IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1209 OF 2018

Maharashtra State Co-operative
Patsanstha Federation Ltd. Mumbai,
Through its Treasurer,
Shri Dadarao S/o Bhaurao Tupkar,
Age : 42 Years, Occu. : Retired,
R/o Jalna, Tq. & Dist. Jalna. .. Petitioner

Versus

1. The State of Maharashtra,
Through the Secretary,
Co-operation and Textile Department,
Mantralaya, Mumbai – 32.

2. The Commissioner,
Co-operation and Registrar,
Co-operative Societies,
Maharashtra State, Pune. .. Respondents

Shri Kamlakar J. Suryawanshi, Advocate for the Petitioner.
Shri S. K. Tambe, A.G.P. for Respondent Nos. 1 and 2.

CORAM : S. V. GANGAPURWALA AND
A. M. DHAVALE, JJ.
DATE : 08TH APRIL, 2019.

ORAL JUDGMENT (***Per S. V. Gangapurwala, J.***) **:-**

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. The petitioner assails the circular dated 25.10.2017 issued by the Commissioner for Co-operation and Registrar Co-operative Societies, Maharashtra State, Pune.

3. The petitioner is a society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 (for short "Act of 1960") and has its area of operation in the State of Maharashtra. The petitioner federation is representing the co-operative credit societies in the State of Maharashtra. The members of the petitioner federation viz Co-operative credit societies are governed by the provisions of the Act of 1960.

4. Under the impugned circular the respondent No. 2 has given guidelines for conducting test audit of the societies and for that purpose the concerned District Deputy Registrar and District Special Auditor are required to prepare a programme. The respondent No. 2 has directed to conduct the test audit of 20% societies per year of which regular audits are conducted upto 31st September.

5. Mr. Suryawanshi, the learned advocate for the petitioner submits that, the respondent No. 2 had forwarded the copy of the impugned circular to the respondent No. 1 for approval. However, the respondent No. 1 refused to grant approval under communication dated 02.12.2017. The respondent No. 2 does not possess the authority under law to issue such a circular. The

learned counsel further submits that, it is only the State Government that can issue directions. The impugned circular is not in consonance with Sec. 81(3)(c) of the Act of 1960. The learned counsel relies on the judgment of the Division Bench of this Court in a case of **Maharashtra Certified Auditors Association (Regd.) and another Vs. State of Maharashtra and others** reported in ***2011(1) All MR 20*** to submit that power U/Sec. 81(1)(a) of the Act of 1960 cannot be exercised by issuing administrative circular.

6. The learned Assistant Government Pleader for respondent Nos. 1 and 2 supports the circular and submits that, to over view the activities of financial co-operative societies and the empaneled private auditors, the office of the respondent No. 2 has issued the impugned circular, wherein only 20% of the total societies are included in the test audit programme with a view to conduct test audit of a society once in five years. In the action programme of the test audit 20% societies are included with priority of the societies in financial crises and societies against whom the field officers or office of the respondent No. 2 has received the complaints, so also the societies of which the audit report includes serious observations. The respondent No. 2 has issued the circular dated 25.10.2017 in the capacity of Registrar as per the powers vested in him under Section 3 of the Act of 1960. The respondent No. 2 has all the powers under Section 81 of the Act of 1960 to regulate and control the matters related to

audit of co-operative societies. No audit fee is charged to the society for conducting the test audit by the department. It is purely a measure for the sustainable growth of co-operative movement.

7. Before we advert to the contentions of the respective parties, it would be appropriate to refer to the relevant provisions of the Maharashtra Co-operative Societies Act, 1960.

The Maharashtra Co-operative Societies Act, 1960

1. ….......
2. ….......

3. Registrar and his subordinates --

The State Government may appoint a person to be the Registrar of Co-operative Societies for the State; and may appoint one or more persons to assist such Registrar with such designations, and in such local areas or throughout the State, as it may specify in that behalf and may, by general or special order, confer on any such person or persons all or any of the powers of the Registrar under this Act. The person or persons so appointed to assist the Registrar and on whom any powers of the Registrar are conferred, shall work under the general guidance, superintendence and control of the Registrar. They shall be subordinate to the Registrar, and subordination of such persons amongst themselves shall be such as may be determined by the State Government.

81. Audit.–

(1) …......
(2) …......

