



AFR
Chief Justice's Court

Misc Bench No 6250 of 2015

MECON Indraprastha Sahakari Avas Samiti Ltd through its Secretary & Anr
Vs
State of U P through Principal Secretary, Cooperative Development & 4 Ors

Counsel for the petitioners:- Rakesh Srivastava, Advocate

Counsel for the respondents:- CSC

Hon'ble Dr Dhananjaya Yeshwant Chandrachud, Chief Justice
Hon'ble Shri Narayan Shukla, J

(Per Dr D Y Chandrachud, CJ)

A The issue

In these proceedings under Article 226 of the Constitution, there is a challenge to the constitutional validity of the provisions of Section 113 (2) of the Uttar Pradesh Cooperative Societies Act, 1965¹ which were introduced by way of an amendment by U P Act 13 of 2013. The state legislature has enacted a provision which stipulates that the Right to Information Act, 2005 – enacted by Parliament – shall cover all cooperative societies in the state. The issue is whether the state legislature has legislative competence to enact the provision.

B Facts

The background in which the constitutional challenge has been

¹ Act

addressed before the Court is that the first petitioner is a primary cooperative housing society² registered under the provisions of the Act. The second petitioner is the Honorary Secretary of the first petitioner. The case of the petitioners is that the cooperative society carries on its business from its own resources without any financial aid or assistance from the State and the State has no contribution to its share capital.

The fourth respondent, Rajendra Singh Verma, is a member of the cooperative society. The cooperative society issued a demand notice to the fourth respondent for the payment of outstanding dues. The demand notice was challenged by the fourth respondent by filing an arbitration case. By an award dated 16 March 2012, the arbitration case was dismissed. The fourth respondent filed an appeal before the Cooperative Tribunal. The appeal was partly allowed and the fourth respondent was held liable to make payment of the outstanding dues of the cooperative society as quantified, together with interest. The fourth respondent has filed a writ petition before this Court challenging the appellate judgment of the Cooperative Tribunal which is pending. The fourth respondent moved applications under the Right to Information Act, 2005³ for the disclosure of information by the cooperative society or, as the case may be, by the Registrar of Cooperative Societies. Eventually, the fourth respondent filed a series of complaints before the State Information Commission in which the cooperative society filed objections by setting up a plea that the complaints were not maintainable. On 1 August 2014, the fourth respondent sought certain information from the

² cooperative society

³ RTI Act

Public Information Officer of the office of the Assistant Registrar, Cooperative Societies, Gautam Budh Nagar under the RTI Act. Purportedly in the exercise of his powers under Section 6 (3), the Assistant Registrar, by a letter dated 5 August 2014 transmitted the application of the fourth respondent to the second petitioner with a direction to provide the information which has been sought. The objections filed by the cooperative society before the State Information Commission are admittedly pending and have not been disposed of. Upon receipt of the letter dated 5 August 2015, the second petitioner addressed a letter dated 2 September 2014 to the fourth respondent stating that the first petitioner is not a public authority within the meaning of Section 2 (h) of the RTI Act and was, therefore, not under any obligation to furnish information. The fourth respondent thereupon filed another complaint case which is pending before the State Information Commission. For the purposes of these proceedings, it is not necessary to burden the record with all the details of individual complaints which have been filed by the fourth respondent which are pending, save and except to note that the petitioners have raised an objection to the maintainability of the complaints on the ground that the first petitioner is not a public authority under Section 2 (h) of the RTI Act.

C State legislation under challenge

The legislature of the State of Uttar Pradesh enacted the Uttar Pradesh Cooperative Societies (Amendment) Act, 2013⁴. The amending Act came into force on 15 February 2013. Section 113, as introduced into the parent

⁴ Introduced by U P Act No 13 of 2013

Act by Section 6 of the amending Act, provides as follows:

“113. Filing of Returns.— (1) Every Co-operative Society shall file returns within six months of the close of every financial year to the Registrar or any officer authorised by him including the following matters, namely—

- (a) annual report of its activities;
- (b) its audited statement of accounts;
- (c) the plan of disposal of surplus, 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 the election when due, and
- (f) any other information as required by the Registrar.

