IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

C.M.P.No. of 2020

in

W.P. No.9147 of 2020

Big Kanchipuram Cooperative Town Bank Ltd (No.3),
Represented by its President,
No.90-91, Annai Indra Gandhi Salai,
Kanchipuram. …Petitioner/Petitioner

-Vs-

1. Union of India
   Represented by its
   Ministry of Law & Justice,
   4th Floor, A-Wing,
   Shastri Bhawan, New Delhi-110 001.

2. Reserve Bank of India,
   16, Rajaji Salai, Fort Glacis,
   Chennai, Tamil Nadu – 600001 ... Respondents/Respondents

AFFIDAVIT FILED BY THE PETITIONER

I, V. Balaji, aged 38 years, President, Big Kanchipuram Cooperative Town Bank Ltd (No.3), having office at No.90-91, Annai Indra Gandhi Salai, Kanchipuram, am the authorised signatory of the Petitioner Cooperative bank herein and as such am well aware of the facts of this case and am competent to swear this affidavit. I solemnly state and affirm as follows:

1. I state that the Petitioner herein, is Big Kanchipuram Cooperative Town Bank Ltd (No.3), Kanchipuram, having its registered office at No.90-91, Annai Indra Gandhi Salai, Kanchipuram. I state that the Petitioner herein is the first cooperative bank started in India and is one of its kind in the Kanchipuram district. I state that as soon as the Cooperative Creditor Societies Act, 1904 was enacted, the then Madras Governor Mr. P. Rajagopalachari, as the first registrar to organise the cooperative movement, who in turn choose Kanchipuram to start such institution. I state that at present, the bank is serving to 27014 members and 28537 customers with a working capital of Rs. 139.73 crores and deposits outstanding Rs. 137.84 crores. I state that the Petitioner is issuing many kinds of loan facilities to the poor peoples and middle class people in Kanchipuram town. I state that at present, the bank is being run profitably.

2. I state that Respondent No. 1 herein is the Union of India, represented by its Ministry of Law and Justice, which has issued the Banking Regulation (Amendment) Act, 2020 on 29th September, 2020.

3. I state that Respondent No. 2 herein is the Reserve Bank of India, having its office at the address mentioned supra. I state that the RBI is a necessary and proper party to the instant proceedings as the Banking Regulation (Amendment) Act, 2020 extends power and control of the RBI to cooperative society banks, which is beyond the legislative competence of the Parliament and consequently, the Central Government vide the Act.

4. I state that the instant writ petition is filed challenging the constitutional validity of sections 4(A), 4(F), 4(G), 4(J), 4(L), 4(M) and 4(Q) (hereinafter collectively referred to as the "**impugned sections**") of the Banking Regulation Amendment Act, 2020, (hereinafter referred to as the "**Amendment Act**") promulgated on 29th September, 2020 as being ultra vires the Constitution of India, as the Act deals with matters beyond the legislative competence of the Parliament. It is submitted that vide the impugned sections Amendment Act deals with matters which are within the exclusive domain of the State List, i.e. List II of Schedule VII, over which the Parliament has no legislative competence under Article 246 of the Constitution of India, as a result of which, the Amendment Act could not have been promulgated per Article 123(3) of the Constitution of India. Accordingly, it is submitted that the impugned sections in the Amendment Act are violative of Articles 246 r/w Article 123(3) of the Constitution of India, as it legislates on matters concerning Entry 32, List II, Schedule VII of the Constitution of India. Further, it is submitted that the Amendment Act is contrary to the judgment of a Constitution Bench of the Hon'ble Supreme Court in ***Pandurang Ganpatii Chaugule v. Vishwasrao Patil Murgud Sahakari Bank Limited***, Civil Appeal No. 5674 OF 2009 (hereinafter referred to as "Pandurang").

Banking Regulation Act, 1949 in Relation to its Applicability to Cooperative Banks

5. I state that the Banking Regulation Act 1949 was originally passed as the Banking Companies Act, 1949, which sought to consolidate and amend the law relating to banking companies in India. With effect from 1st March, 1966, the name of the Act has been changed to the Banking Regulation Act, 1949. The purpose of the Act is to regulate the functioning of banking companies and corporations. I state that the said Act was passed by the Parliament, in exercise of the powers conferred upon it under Entries 38, 43 and 45 of List I. Entry 38 of List I, deals with the "Reserve Bank of India", whereas Entry 43 of List I deals with "incorporation, regulation and winding up of trading corporations, including

banking, insurance and financial corporations but not including cooperative societies". Entry 45 of List I deals with "banking".

6. I state that the Act was amended by the Banking Laws (Application to Cooperative Societies) Act, 1965, by virtue of which, the Banking Regulation Act, 1949 was made applicable to cooperative banks, with modifications. Vide the said Amendment, a new Part V was added to the Banking Regulation Act, 1949, which consists of section 56. Section 56 of the Act, provides for the modifications which are to be given effect to, with respect to all the other sections of the Banking Regulation Act, in its application to Cooperative banks. For example, section 56(g) (pre-Amendment Act) provides for omission of section 10, 10A, 10B, 10BB, 10C and 10D, in relation to the application of the Act to cooperative banks. Thus, section 56 is a complete code in itself in relation to application of the Act to cooperative banks, as it enacts the entire Banking Regulation Act by reference with modifications, as it must apply to cooperative banks.