(3) (a) The Registrar or the person authorised shall, for the purpose of audit, at all times have access to all the books, accounts, documents papers, securities cash and other properties belonging to, or in the custody of, the society, and may summon any person in possession or responsible for the custody of any such books, accounts, documents, papers, securities, cash or other properties, to produce the same at any place at the headquarters of the society or any branch thereof.

(b) The Registrar shall be competent to depute Flying Squad to a society or societies for examination of books, records, accounts, and such other papers and for verification of cash balance. The report of the Flying Squad shall be deemed to be an audit report for the purpose of taking further action, if necessary.

(c) If it is brought to the notice of the Registrar that the audit report submitted by the auditor does not disclose the true and correct picture of the accounts, the Registrar or the authorised person may carry out or cause to be carried out a test audit of accounts prescribed and specified by the Registrar in such order.

8. This Court under order dated 11.10.2018 had directed the

learned Assistant Government Pleader to clarify whether the State Government has approved the impugned directives issued by the Commissioner, Co-operation and Registrar, Co-operative Societies. The learned A. G. P. made a statement that the State Government has not approved the said circular.

9. The impugned circular does not appear to have been approved by the State Government, nor same is issued with the sanction of the Government. Section 3 of the Act of 1960 gives power to the State Government to appoint a person to be Registrar of Co-operative Societies for the State and may appoint one or more persons to assist such Registrar with such designations, and in such local areas or throughout the State, as it may specify in that behalf. The person or persons so appointed to assist the Registrar and on whom any powers of the Registrar are conferred shall work under the general guidance, superintendence of the Registrar. The reliance placed on Section 3 of the Act of 1960 by respondents appears to be misplaced. Section 3 of the Act of 1960 does not give any power to the Commissioner/Registrar to issue circular in derogation to the provisions of the Statute.

10. The Commissioner does not possess the rule making authority. The executive instructions cannot be dehors the rules. The executive instructions cannot sup-plant the provisions of the Statute or the rules. In the executive instructions any

derogation to the provisions of the Statute or the rules will have no statutory force. Section 165 of the Act of 1960 enables the State Government to make rules for the conduct and the regulation of the business of the society or class of the societies for carrying out the purpose of the Act. The Statute does not provide delegation of the power to frame the policy and the scheme to implement the provisions of Sec. 81(3) of the Act of 1960. Section 165(2)(xliv) empowers the State Government to make rules so as to provide for the procedure to be adopted for taking possession of books, documents, securities, cash and other property of a society by a person acting under sections 81, 83 and 84 in cases where misappropriation of funds, breach of trust or fraud has been committed or where it is suspected or apprehended that the books, documents, securities, cash and other properties are likely to be tampered with or destroyed or removed. The respondents could not point out any provision in the Statute empower the Commissioner to issue circular regarding the procedure or to issue general directions for conduct of test audit.

11. It is settled proposition of law that, if a statute requires a particular act to be done in a particular manner, it has to be done in that manner only. Section 81(3)(c) empowers the Registrar or the authorized person to carry out the test audit of accounts of a society if it is brought to his notice that the audit report submitted by the auditor does not disclose the true and correct

picture of the accounts and the test audit shall include the examination of such item as may be prescribed or specified by the Registrar for such year. Perusal of said provision, it is manifest that the Registrar is empowered under the Statute to direct/order to carry out a test audit of accounts of such society wherein it is brought to his notice that the audit report submitted by the auditor does not disclose the true and correct picture. The circular restricts the carrying out of test audit to only 20% of the societies whose audits have been conducted.

12. The Registrar is empowered to issue directions as contained in Section 79 of the Act of 1960. Under Section 79A of the Act of 1960, the Government has power to give directions in the public interest. The power of audit, enquiry, inspection and supervision is provided under Section 81 of the Act of 1960. Sub Section 2A of Section 81 of the Act of 1960 empowers the State Government in public interest or in the interest of the society for ensuring management thereof by order direct that such society or class of societies shall prepare and maintain its accounts in the form determined by the State Government, from time to time and that cost audit or performance audit or both of such societies or class of societies as may be specified in the order shall be conducted. Sec. 81(3)(b) of the Act of 1960 empowers the Registrar, if the Registrar has reason to believe that there exists an element of fraud, misappropriation of funds, manipulation of the account of society are likely to be tampered with, thereby