(2) Every co-operative society shall be covered by the Right to Information Act, 2005.” (emphasis supplied)

After the amendment was brought into force, an Office Memorandum was issued on 20 November 2013 by the Assistant Commissioner and Assistant Registrar (Cooperatives)⁵, Gautam Budh Nagar stipulating that by virtue of the provisions of Section 113 (2) as amended, all cooperative societies in the State of Uttar Pradesh would be governed by the RTI Act. A direction was issued that the Secretaries of all Cooperative Societies in the State shall be designated as Public Information Officers. First appellate authorities were also designated by virtue of the provisions of the Office

⁵ Assistant Registrar (Cooperative)

Memorandum.

D The challenge to constitutional validity

The petitioners have sought to challenge, in these proceedings under Article 226 of the Constitution, –

- (i) the constitutional validity of Section 113 (2) of the Act on the ground that the provision is ultra vires;
- (ii) the legality of the Office Memorandum dated 20 November 2013 issued by the Assistant Registrar (Cooperatives), Gautam Budh Nagar; and
- (iii) the complaint which is pending before the State Information Commission.

The challenge to the constitutional validity of Section 113 (2) is premised on the basis that as a result of the amendment, all cooperative societies in the State have been brought within the purview of the RTI Act, enacted by Parliament, irrespective of whether or not these cooperative societies constitute public authorities within the meaning of Section 2(h) of the Central Act, i.e. the RTI Act.

The submissions which have been urged behalf of the petitioners are as follows:

- (i) The RTI Act has been enacted by Parliament in exercise of its power under Article 246 (1) of the Constitution, the subject of the legislation being referable to Entry 97 of the Union List of the Seventh Schedule;

- (ii) The subject covered by the legislation enacted by Parliament falls within the exclusive legislative competence of Parliament under Entry 97 of the Union List and hence the State is denuded of legislative competence to enact the provisions of Section 113 (2) of the RTI Act;
- (iii) The state legislature by enacting the provisions of Section 113 (2) has sought to legislate by incorporation; the incorporation in the present case being of central legislation enacted by Parliament. Unless the state legislature is competent to enact the law on the subject on which Section 113 (2) has been enacted, the legislation would lie outside the legislative power of the State. Since the RTI Act falls within the purview of the residuary legislative power of Parliament, it was not open to the state legislature to provide, by means of Section 113 (2), that all cooperative societies within the State would be governed by the RTI Act enacted by Parliament; and
- (iv) The Office Memorandum which has been issued by the Assistant Registrar (Cooperatives) on 20 November 2013 designating the Secretaries of cooperative societies as Public Information Officers, lies outside his statutory and administrative power. Even if a particular cooperative society is held to be a public authority within the meaning of Section 2 (h) of the RTI Act, it is for that particular entity to designate a Public Information Officer under Section 5(1). By usurping that power, the Assistant Registrar has infringed upon the autonomy of cooperative societies.

E Submissions

In view of the constitutional challenge to the provisions of Section 113 (2), this Court had issued notice to the Advocate General. In pursuance of the notice, the learned Standing Counsel, who has appeared on behalf of the State, has submitted that –

(i) By virtue of the provisions of Part IX-B of the Constitution, the state legislature has been vested with the legislative power in regard to the incorporation, regulation and winding up of cooperative societies, particular reference being made to the provisions of Article 243-ZI;

(ii) Article 243-ZQ empowers the legislature of a State to make provisions for offences relating to cooperative societies and for penalties for such offences. These offences and penalties may extend to situations where a cooperative society or an officer furnishes a false return or false information or fails to willfully furnish information required from him by a person authorised in this behalf under the provisions of the State Act;

(iii) The provisions of Part IX-B would indicate that state legislatures are vested with the authority to regulate cooperative societies. Moreover, Entry 32 of the State List of the Seventh Schedule deals with cooperative societies and state legislatures are competent to enact laws in respect of cooperative societies under Article 246 (3); and

(iv) In the present case, what the state legislature has essentially required is the furnishing of information by cooperative societies and

in doing so, there has been no encroachment on the legislative field reserved to Parliament by Article 246 of the Constitution.