7. I am advised to state that the reason for such separate enactment for the purpose of cooperative banks arises from the different legislative competences on different matters, in relation to cooperative banks. Whereas in respect of banking matters, the Union List provides for banking in Entry 45, in relation to management of trading companies, including cooperative societies, the Union List in Entry 43 specifically excludes cooperative societies, which is instead provided for in Entry 32 of the State List. Consequently, with respect to cooperative banks, different aspects of these banks are required to be handled by different legislative bodies. I am advised to state that this position in law, in relation to cooperative banks, Entry 43, 45 of Union List and Entry 32 of State List, has been explained by the Hon'ble Supreme Court of India in its recent decision in *Pandurang,* wherein, the Hon'ble Supreme Court, observed as follows:

> *The cooperative banks run by the cooperative societies registered under the State legislation with respect to the aspects of 'incorporation, regulation and winding up', in particular, with respect to the matters which are outside the purview of Entry 45 of List I of the Seventh Schedule of the Constitution of India, are governed by the said legislation relatable to Entry 32 of List II of the Seventh Schedule of the Constitution of India.*

8. From a mere perusal of the aforesaid observation, it is clear that the Banking Regulation Act, 1949, enacted under the powers conferred in the Union List, cannot provide for matters provided for in Entry 32 of the State List, i.e.

incorporation, regulation and winding up, in relation to cooperative banks. In this regard, it is relevant to note that insofar as cooperative banks are concerned, the Hon'ble Supreme Court in *Pandurang,* as recognized the provisions in section 56 to be a balance between the powers envisaged for the State and the Union under Entry 45 of List I and Entry 32 of List II. Noting section 56 of the Act, the Hon'ble Supreme Court in *Pandurang*, observed:

> *"…amendments were incorporated by a different Chapter V by way of various provisions incorporated in Section 56 as it was necessary to retain certain provisions in the existing form as they applied to other banks and companies considering that the amendments and certain modifications which were necessary and were extensively required. The provisions in amended form in their application to the cooperative banks were separately provided. When the BR Act, 1949 was applied to the co-operative bank, all the provisions under the Act concerning 'incorporation, regulation and winding up' were omitted insofar as the Act of 1949 is applied to cooperative banks, though they continue to exist in the Act for other entities but not concerning cooperative banks.* ***It was mentioned in the advice given to the President under Article 117 that these matters were specifically not covered under Entry 45 of List I of the Seventh Schedule and formed the subject matter of Entry 32 of List II.*** *Thus, when we apply the provisions of the Act of 1949 to a cooperative bank, the definition of 'banking company' has to be read to include a co-operative bank. Section 56(a) becomes part of Section 5(c), although it is located in a separate place. As only Part V of the Act applies to the co-operative banks, Section 56(a) amends the definition of the 'banking company,' and it becomes an integral part of Section 5(c), as the full effect is required to be given."*

9. I state that the Amendment Act, as per the press statement of the Ministry of Finance, is *to protect the interests of depositors and strengthen cooperative banks by improving governance and oversight by extending powers already available with RBI in respect of other banks to Co-operative Banks as well for sound banking regulation, and by ensuring professionalism and enabling their access to capital.* I am advised to state that to achieve this purpose, vide the Amendment Act, the impugned sections have been introduced to amend section 56 of the Banking Regulation Act, all of which are beyond the legislative competence of the Parliament and are consequently void under Article 123(3) of the Constitution of India.

Unconstitutionality of Section 4(A) of the Amendment Act

I am advised to state that section 4(A) of the Amendment Act substitutes the words "*Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act*" for the words "*The provisions of this Act, as in force for the time being*" in section 56 of the Banking Regulation Act, 1949. I am advised to state that as a result of the said section 4(A) of the Amendment Act, provisions of section 56 of the Banking Regulation Act, post amendment would apply notwithstanding anything contained in any other law for the time being in force. A mere perusal of section 56 of the Banking Regulation Act, as amended by the Amendment Act, deals with matters pertaining to "incorporation, regulation and winding up" in addition to matters relating to "banking". I am advised to state that insofar as the provisions relating to "banking" are concerned, the exclusive domain for legislation lies with the Parliament whereas, for matters pertaining to "incorporation, regulation and winding up", the exclusive domain for legislation lies with the State. Consequently, it is submitted that insofar as the *non obstante* clause introduced vide section 4(A) in the Amendment Act, the effect of the said provisions would be to supersede provisions made in the State Legislation, i.e. the Cooperative Societies Act in relation to "incorporation, regulation and winding up", as a result of which, the Central legislation would be colourably enforced on aspects which are exclusively covered by the State Legislation, for which reason alone section 4(A) of the Amendment Act ought to be found unconstitutional for want of legislative competence, as matters pertaining to Entry 32, List II are also superseded by the impugned section 4(A) of the Amendment Act.