causing loss to the society to depute flying squad to a society or societies for examination of books, records, accounts and such other papers and for verification of cash balance. Section 81(3)(c) of the Act of 1960 gives ample power to the Registrar, if it is brought to his notice that, the audit report submitted by the auditor does not disclose the true and correct picture of the accounts, the Registrar has the power to carry out or caused to be carried out test audit of accounts of such societies. Section 81(6) of the Act of 1960 further provides that if it appears to the Registrar on an application by a society or otherwise, that it is necessary or expedient to re-audit any accounts of the society, the Registrar may by order provide for such re-audit and the provisions of this Act applicable to audit of accounts of the society shall apply to such re-audit.

13. The scheme of Section 81 is comprehensive and deals with each and every eventuality. Section 81 of the Act of 1960 gives ample powers to the Registrar to take steps and corrective measures on the defalcation by the society and the audit report not disclosing the true and correct picture of the account. The powers are not restricted to the 20% of the societies whose audit is conducted. The amplitude and the width of the powers of the Registrar under Sec. 81(3(c) of the Act of 1960 is very wide. In each and every case, wherein it is brought to the notice of the Registrar that the audit report submitted by the auditor does not disclose true and correct picture of the account, the Registrar is

empowered to carry out or cause to be carried out test audit of such society. There are no fetters on the powers of the Registrar in issuing such directions. The powers under Section 81 of the Act of 1960 are unfettered in the circumstances, eventuality and the contingencies enumerated in the said section. The powers of the Registrar cannot be curtailed to the 20% of the societies only as provided in the impugned circular. Sec. 81(3)(c) of the Act of 1960 cannot be restricted to mean that the test audit has to be done only in respect of 20% of the societies, however, the impugned circular recites so. The impugned circular cannot restrict the powers of the Registrar to limit the test audit to only 20% of the societies whose audit has been conducted. If the audit report of more than 20% societies does not disclose the true and correct picture of the accounts, the Registrar has every power and authority to carry out or caused to be carried out test audit of accounts of such societies. The said powers would be unqualified, unrestricted. The impugned circular does not take into consideration the said aspect.

14. The Commissioner does not have any power to frame rules or issue directions in the nature sought to be done by the Commissioner under the impugned circular.

15. The Registrar has to arrive at subjective satisfaction based on objective assessment and issue directions for carrying out test audit. Section 81(3)(c) of the Act of 1960 does not give blanket

power to the Registrar to direct a test audit even in case where no deficiencies are pointed out or where the audit report discloses the true and correct picture of the accounts. In absence of any powers in that regard, the general directions issued under circular are not countenanced by law. Said circular apart from being beyond the statutory power is arbitrary. Arbitrariness is antitheses to the rule of law.

16. The respondent No. 2 could not have circumvented the provisions of Section 81(3) of the Act of 1960 by issuing such a circular. The Registrar has power under Section 79(1) of the Act of 1960 to call for annual report of the activities of the society, audited statement of accounts and all the relevant aspects as is detailed in Section 79(1)(a) to (f) of the Act of 1960. The powers of the Registrar in that regard would be limited to the matters enumerated in the said provisions. The Commissioner cannot arrogate unto himself the powers of the State Government. The Commissioner has travelled beyond his power and authority in issuing the impugned general circular. The Commissioner could not have circumvented the powers of the State Government in that regard.

17. Though the purpose mentioned in the circular may be laudable, however, as the respondent No. 2 did not posses the power and authority to issue general circular for the matters covered U/Sec. 81(3)(c) of the Act of 1960 dehors the provisions of

the Statute and rules, the same cannot be sustained. It is for the State Government to issue necessary directions in that regard. None the less where the Registrar finds that the auditors report does not disclose the true and correct picture of the account, the Registrar has power and authority to carry out or cause to be carried out test audit of such society, invoking his powers under Section 81(3)(c) of the Act of 1960.

18. With these observations, the impugned circular dated 25.10.2017 issued by the respondent No. 2 to the extent of directing test audit of 20% of the societies is set aside.

Rule accordingly is made absolute in above terms.

Sd/-
[A. M. DHAVALE, J.]

Sd/-
[S. V. GANGAPURWALA, J.]

bsb/April 19