The fourth respondent, who has appeared in person, placed reliance on a judgment of the Supreme Court in **Thalappalam Service Cooperative Bank Limited Vs State of Kerala**⁶. The submission of the fourth respondent is that the information which he sought was from the Registrar of Cooperative Societies. The Supreme Court in the course of its judgment, held that the cooperative societies, which were the appellants before the Supreme Court in a batch of proceedings, were not public authorities within the meaning of Section 2 (h) of the RTI Act. However, it was clarified that if there is any dispute on facts, as to whether a particular society is a public authority or not, the State Information Commission would be entitled to examine it. Hence, it is for the State Information Commission to examine whether the first petitioner is a public authority within the meaning of Section 2(h) of the RTI Act. Moreover, it was submitted that even if the first petitioner is held not to be a public authority within the meaning of Section 2(h) of the RTI Act, the fourth respondent was entitled to demand information in respect of the cooperative society from the Registrar of Cooperative Societies. Such information which the Registrar of Cooperative Societies can access under the Act from the cooperative society would be information which is held under the control of a public authority, namely, the Registrar and which can be legitimately accessed by the fourth respondent.

The rival submissions fall for consideration.

⁶ (2013) 16 SCC 82

F The scope of these proceedings

Before we address ourselves to the constitutional challenge which has been urged on behalf of the petitioners, it would, at the outset, be necessary to define the scope of the present proceedings.

The petitioners have challenged the validity of Section 113 (2) of the Act, as amended, and the legality of an Office Memorandum issued by the Assistant Registrar (Cooperatives), Gautam Budh Nagar on 20 November 2013 requiring all the cooperative societies in the district to designate their Secretaries as Public Information Officers and providing for first appellate authorities. The constitutional challenge and the challenge in regard to the legality of the Office Memorandum has to be addressed by this Court. Apart from these two challenges which invoke the power of judicial review, the petitioners also seek a writ of this Court for quashing the proceedings before the State Information Commission. The fourth respondent has sought access to information under the RTI Act, either directly from the cooperative society or, as the case may be, from the Registrar of Cooperative Societies. Information can be accessed directly from a cooperative society provided it fulfills the description of being a public authority under Section 2(h) of the RTI Act. Insofar as the Registrar is concerned, the fourth respondent has independently sought a disclosure of information and is contesting the proceedings before the State Information Commission. The issue as to whether the first petitioner is a public authority within the meaning of Section 2(h) of the RTI Act has to be decided by the State Information Commission. This is abundantly clear from the observations of the Supreme

Court in **Thalappalam Service Cooperative Bank Limited (supra)** where it was held as follows:

“65⁷. We have found, on facts, that the Societies, in these appeals, are not public authorities and, hence, not legally obliged to furnish any information sought for by a citizen under the RTI Act. All the same, if there is any dispute on facts as to whether a particular Society is a public authority or not, the State Information Commission can examine the same and find out whether the Society in question satisfies the test laid in this judgment.” (emphasis supplied)

Insofar as the Registrar of Cooperative Societies is concerned, the right to access information was dealt with in the following observations of the Supreme Court:

“67. The Registrar of Cooperative Societies functioning under the Cooperative Societies Act is a “public authority” within the meaning of Section 2(h) of the Act. As a public authority, the Registrar of Cooperative Societies has been conferred with lot of statutory powers under the respective Act under which he is functioning. He is also duty bound to comply with the obligations under the RTI Act and furnish information to a citizen under the RTI Act. The information which he is expected to provide is the information enumerated in Section 2(f) of the RTI Act subject to the limitations provided under Section 8 of the Act. The Registrar can also, to the extent law permits, gather information from a society, on which he has supervisory or administrative

7 Ed.: Para 65 corrected vide Official Corrigendum No. F.3/Ed.B.J./60/2013 dated 26.10.2013

control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, under Section 2(f), he can also gather those information from the society, to the extent permitted by law. The Registrar is also not obliged to disclose those information if those information fall under Section 8(1)(j) of the Act. No provision has been brought to our knowledge indicating that, under the Cooperative Societies Act, a Registrar can call for the details of the bank accounts maintained by the citizens or members in a cooperative bank. Only those information which a Registrar of Cooperative Societies can have access under the Cooperative Societies Act from a society could be said to be the information which is “held” or “under the control of public authority”. Even those information, the Registrar, as already indicated, is not legally obliged to provide if those information fall under the exempted category mentioned in Section 8(j) of the Act. Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a Co-operative Bank of a private account maintained by a member of a society under law, in the event of which, in a given situation, the society will have to part with that information. But the demand should have statutory backing.”