Unconstitutionality of Section 4(F) of the Amendment Act, 2020

10. I am advised to state that vide section 4(F) of the Amendment Act, section 56(fi), section 56(fii) and section 56(g) of the Banking Regulation Act, 1949 are omitted. Prior to the amendment, section 56(fi) provides for certain modifications to section 8 of the Banking Regulation Act, 1949, in relation to its application to cooperative banks. Similarly, section 56(fii) provides for certain modifications to section 9 of the Banking Regulation Act, 1949, in relation to its application to cooperative banks. Similarly, section 56(g) of the Banking Regulation Act, 1949, prior to the amendment, provided that sections 10, 10A, 10B, 10BB, 10C and 10D of the Banking Regulation Act, 1949, would not apply to cooperative banks. I am advised to state that the modifications made vide section 56 to the Banking Regulation Act, 1949, in relation to the applicability of the said Act to cooperative banks, have been withdrawn by the impugned section 4(F) of the Amendment Act. By virtue of section 4(F) of the Amendment Act, sections 56(fi), section 56(fii) and section 56(g), stand omitted, as a result of which, section 8, 9, 10,

10A, 10B, 10BB, 10C and 10D as they exist in the Banking Regulation Act, 1949, would directly become applicable to cooperative banks.

11. I state that with the applicability of sections 10, 10A, 10B, 10BB, 10C and 10D of the Banking Regulation Act, 1949 to cooperative bank, essential aspects of management of cooperative banks, which were previously governed by the concerned state legislations, shall now be governed by the Banking Regulation Act. I am advised to state that section 10 deals with the prohibition of employment of managing agents and restrictions on certain forms of employment. Section 10A of the Act deals with the obligation to the board of directors to include persons with professional or other experience. Section 10B of the Act deals with the obligation of the banks to be managed by whole time Chairman. Section 10BB of the Act deals with the power of the Reserve Bank to appoint a Chairman to the Board of Directors who may be appointed on a whole-time basis or a Managing Director for the banking company. Section 10C of the Act deals with the requirement for the chairman and certain Directors to hold qualification shares. Section 10D of the Act deals with the overriding of all other laws, contracts, etc by sections 10A and 10B of the Act. I am advised to state that as a result of the section 4(F) of the Amendment Act, section 10, 10A, 10B, 10BB, 10C and 10D of the Act, which deal with management of these companies, have been made applicable to cooperative banks.

12. I state that management of cooperative societies, including cooperative banks, being matters which can be legislated under Entry 32, List II and as such, cannot be governed by sections 10, 10A, 10B, 10BB, 10C and 10D of the Banking Regulation Act, 1949. I am advised to state that the effect of section 4(F) of the Amendment Act is to make applicable to cooperative banks, section 10, 10A, 10B, 10BB, 10C and 10D, which are enacted in exercise of powers under Entries 43, 45 and 38 of the Constitution of India. Consequently, it is submitted that section 4(F) of the Amendment Act, which makes applicable the aforesaid sections relating to management to cooperative banks, is without legislative competence and as such, deserves to held as null, void and unconstitutional.

Unconstitutionality of Section 4(G) of the Amendment Act, 2020

13. I am advised to state that vide section 4(G) of the Amendment Act, section 56(i) of the Banking Regulation Act, 1949 stands amended. Prior to the amendment, section 56(i) excluded the applicability of sections 12, 12A, 13, 15, 16 and 17 of the Banking Regulation Act, 1949 to cooperative banks. By virtue of section 4(G) of the Amendment Act, section 56(i) has been amended and sections 12A, 13, 15, 16 and 17 of the Act have been made applicable to cooperative banks.

Further, section 12 of the Act has been modified, insofar as its application to cooperative banks is concerned. Section 12 deals with access to capital, i.e. regulation of paid-up capital, subscribed capital and authorized capital and voting rights of shareholders. Section 12A regulates acquisition of shares or voting rights in the banking company. Section 13 restricts and prohibits commission, brokerage, discount, etc. on sale of shares. Section 15 deals with restrictions as to payment of dividend. Section 16 prohibits having of directors and prescribes norms for management of the banking company. Section 17 deals with the reserve fund that needs to be maintained by a bank.

14. I am advised to state that as a result of section 4(G) of the Amendment Act, provisions which were previously excluded in their application to cooperative banks on account of Entry 32, List II, have now been made applicable, thereby making matters concerning incorporation, regulation and winding up of cooperative banks, come within the purview of the Banking Regulation Act, passed under Entries of the Union List, which does not have any competence over the said subject matters. I am advised to state that section 12, dealing with share capital and access to funds, is an essential facet of the very incorporation of the cooperative bank and regulations with respect to such terms and norms of incorporation directly impinge upon the legislative competence of the State under Entry 32 of List II, for which reason alone, section 4(G) of the Amendment Act deserves to be held unconstitutional for lack of legislative competence. Further, it is submitted that section 12A, dealing with voting rights concerns the management of the cooperative banks, for which, regulations can only be prescribed under Entry 32 of List II. Consequently, section 4(G), which provides for application of section 12A in connection with cooperative banks, seeks to introduce laws made under Entry 43, 45 and 38 of List I to matters falling within Entry 32 of List II, for which reason also, section 4(G) of the Amendment Act is without legislative competence. Further, section 16 of the Act provides for restrictions on persons who can be appointed as directors in the cooperative banks, which, beyond an iota of doubt, is a matter concerning management of the cooperative bank, on which, regulations can be made under Entry 32 of List II only. For this reason as well, section 4(G) of the Amendment Act, which makes section 16 applicable to cooperative banks, should be found unconstitutional.

