lifted from Art. 13 (1), and (2), while Art. 13 (2) invalidates legislation, which takes away or abridges the rights conferred by Part III, ***Art. 31-B extends protective umbrella to such legislation if it is included in Ninth Schedule and, therefore, the Courts will have no power to go into the constitutionality of the enactment as included in the Ninth Schedule except on the ground of want of legislative competence.****"*

(Emphasis supplied by us).

24.1 As it appears from the portion highlighted by us, the question involved in that matter regarding the validity of the State Laws included in the Ninth Schedule cannot have any application to the facts of the present case. Regarding constituent power under Article 368, we have already relied upon the observations of the nine-bench-judgment of the Supreme Court in the case of **I.R. Coelho [dead] by L.Rs. v. State of T.N. (supra)** holding that *by addition of the words 'constituent power' in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly.* We,

thus, find that the above decision relied upon by Mr. Champaneri does not help his client in any way.

25. Mr. Champaneri also relied upon paragraphs 108 to 122 of the judgment of the Supreme Court in the case of **Ashoka Kumar Thakur v. Union of India** reported in **(2008) 6 SCC 1**. In those paragraphs, the Supreme Court dealt with the question whether the 93rd amendment of the Constitution was against the basic structure of the Constitution or not. By the Constitution [93rd amendment] Act, 2005, clause (5) was added to Article 15 of the Constitution which is an enabling provisions which states that nothing in Article 15 or in sub-clause (g) of Clause (I) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State. In such a case it was held by the Supreme Court that the said amendment does not violate the basic structure of the Constitution so far as it relates to aided educational institutions. The Supreme Court further held that the question whether reservation could be made for SCs, STs or SEBCs in private educational institutions on the basis of the Constitution [93rd amendment] or whether reservation could be given in such institutions or whether any such legislation would be violative of Article 19(1)(g) or Article 14

of the Constitution or whether the said amendment which enables the State Legislatures or Parliament to make such legislation are all questions to be decided in a properly constituted lis between the affected parties and others who support such legislation.

25.1 As pointed out above, in dealing with a case where the Supreme Court was faced with the question of reservation for SEBCs in central educational institutions, the contention that an amendment that inserted a fundamental right is violative of the basic structure of the Constitution was found to be untenable. We fail to appreciate how the decision is relevant for our purpose where the question is without taking recourse to the specific provision of Article 368(2) requiring ratifications of the majority State Legislatures whether the power of the State Legislature in enacting law relating to Co-operative Societies can be curtailed by the Parliament. We have already pointed out that a constitutional authority cannot do indirectly what it is not permitted to do directly.

26. Thus, the decisions cited by Mr. Champaneri do not help his client.

27. We, therefore, allow this Public Interest Litigation by declaring that the Constitution [97th amendment] Act, 2011 inserting part IXB containing Articles 243ZH to 243ZT is *ultra vires* the Constitution of India for not taking recourse to Article 368(2) of the Constitution

providing for ratification by the majority of the State Legislatures. This order, however, will not affect other parts of the Constitution [97th amendment] Act, 2011. In the facts and circumstances, there will be no order as to costs.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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FURTHER ORDER:

After this judgment was pronounced, Mr. Champaneri, the learned Assistant Solicitor General of India appearing on behalf of the Union of India prays for stay of operation of our judgment.

In view of what has been stated above, we find no reason to stay our judgment. The prayer is refused. However, certified copy be given by 24th April 2013, if applied for.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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