The issue as to whether the Registrar is bound to disclose the information which has been sought by the fourth respondent or whether the information falls within the categories of exemptions contemplated by Section 8 of the RTI Act would have to be determined in the primary instance by the State Information Commission. Hence, at the outset, we

make it clear, while defining the scope of the controversy before this Court, that the issue as to whether the first petitioner is a public authority within the meaning of Section 2(h) as well as the issue as to whether the information which has been sought from the Registrar is liable to be disclosed under the RTI Act, is a matter which will be resolved by the State Information Commission having due regard to the objections which have been submitted by the petitioners.

G The issue of Constitutional validity analysed

Now, it is in this background that we address the constitutional challenge which has been urged before this Court.

(i) The RTI Act

Parliament enacted the RTI Act to provide an enforceable practical regime of a right to information for citizens and to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. Section 2 contains definitions. The expression 'public authority' is defined under clause (h) of Section 2 as follows:

"(h) "public authority" means any authority or body or institution of self-government established or constituted,

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any—
 - (i) body owned, controlled or substantially

financed;
(ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.”

Clause (j) defines the expression 'right to information' in the following terms:

“(j) “right to information” means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

- (i) inspection of work, documents, records;
- (ii) taking notes, extracts, or certified copies of documents or records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.”

Section 3 provides that all citizens shall, subject to the provisions of the Act, have a right to information. Right to information has been defined in Section 2(j) to mean the right to information accessible under the Act which is held by or under the control of any public authority. Information, of which a right to obtain disclosure has been conferred upon citizens with a corresponding obligation to disclose, is information which is accessible under the Act and which is held by or under the control of a public authority. Section 2(h) defines the expressions 'public authority' in two parts: the first

part defines what the expression means while the second part defines what it includes. As a matter of legislative devices, it is a well settled principle of law that where a legislature uses the 'means and includes' formula as a part of a definition, the 'means' part of the definition is intended to be exhaustive whereas the 'includes' part expands upon what would have otherwise fallen within the ambit of the definition. By using the means and includes approach to the definition, the Legislature has, in Section 2(h), indicated a complete definition as what constitutes a public authority. In order to be a public authority, an authority, body or institution of self-government must be established or constituted by or under the Constitution, or by a law made by Parliament or by the law of a state legislature or by a notification which is issued or an order made by the appropriate government. The latter part of the definition includes (i) a body owned, controlled or substantially financed by; or (ii) a non-governmental organisation substantially financed, directly or indirectly by funds provided by the appropriate government. The expression 'appropriate government' is defined under clause (a) of Section 2 as follows:

“(a) “appropriate Government” means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly --

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government.”

(ii) The judgment in Thalappalam Cooperative Bank

In the judgment of the Supreme Court in **Thalappalam Service Cooperative Bank Limited (supra)**, the issue was whether a cooperative society registered under the Kerala Cooperative Societies Act, 1969 would fall within the definition of the expression 'public authority' under Section 2(h) of the RTI Act. In that context, the Supreme Court observed as follows:

“We can, therefore, draw a clear distinction between a body which is created by a statute and a body which, after having come into existence, is governed in accordance with the provisions of a statute. The Societies, with which we are concerned, fall under the later category that is governed by the Societies Act and are not statutory bodies, but only body corporate within the meaning of Section 9 of the Kerala Cooperative Societies Act having perpetual succession and common seal and hence have the power to hold property, enter into contract, institute and defend suits and other legal proceedings and to do all things necessary for the purpose, for which it was constituted. Section 27 of the Societies Act categorically states that the final authority of a society vests in the general body of its members and every society is managed by the managing committee constituted in terms of the bye-laws as provided under Section 28 of the Societies Act. Final authority so far as such types of societies are concerned, as statute says, is the general body and not the Registrar of Cooperative Societies or State Government.”⁸

The Supreme Court noted that cooperative societies are undoubtedly subject to the control of statutory authorities like the Registrar but it could not be