Unconstitutionality of Section 4(J) of the Amendment Act

15. I am advised to state that vide section 4(J) of the Amendment Act, section 56(r), section 56 (ri) and section 56(sa) of the Banking Regulation Act, 1949 stand omitted. Prior to the amendment, section 56(r) omitted section 25 of the Banking Regulation Act, 1949, in its applicability to cooperative banks. Section 56(ri)

made modifications to section 26, in their application to cooperative banks and section 56(sa) provided for an different audit mechanism for cooperative banks, by substituting section 30 with a different mechanism, insofar as cooperative banks were concerned. By virtue of section 4(J) of the Amendment Act, with sections 56(r), 56(ri) and 56(sa) having been repealed, section 25, 26 and 30 of the Banking Regulation Act, have been made applicable to cooperative banks. The exclusions and modifications, which had been previously given to cooperative banks, in deference to the difference in legislative competence of the Parliament in relation to cooperative banks have been taken away, as a result of which provisions enacted under Entry 43, 45 and 38 for management of commercial banks, have been extended to cooperative banks, in respect of which matters concerning management can be provided for under Entry 32, List II only.

16. I am advised to state that prior to section 4(J) of the Amendment Act, the RBI under section 56(sa) was only competent to pass orders for additional audit, without prejudice to any other law. However, by virtue of section 4(J) of the Amendment Act, section 30 of the Banking Regulation Act, has been made directly applicable to cooperative banks, as a result of which cooperative banks have been put at par with commercial banks in relation to audit obligations and extensive powers in this regard have been conferred on the RBI, which by law, cannot have any supervisory powers on non-banking aspects of a cooperative society, including on matters of audit, which essentially is a facet of management itself. For this reason alone, I am advised to state that section 4(J) of the Amendment Act, 2020 is unconstitutional and invalid for lack of legislative competence, as it enables by enactment through reference, the application of section 30 to cooperative banks, which in respects of audit, can only be governed by a state legislation under Entry 32 and not under a central legislation like the Banking Regulation Act.

Unconstitutionality of Section 4(L) of the Amendment Act, 2020

17. I am advised to state that vide section 4(L) of the Amendment Act, section 56(u), section 56 (v), section 56(x), section 56(y), section 56(z) and section 56(za) of the Banking Regulation Act, 1949 stand omitted. Prior to the amendment, section 56(u) provided for the omission of sections 32 to 34 in the application of the Banking Regulation Act, in connection with cooperative banks. Section 56(v) provided for the exclusion of section 34A(3) to be omitted in connection with the application of the Banking Regulation Act, in connection with cooperative banks. Section 56(x) provided for modification of certain words in section 35A of the Banking Regulation Act, in connection with cooperative banks. Section 56(y)

provided for the ommission of section 35B, in relation to the application of the Banking Regulation Act, to cooperative banks. Section 56(z) provided for certain modifications to section 36 in connection to its application to cooperative banks. Section 56(za), modifications were made to section 36A of the Banking Regulation Act, in connection with cooperative banks.

18. As a result of section 4(L) of the Amendment Act, sections 32 to 34, which were previously excluded from application in connection to cooperative banks have now been made applicable. Section 32 deals with copies of balance-sheets and accounts to be sent to Registrar of Companies, whereas section 33 deals with obligations to display of audited balance-sheet by companies incorporated outside India. Section 34 provides that the accounting practices prescribed under the Banking Regulation Act shall be prospective. I am advised to state that as a result of section 4(L) of the Amendment Act, new obligations, pertaining to the accounts and consequently, the management of cooperative banks has been made applicable. I state that such obligations cannot be imposed on cooperative banks by a central legislation, as it pertains to the very management of the cooperative society, which can only be dealt with under Entry 32, List II.

19. Similarly, as a result of section 4(L), section 56(y) of the Banking Regulation Act has been omitted, consequent to which section 35B of the Banking Regulation Act has been made applicable to cooperative banks. I state that section 35B of the Act which provides for certain provisions relating to appointments of Managing Directors, etc in banking companies. I state that the said provision also requires the cooperative bank to take prior approval of the RBI in relation to matters concerning appointment of managing directors, etc in banking companies. I am advised to state that these provisions amount to restrictions on the management rights of cooperative banks, which restrictions can only be imposed under Entry 32, List II, failing which, they are ultra vires.

20. In light of the above, it is most humbly submitted that section 4(L) of the Amendment Act is unconstitutional and ultra vires, for having been passed without legislative competence.

Unconstitutionality of Section 4(M) of the Amendment Act, 2020

21. I am advised to state that vide section 4(M) of the Amendment Act, section 56(zaa) of the Banking Regulation Act stands amended. Prior to the amendment, sectin 56(zaa) provided for certain modifications to section 36AAA in its application to cooperative societies. By virtue of the amendment in section 56(zaa) vide section 4(M) of the Amendment Act, the applicability of section 36AAA is extended to intra-state cooperative banks, in addition to multi-state

cooperative banks, as a result of which the power to supersede the board of the cooperative bank is conferred upon the RBI, even in relation to local and intra-state cooperative banks, which power as such is in derogation of the powers conferred on the Registrar of Cooperative Societies of the State, who is merely given a consultative role in proviso to section 36AAA(1) as introduced by section 4(M) of the Amendment Act, 2020.

22. I state that as a result of the said amendment, powers to supersede the board of a cooperative bank, which is an essential facet of the power to regulate its management, is conferred on the RBI, for which, no powers vest with the Parliament, but can only be done under Entry 32 of List II. Consequently, it is submitted that section 4(M) of the Amendment Act is unconstitutional for want of legislative competence.