⁸ Id at para 18, p 99

said that the the State exercises any direct or indirect control over the affairs of a cooperative society which is deep and all pervasive. Moreover, the supervisory or general regulation under the statute over cooperative societies, which are bodies corporate, does not render the activities of the body so regulated as subject to such control of the State so as to bring it within the meaning of the expression 'State' or an instrumentality of the State. The cooperative societies in the batch of cases before the Supreme Court were held to be neither bodies or institutions of self-government established or constituted under the Constitution or by law made by Parliament, by a law made by the state legislature or by way of a notification issued or made by the appropriate government. Insofar as the aspect of control is concerned, the Supreme Court observed as follows:

“We are of the opinion that when we test the meaning of expression “controlled” which figures in between the words “body owned” and “substantially financed”, the control by the appropriate Government must be a control of a substantial nature. The mere “supervision” or “regulation” as such by a statute or otherwise of a body would not make that body a “public authority” within the meaning of Section 2(h)(d)(i) of the RTI Act. In other words just like a body owned or body substantially financed by the appropriate government, the control of the body by the appropriate government would also be substantial and not merely supervisory or regulatory. The powers exercised by the Registrar of Cooperative Societies and others under the Cooperative Societies Act are only regulatory or supervisory in nature, which will not amount to dominating or interfering with the management or affairs of the society so

as to be controlled. Management and control are statutorily conferred on the Management Committee or the Board of Directors of the Society by the respective Cooperative Societies Act and not on the authorities under the Cooperative Societies Act.”⁹

Having held that the cooperative societies in the appeals before the Supreme Court were not public authorities within the meaning of Section 2(h) of the RTI Act, the Supreme Court held that (i) the burden to show that a body is owned, controlled or substantially financed, directly or indirectly by the funds provided by the appropriate government is on the applicant who seeks information or the appropriate government and can be examined by the State Information Commission; (ii) where there is a dispute on facts as to whether a particular society is a public authority, the Information Commission can examine the issue and decide the question as to whether the society satisfies the tests laid in the judgment.

(iii) RTI Act 2005 : legislation referable to Entry 97 of Union List

The RTI Act has been enacted by Parliament in pursuance of its plenary legislative power under Article 246(1) of the Constitution. Article 246(1) vests the exclusive power to make laws with reference to matters enumerated in the Union List of the Seventh Schedule in Parliament, notwithstanding anything contained in clauses (2) and (3). Clause (3) of Article 246 confers exclusive legislative power on the state legislatures to enact laws with respect to subjects contained in the State List of the Seventh Schedule, subject to clause (1) which deals with the exclusive legislative

⁹ Id at para 44, pp 106 & 107

power of Parliament over the Union List and clause (2) which deals with the legislative powers of Parliament over the Concurrent List and those of the state legislatures, subject to legislation enacted by Parliament. The RTI Act is referable to Entry 97 of the Union List of the Seventh Schedule which confers the residuary power of legislation upon Parliament together with Article 248 of the Constitution. There is no specific entry either in the State or Concurrent List of the Seventh Schedule that covers the right to information. The RTI Act has been enacted by Parliament in exercise of its residuary power.

As a matter of fact, we may note that in the decision of the Supreme Court in **Namit Sharma Vs Union of India**¹⁰, the Supreme Court held that “it was a commonly conceded case” that the Act of 2005 was enacted by Parliament in the exercise of its residuary power of legislation and was referable to Entry 97 of the Union List¹¹. The decision in **Namit Sharma (supra)** was subsequently reviewed by the Supreme Court in **Union of India Vs Namit Sharma**¹². The review was of the declaration which was issued by the Supreme Court in the first judgment together with the directions in regard to the appointment of Chief Information Commissioners or Information Commissioners, as the case may be. The issue in regard to the legislative competence of Parliament to enact the RTI Act in exercise of its residuary power of legislation was not the subject matter of the review. Be that as it may, there can be no dispute about the fundamental principle that the RTI Act was enacted by Parliament in exercise of its residuary

10 (2013) 1 SCC 745

11 Id at para 49, p 780

12 (2013) 10 SCC 359

power of legislation.