Unconstitutionality of Section 4(Q) of the Amendment Act

23. I am advised to state that vide section 4(Q) of the Amendment Act, section 56(zg) of the Banking Regulation Act stands amended. Prior to the amendment, section 49B and 49C of the Banking Regulation Act were not applicable to cooperative banks. Section 49C deals with the power to amend the MOA of a banking company. I state that by virtue of the amendment in section 4(Q) of the Amendment Act, section 49C has been made applicable to cooperative banks, as a result of which, amendments to the MOA, which is also a facet of incorporation and management, cannot be undertaken without consent from the RBI. Consequently, it is submitted that an essential facet of management and regulation is being dealt with, vide section 4(Q) of the Amendment Act, for which, the Parliament has no legislative competence, being within the exclusive domain of Entry 32, List II. Consequently, it is submitted that section 4(Q) of the Amendment Act is unconstitutional and ultra vires.

24. I state that from the foregoing discussion and for the grounds stated herein below, sections 4(A), 4(F), 4(G), 4(J), 4(L), 4(M) and 4(Q) of the Amendment Act are without legislative competence and consequently, null, void and unconstitutional. The grounds for the same are as stated herein below:

25. **GROUNDS**

i. That the constitutional validity of legislation can be challenged on three grounds, namely: (i) legislative competence of the legislative body passing such enactment to deal with such subject matter; (ii) violation of any provision of the Constitution of India and (iii) violation of the doctrine of basic structure. It is submitted that the impugned legislations are without legislative competence and are also contrary to principles of federalism, which is a basic

feature of the Constitution of India, as per the judgment of the Hon'ble Supreme Court in **S.R. Bommai v Union of India**, (1994) 3 SCC 1.

ii. That the impugned sections are violative of Article 246 of the Constitution of India as the Amendment Act, passed in furtherance to entries 38, 43, and 45 of List I of Schedule 7 deal with matters pertaining to Entry 32 of List 2 of Schedule 7, which is within the exclusive domain of state legislatures, on which the Parliament cannot enact any legislation.

iii. That entries 38, 43, 45 of List I, Schedule 7 and entry 32 of List II, Schedule 7 of the Constitution of India provides as follows:

> *"*** List I*
>
> *43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co operative societies.*
>
> *45. Banking.*
>
> ****List II*
>
> *32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies."*

iv. That Article 246 distributes legislative powers between the Union and the State regarding three lists in the Seventh Schedule. Under Article 246(1), the Parliament has exclusive power to make laws in respect of 97 matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). As per Article 246(3), the State legislature has legislative powers to make laws with respect to 66 matters enumerated in List II. 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 Article 246(1), i.e., the exclusive power of the Parliament to legislate concerning matters enumerated in List I.

v. That a Constitution Bench of the Hon'ble Supreme Court of India, in *Pandurang,* while dealing with legislative competence under Entries 43, 45, 38 of List 1 vis a vis Entry 32 of List II and the legislative history of section 56 of the Banking Regulation Act, which introduced provisions for applicability of the Banking Regulation Act to cooperative banks, made the following observations:

24. The notes on clauses explain in detail the various provisions of the Bill." (emphasis supplied) The President's recommendation under Article 117 of the Constitution contained in appended Notes on clauses is also significant. The State or apex cooperative banks, all central co operative banks, and primary nonagricultural credit societies, which have paidup capital and reserves of a nominal value of Rs.1 lakh or more, were to be deemed to be cooperative banks. Consequential change in the qualifications of directors was proposed to be made. Clause 6 provided to keep reserve at 3 per cent for apex cooperative banks. It was proposed to control cooperative banks effectively under the provisions of the Reserve Bank of India Act and Banking Companies Act. It would not be necessary to make separate provisions concerning them, as such the Banking Companies Act was to be renamed as Banking Regulation Act, and it would not be confined any longer to companies incorporated under the Companies Act carrying on the business of banking.

25. What is of utmost significance is that extensive amendments and omissions of several provisions of the BR Act, 1949 became necessary concerning matters covered under Entry 32 of List II; as such various amendments were separately reflected in a separate chapter, amendments were incorporated under various provisions of the Act in Parts IIA, III and IIIA. The provisions relatable directly or indirectly to incorporation, management and winding up of cooperative banks were proposed to be omitted as these Parts or provisions were not in pith and substance within the scope of any entry in the Central or Concurrent List of subjects in the Seventh Schedule of the Constitution of India. Following is the relevant extract of the Notes appended to President's recommendation under Article 117 of the Constitution of India:

> *"According to the scheme of control as it is envisaged in the Reserve Bank of India Act and in the Banking Companies Act, (a) all the State or apex cooperative banks, (b) all central cooperative banks and (c) such of the primary nonagricultural credit societies, including in particular urban co operative banks, as have paidup capital and reserves of a nominal value of Rs. 1 lakh or more, will be deemed to be cooperative banks. The definition of the expression "cooperative bank" will exclude (a) all primary agricultural credit societies, whatever the nominal value of their paidup capital may be, (b) primary nonagricultural credit societies with paidup capital and reserves of a nominal value of less than*

rupees one lakh, even though they may be accepting deposits from nonmembers and (c) all other cooperative societies which do not obtain, or may hereafter cease to obtain, deposits from non members.