(iv) The validity of the state legislation : Section 113 (2)

Once, it is held that the RTI Act was enacted by Parliament in pursuance of its residuary power of legislation, the issue which needs to be considered is whether the state legislature could, by a legislative amendment to the Act, have mandated that all cooperative societies in the State would be governed by the RTI Act. The issue here is not whether a particular cooperative society is a public authority within the meaning of Section 2(h) of the Central Act which is a matter which has to be decided in accordance with the principles which are enunciated under the RTI Act by the Information Commission. What the state legislature has essentially done is to enact that irrespective of whether or not a cooperative society falls within the definition of a public authority within the meaning of Section 2(h) of the RTI Act, all cooperative societies would be governed by the Central Act. The state legislature in legislating upon the subject of the right to information could not have done so. What the state legislature has enacted is to incorporate the central legislation contained under the RTI Act into the State legislation. Unless the state legislature is competent to enact a law on the subject, it would not be open to it to provide that the RTI Act which has been enacted by Parliament must apply to all cooperative societies in the State. If the ambit and purview of the Section 113(2) of the Act were to be coextensive with the provisions of the RTI Act, there would be no substantive meaning attributable to Section 113 (2) but more fundamentally, the challenge is one on the ground of the absence of legislative competence.

Parliament has legislated to enact the RTI Act in pursuance of its plenary power of legislation under Article 246 (1) read with Entry 97. Once that is the position, the state legislature was not competent to legislate with respect to the same subject and to enact, by a legislative prescription of Section 113 (2), that the central legislation would apply to all cooperative societies in the State. The effect of the provisions of Section 113 (2) is in effect to widen the ambit of the RTI Act as a result of which every cooperative society in the State of Uttar Pradesh would be governed by the Central Act irrespective of whether or not a cooperative society properly falls within the ambit of the definition of a 'public authority' under Section 2(h). This is clearly impermissible and falls outside the legislative competence of the state legislature.

(v) Validity of legislation by incorporation

By the provisions of Section 113 (2) of the Act, the legislature of the State of Uttar Pradesh has incorporated Parliamentary legislation – the Right to Information Act, 2005 – into a State enactment – the Uttar Pradesh Cooperative Societies Act, 1965. Incorporation is a legislative device adopted by the legislature by which an earlier Act is incorporated into a later Act. Upon incorporation, the provisions of an earlier Act become an integral part of a later Act into which they are incorporated. Justice G P Singh in his seminal work on the Interpretation of Statutes¹³ has explained legislation by incorporation in the following extract:

“Incorporation of an earlier Act into a later Act is a

¹³ Principles of Statutory Interpretation, 13th edition 2012

legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been “bodily transposed into it”. The effect of incorporation is admirably stated by LORD ESHER, M.R. : “If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it.” The result is to constitute the later Act along with the incorporated provisions of the earlier Act, an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. As observed by BRETT, J. : “Where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. To the same effect is the statement by SIR GEORGE LOWNDES : “It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function, effectually without the addition.”¹⁴

Ordinarily, the same legislature which had incorporated the earlier law may incorporate its provisions into a later Act. The present instance is one where the parent enactment, namely the Uttar Pradesh Cooperative Societies

¹⁴ At pp 321, 322

Act is an state enactment of 1965. The Act which is incorporated namely the Right to Information Act, 2005 is an Act of Parliament. The amendment of the state Act by which the Parliamentary enactment was incorporated is a subsequent amendment of 2013. Now, it is well settled that in a situation involving legislation by incorporation, the provisions of the law which are incorporated become an integral part of the fresh statute. The constitutional validity of the fresh statute has to be determined with reference to the legislative competence of the body enacting the fresh statute and not with reference to the competence of the legislature which enacted the original statute. In the present case, the constitutional validity of Section 113 (2) of the State Act has to be decided with reference to the legislative competence of the state legislature which has purported to incorporate the provisions of the Central Act into the State Act. The constitutional validity of Section 113 (2) has to be decided not with reference to the legislative competence of Parliament which enacted the RTI Act but with reference to whether the state legislature of Uttar Pradesh had the competence to enact a law on the subject matter covered by Section 113 (2). This principle is succinctly stated in Justice G P Singh's Principles of Statutory Interpretation as follows:

“In case of legislation by incorporation as the incorporated provisions become part and parcel of a fresh statute, the constitutional validity of such a statute including the provisions so incorporated is judged with reference to the powers of the Legislature enacting the fresh statute and not with reference to the powers of the Legislature enacting the original legislation. The two statutes remain different and distinct and each is to be

judged with reference to its own source...”¹⁵

Issues of constitutional validity of this nature have arisen before the Supreme Court in the context of sales tax legislation which was in force in Part A States and was extended to Part C States by the Part C States (Laws) Act, 1950. A Constitution Bench of the Supreme Court dealt with this issue in **Mithan Lal Vs State of Delhi**¹⁶. The state legislature in the case of Part A States could tax a transaction on the sale of goods but had no competence to tax a transaction which was not in reality a sale, by adopting an artificial definition of the expression 'sale'. However, in the case of Part C States, the legislative power of Parliament was not controlled by any legislative entry. The Part C States (Laws) Act, 1950, which was a Parliamentary statute, conferred power on the Central Government to extend laws which were in force in Part A States to Part C States with or without modification. The Central Government in exercising this power extended sales tax legislation in force in Part A States to Part C States. The sales tax legislation enacted by state legislature in Part A States contained an artificial definition of 'sale' which was impermissible. The issue which arose was whether such legislation which was extended to Part C States under the Part C States (Laws) Act, 1950 suffered from the same infirmity in its application to Part C States. The Supreme Court held in the negative and laid down that on the issuance of a notification by the Central Government under the Part C States (Laws) Act extending a sales tax law in force in a Part A State to a Part C State, the provision of the law which is extended becomes incorporated by

¹⁵ At p 325

¹⁶ AIR 1958 SC 682

reference in the Act itself and, therefore, a tax imposed thereunder is a tax imposed by Parliament. The power of Parliament to enact legislation in relation to Part C States being plenary and absolute, the law so extended in its application to Part C States was held to be valid. These principles were affirmed by a nine Judge Bench in **New Delhi Municipal Committee Vs State of Punjab**¹⁷. The Supreme Court held that the Punjab Municipal Act extended to the Part C State of Delhi by a notification issued under the Part C States (Laws) Act, 1950 was a Parliamentary enactment and taxes levied under it amounted to Union taxation.

If a State Act is void for want of legislative competence, it can be incorporated in a later Central Act if Parliament has legislative competence over the subject matter. Though, the legislation may be void as a State law since the state legislature lacks legislative competence, it would become part and parcel of a central enactment into which it is incorporated and would gain validity as a Central Act. In **Krishna Chandra Gangopadhyaya Vs Union of India**¹⁸, a Validation Act was enacted by Parliament to validate certain provisions of the Bihar Minor Mineral Concession Rules, 1964 framed by the Bihar Government which had been held to be ultra vires in a judgment of the Supreme Court. The Supreme Court held that by the Validation Act, Parliament did more than simply validate an invalid law passed by the Bihar legislature but re-enacted it with retrospective effect in its own right, adding an amending Central Act to the statute book. This was held to be valid. The Supreme Court held that if a validating law enacted by

¹⁷ AIR 1997 SC 2847, p 2896

¹⁸ AIR 1975 SC 1389

Parliament merely validated an invalid State law which is outside the State List, such a validating Act would be invalid. It is only for the Constitution and not Parliament to confer competence on the state legislatures. But where Parliament which had the power to enact on a topic actually legislated within its competence and, as an abbreviation of drafting, borrows into the statute by reference the words of a State Act as a convenient shorthand, such legislation stands or falls on Parliament's legislative power in relation to the subject. This distinction, it was held, may sometimes be fine but is always real.

The factual situation in the present case is exactly the reverse. The RTI Act has been enacted by Parliament which has legislative competence over the subject matter which is referable to Article 246 (1) read with Entry 97 of the Union List to the Seventh Schedule. Whether a particular entity is a 'public authority' within the meaning of Section 2(h) of the Central Act has to be determined with reference to the provisions of that Act alone. What the state legislature in the present case has mandated by a legislative prescription is that every cooperative society will be covered by the RTI Act. The prescription that every cooperative society would be covered has the consequence that irrespective of whether or not a cooperative society in question is a 'public authority' within the meaning of Section 2(h) of the Central Act, it would be governed by the RTI Act by virtue of the provisions of Section 113 (2) of the State Act. This is beyond the legislative competence of the state legislature. The validity of the incorporating amendment made by the state legislature under Section 113 (2) has to be

determined with reference to the legislative competence of the state legislature to enact a law on the subject of the right to information. In the absence of legislative competence on the part of the state legislature to do so, Section 113 (2) must be held to be ultra vires.