Clauses 8 and 9 provide for the modification of the definition of (a) financial institutions and (b) non banking insitutions for the purposes of Chapter IIIB of the Reserve Bank of India Act. It is proposed that

(a) all cooperative banks, (b) all agricultural credit societies and (c) all primary nonagricultural credit societies which are not co-operative banks should be excluded from the scope of the statutory provisions relating to the Reserve Bank's control over the loan investment or other allied policies of financial and nonbanking institutions. Co operative banks will be effectively controlled in accordance with other provisions which are being made for this purpose in the Reserve Bank of India Act and the Banking Companies Act and it will not, therefore, be necessary to make any separate provision in regard to them. Agricultural credit societies have been excluded generally from the scope of the various provisions of the present Bill. The working funds and turnover of primary non agricultural credit societies which are not co operative banks are relatively insignificant, with the result that the trouble or expense involved in controlling their loans or advances or investment policies may not be worthwhile.

Clauses 10 and 11.— Chapter III provides for the amendments necessary to Banking Companies Act. Clauses 10 and 11 seek to alter the description of this Act and to make certain consequential changes in the long title and the preamble. The Act, it is proposed, should be known in future as the Banking Regulation Act, 1949. This will be appropriate, as its application will not be confined any longer to companies incorporated under the Companies Act and carrying on the business of banking.

Parts IIA, III and IIIA and such of the provisions in the other Parts of the Act as are relatable either directly or indirectly to the incorporation, management and winding up of cooperative banks are proposed to be omitted, as these Parts or provisions are not in pith and substance within the scope of any entry in the Central or

Concurrent List of subjects in the Seventh Schedule to the Constitution."

…

44. Entry 43 of List I of the Seventh Schedule of the Constitution of India has been pressed into service on behalf of appellants. It confers upon the Parliament the competence to pass the law pertaining to 'incorporation, regulation and winding up' of the trading corporation, more particularly, a banking corporation. However, cooperative societies are expressly excluded from the purview of the Parliament's competence. No doubt about it that in Entry 43 of List I 'incorporation, regulation and winding up' of the cooperative societies have been kept out of the purview of the Union List by specifically excluding the cooperative societies, otherwise, they would have been included for 'incorporation, regulation and winding up' in Entry 43 of List I. The terms "incorporation, regulation and winding up of co operative societies" were reserved as State subjects under Entry 32 of List II, it was so omitted from List 43 of List I.…

Entry 38 of the Government of India Act was reenacted as 'banking' in Entry 45 of List I, while Entry 33 was bifurcated in Entries 43 and 44. Learned Counsel further argued that up to 1965, the primary entity which was regulated by the Parliament was a company that found a place in Entry 43. Thus, both in its function, i.e., banking and as an entity, fell in List I (banking under Entry 45 and company under Entry 43). Therefore, it was within the control of the Parliament. Up to 1965, Banking Companies Act, 1949, only dealt with a juristic entity called banking companies. Then from the Preamble, the word "company" was omitted. The banking corporation was governed by the State Bank of India Act, 1955. Thus, the question of regulating the banking business of an entity outside the purview of List I never arose. In 1965, the Government enacted Banking Laws (Application to Cooperative Societies Act, 1965 (Act No.23 of 1965) and extended the provisions of Banking Companies Act, 1949, and Reserve Bank of India Act to cooperative banks. Thus, learned counsel urged that the Statement of Objects and Reasons of the said Amendment Act was only to regulate relatable Entry 45 and not to regulate the co-operative societies. The provisions relatable either directly or indirectly to 'incorporation, management and winding up' of cooperative banks were omitted as they were not covered under Entry 45 of List I.

The provisions in amended form in their application to the co operative banks were separately provided. When the BR Act, 1949 was applied to the cooperative bank, all the provisions under the Act concerning 'incorporation, regulation and winding up' were omitted insofar as the Act of 1949 is applied to cooperative banks, though they continue to exist in the Act for other entities but not concerning cooperative banks. It was mentioned in the advice given to the President under Article 117 that these matters were specifically not covered under Entry 45 of List I of the Seventh Schedule and formed the subjectmatter of Entry 32 of List II. Thus, when we apply the provisions of the Act of 1949 to a cooperative bank, the definition of 'banking company' has to be read to include a co-operative bank. Section 56(a) becomes part of Section 5(c), although it is located in a separate place. As only Part V of the Act applies to the co-operative banks, Section 56(a) amends the definition of the 'banking company,' and it becomes an integral part of Section 5(c), as the full effect is required to be given.

vi. That the Hon'ble Supreme Court of India in *Pandurang,* approved the decisions of the Hon'ble Punjab and Haryana High Court in ***Sant Sadhu Singh v State Of Punjab***, AIR 1970 P H 528 and the Hon'ble Bombay High Court in ***Nagpur District Central v. Divisional Joint Registrar*****,** AIR 1971 Bom 365, wherein, it was held that aspects of shareholding, appointment of directors and management of a cooperative bank would fall under Entry 32, List II and not Entry 45, List I. The Hon'ble Supreme Court of India in *Pandurang,* made the following observations:

66…In Greater Bombay Coop. Bank Ltd. (supra), the Court relied upon the decisions in Sant Sadhu Singh v. State of Punjab37, and Nagpur District Central Cooperative Bank Ltd. v. Divisional Joint Registrar, Cooperative Societies38. In Sant Sadhu Singh (supra), the amendment made to the Punjab Cooperative Societies Act, 1961, which curtailed the rights and powers of the shareholders in managing the cooperative society, was under challenge. Thus, the question involved was related to the management aspect of the bank governed by the Cooperative Societies Act for which State had the exclusive legislative competence under Entry 32 of List II. Whereas in Nagpur District Central Cooperative Bank Ltd. (supra), the question arose 37 AIR 1970 P&H 528 38 AIR 1971 Bom 365 whether Registrar had the power under Section 78 of the Maharashtra Cooperative Societies Act to issue show cause notice to any committee of the society or any member of such committee including the

Directors in respect of any default or negligence in the performance of the duties imposed on it or him by the Act or the rule or the byelaws and power of the Registrar to remove the Committee or the members thereof if any such action is called for. The argument was rejected that the co-operative societies indulged in the banking business, hence, the State did not have the legislative competence under Entry 32 of List II, and only the Parliament had the legislative competence under Entry 45 of List I. The question involved as to management was clearly covered under Entry 32 of List II. It was with respect to incorporation, management, and winding up of a society.

vii. That the Hon'ble Supreme Court of India in ***Virendra Pal Singh v District Assistant Registrar***, (1980) 4 SCC 109, held that cooperative societies by merely running banks, do not lose their colour as cooperative societies. Further, the Hon'ble Court held that on matters of management, such cooperative societies running banks are governed by Entry 32, List II, made the following observations:

10. We do not think it necessary to refer to the abundance of authority on the question as to how to determine whether a legislation fails under on entry in one list or another entry in one list or another entry in another list. Long ago in Prefulla Kumar Mukherjee and Ors v. Bank of Commerce Ltd, Khulna, the Privy Council was confronted with the question whether the Bengal Money Landers Act fell within entry 27 in List II of the Seventh Schedule to the Government of India Act 1935 which was 'money landing', in respect of which the Provincial Legislature was competent to legislate, or whether it fell within entries 28 and 38 in the List I which were 'Promissory notes' in and 'banking' which were within the competence of the Central Legislature. The argument was that the Bengal Money Leders Act was beyond the competence of the provincial Legislature in so far as it dealt with promissory notes and the business of banking The Privy Council upheld the vires of the whole of the Act because it dealt in pith and substance, with money landing. They observed :

> *Subjects must still overlap, and where they do the question must be asked what in pith and substance in the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, such beneficient legislation would be stifled at birth, and many of the*

subjects entrusted to provincial legislation could never affectively be dealt with.

Examining the provisions of the UP. Co-operative Societies Act in the light of the observations of the Privy Council we do not have the slightest doubt that in pith and substance the Act deals with "Cooperative Societies". That it trenches upon banking incidentally does not take it beyond the competence of the State Legislature. It is obvious that for the proper financing and effective functioning of Cooperative Societies there must also be Cooperative Societies which do banking business to facilitate the working of other Comparative Societies. Merely because they do banking business such Cooperative Societies do not cease to be Cooperative Societies, when otherwise they are registered under the Cooperative Societies Act and are subject to the duties, liabilities and control of the provisions of the Cooperative Societies Act. We do not think that the question deserves any more consideration and, we, therefore, hold that the UP. Cooperative Societies Act was within the competence of the State Legis latare. This was also the view taken In Nagpur District Central Cooperative Sank Ltd. Nagpur and Anr. v. Divisional Joint Registrar, Cooperative Societies Nagptir and Anr. AIR 1971 SC 365 and Sent Sadhu Singh and Ors. v. the State of Punjab and Anr. AIR 1970 PLH 528.

viii. That the Hon’ble Supreme Court in *Pandurang,* applying aspect theory to determine legislative competence, made the following observations regarding legislative competence in relation to cooperative banks:

69. The concept of regulating nonbanking affairs of society and regulating the banking business of society are two different aspects and are covered under different Entries, i.e., Entry 32 of List II and Entry 45 of List I, respectively…

…

The cooperative banks run by the cooperative societies registered under the State legislation with respect to the aspects of 'incorporation, regulation and winding up', in particular, with respect to the matters which are outside the purview of Entry 45 of List I of the Seventh Schedule of the Constitution of India, are governed by the said legislation relatable to Entry 32 of List II of the Seventh Schedule of the Constitution of India.

ix. That in pith and substance, the impugned sections of the Amendment Act deal with matter pertaining to “incorporation, regulation and winding up” of cooperative banks. The Hon’ble Supreme Court of India in ***K.K. Baskaran vs. State of Tamil Nadu,*** (2011) 3 SCC 793, observed as follows:

> *18. It often happens that a legislation overlaps both List I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. We are of the opinion that in pith and substance the impugned State Act is referable to Entries 1, 30 and 31 of List II of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule.*
>
> *19. It is well settled that incidental trenching in exercise of ancillary powers into a forbidden legislative territory is permissible vide the Constitution Bench decision of this Court in State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 [vide SCC paras 31(4), (5) & (6) and 129(5)]. Sharp and distinct lines of demarcation are not always possible and it is often impossible to prevent a certain amount of overlapping vide ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17). We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits.*
>
> *…*
>
> *21. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence, vide Union of India v. Shah Goverdhan L. Kabra Teachers’ College, (2002) 8 SCC 228 (SCC para 7).*
>
> *22. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions vide Special Reference No. 1 of 2001, In re, (2004) 4 SCC 489 (SCC para 15). For this purpose the language of the entries in the Seventh Schedule should be given the widest scope of which the meaning*

is fairly capable, vide State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201, [SCC para 31(4)], Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 (SCC para 6) and ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17)."