For these reasons, we have come to the conclusion that the provisions of Section 113(2) of the RTI Act are unconstitutional. The state legislature lacks legislative competence to enact the provisions of Section 113(2).

(vi) The Part IX-B defence

We find no substance in the submission that the law which has been enacted by the state legislature falls within the ambit of Part IX-B of the Constitution. Article 243-ZI empowers the legislature of a state to make provisions with respect of the incorporation, regulation and winding up of cooperative societies based on the principle of voluntary formation, democratic member-control, member-economic participation and autonomous functioning. Article 243-ZP provides for the returns which a cooperative society is required to file to the authority designated by the State Government. The matters on which returns are required to be filed correspond broadly to the provisions of Section 113 (1) of the Act. There is no merit in the submission of the learned Standing Counsel based on the provisions of Article 243-ZQ. Article 243-ZQ empowers the legislature of a State to make provisions for offences relating to cooperative societies and penalties for such offences. Article 243-ZQ provides as follows:

“243-ZQ. Offences and penalties.- (1) The Legislature of a State may, by law, make provisions for the

offences relating to the cooperative 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 willfully 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 cooperative 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 willfully fails to handover custody of books, accounts, documents, records, cash, security and other property belonging to a cooperative 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.”

Sub-clause (a) of clause (2) of Article 243-QZ deals with a situation where a cooperative society or an officer or member thereof has willfully made a false return or furnished false information or has willfully not furnished information required from him by a person authorised under the provisions of the State Act. This has absolutely no relevance to the issue which is being determined at hand which is, whether it was open to the state legislature by enacting Section 113 (2) to legislate upon a field which fell within the province of Parliament and to extend the applicability of the Central Act to all cooperative societies in the State. Undoubtedly, the subject of cooperative societies falls within Entry 32 of the State List of the Seventh Schedule. However, that would not include the right to information which, as we have found earlier, is referable to residuary Entry 97 of the Union List of the Seventh Schedule.

For these reasons, we also hold that the Assistant Registrar (Cooperatives), Guatam Budh Nagar has transgressed the limits of his jurisdiction by requiring all cooperative societies of the district to designate their Secretaries as Public Information Officers. Such an appointment, in any event, even in the case of a public authority, has to be made by the authority concerned under Section 5 of the RTI Act and it was not open to the Assistant Registrar to make or direct such an appointment.

H Conclusion

We, consequently, allow the writ petition by holding that the provisions of Section 113 (2) of the Uttar Pradesh Cooperative Societies Act 1965 are ultra vires and that the state legislature has no legislative

competence to enact the law. We also quash the Office Memorandum dated 20 November 2013 issued by the Assistant Commissioner and Assistant Registrar (Cooperatives), Gautam Budh Nagar.

However, we expressly clarify that the issue as to whether the first petitioner is a 'public authority' within the meaning of Section 2(h) of the Right to Information Act, 2005 shall be decided by the State Information Commission having due regard to the objections which have been raised by the petitioners to the maintainability of the proceedings instituted by the fourth respondent. Similarly, the disclosure which has been sought by the fourth respondent from the Registrar of Cooperative Societies is a matter which will have to be determined by the State Information Commission. That issue together with the question as to whether any part of the information on which disclosure is sought, falls within the exemptions under Section 8 of the RTI Act are kept open to be addressed before and decided by the State Information Commission.

The writ petition is accordingly disposed of in the aforesaid terms. There shall be no order as to costs.

Order Date :- 19.8.2015
AHA

(Dr D Y Chandrachud, CJ)

(S N Shukla, J)

Hon'ble Dr D Y Chandrachud, CJ
Hon'ble Shri Narayan Shukla, J

Disposed of.

For orders, see order of date passed on separate sheets.

Order Date :- 19.8.2015
AHA

(Dr D Y Chandrachud, CJ)

(S N Shukla, J)