x. That the impugned sections of the Amendment Act are against the federal principles of the Constitution of India. The Hon'ble Supreme Court of India in *Pandurang*, while considering Entries 43, 44, 45, 38 of List I vis a vis Entry 32 of List II, recognised the exclusivity of the respective legislature in each sphere, by referring to principles of federalism. The Hon'ble Court observed as follows:

173. The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the court is called upon to examine the enactment to be ultra vires on account of legislative incompetence.

174. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance finds its origin from the principle that it is necessary to examine the true nature and character of the legislation to know whether it falls in a forbidden sphere.

xi. That the impugned sections of the Amendment Act constitutes colourable legislation as they seek to legislate on matters within the purview of Entry 32 of List II, under the aegis and guise of Entry 43, 45 and 38 of List I.

xii. That Article 123(3) of the Constitution provides that Acts passed under Article 123(1), in relation to matters outside the legislative competence of the Parliament are void under Article 123(3) of the Constitution of India.

xiii. That Article 43B of the Constitution of India, being a directive principle of state policy, provides for autonomy of cooperative societies and reads as follows:

"43B. Promotion of cooperative societies.— The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of co operative societies."

xiv. That Article 243ZI provides that the legislature of a State may, by law, make provisions with respect to 'incorporation, regulation and winding up' of co-operative societies. Article 243ZI is extracted hereunder:

"243ZI. Incorporation of cooperative 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 cooperative societies based on the principles of voluntary formation, democratic membercontrol, membereconomic participation and autonomous functioning."

xv. That the Ninety Seventh Amendment also incorporated Article 243ZL dealing with supersession and suspension of the board and interim management. Article 243ZL is extracted hereunder:

"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; 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 cooperative 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 cooperative society, other than a multiState 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 cooperative society shall arrange for conduct of elections within the period specified in clause (1) and handover the management to be elected board.

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

It is submitted that proviso 3 to the Article 243ZL provides for the Banking Regulation Act to apply, in addition to the state legislation and not in substitution thereof. It is submitted that the primary legislation, in relation to "incorporation, regulation and winding up" are the state legislations and as such, the Constitution envisages the applicability of the Banking Regulation Act, 1949, for the core business of "banking" only.

xvi. That the right to raise additional grounds during the course of hearing and by way of additional written submissions is reserved.

26. I state that the impugned sections of the Amendment Act being without legislative competence and being contrary to the previous position adopted in section 56 of the Act itself, it is ex facie clear that the provisions are unconstitutional and ultra vires for the reasons stated hereinabove. I state that in light of the above, a prima facie case is made out in favour of the petitioner herein that it would succeed in its challenge to the impugned sections. If control and supervision of cooperative banks are passed to the RBI and Central Government based on legislation passed without legislative competence irreparable injury could be caused to the petitioners herein. I state that the balance of convenience is also in favour of the Petitioner herein.

27. I state that this Hon'ble Court, vide its order dated 20th July, 2020, has granted liberty to the Petitioner herein to approach this Hon'ble Court to if any action is taken in furtherance to the Banking Regulation Amendment Ordinance, 2020,

which Ordinance stands repealed and re-enacted vide the Amendment Act. Consequently, it has become just and necessary that the liberty granted by this Hon'ble Court vide its order dated 1st July, 2020, be extended to the application of the Amendment Act as well.

The operative portion of the order extracted hereunder for easy reference

> 39. *Having weighed the consequences, we find that for the grant of an interim relief the sounding of a trumpet and war drums is sufficient to entertain a legal debate, the arbiter whereof is this Court, but, in our opinion, unless there is an imminent tangible cause or evidence indicating actual invasion of the rights of the petitioner banks in running the affairs of the Society, it would not be appropriate to consider the issue of interim relief at this stage, leaving it open to be considered as and when any overt or covert act by the Central Government authorities or the Reserve Bank of India based upon the impugned provisions of the Ordinance actually impinges upon the functioning of the affairs of the Society, for which any appropriate material can be brought on record by the petitioner banks for such consideration.*
>
> *40. We, therefore, grant four weeks to both the respondents to file their counter affidavits, and thereafter two weeks to the petitioner banks to file a rejoinder.*
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> *List on 1.9.2020.*

For the reasons stated above, it is prayed that this Hon'ble court may be pleased to stay the operation of sections 4(A), 4(F), 4(G), 4(J), 4(L), 4(M) and 4(Q) of the Banking Regulation Amendment Act, 2020 pending disposal of the present writ petition and thus render justice.

For the reasons stated above, it is prayed that this Hon'ble court may be pleased to pass an order of Interim Injunction restraining the 2nd Respondent herein from implementing sections 4(A), 4(F), 4(G), 4(J), 4(L), 4(M) and 4(Q) of the Banking Regulation Amendment Act, 2020 against the Petitioner herein and thus render justice.

Solemnly affirmed at Chennai
on this the day of October' 2020
and signed her name in my
presence.

Before me

Advocate : Kanchipuram

No. of Corrections