

(2004) 08 BOM CK 0091

In the Bombay High Court

Case No : Writ Petition No. 2632 of 1996

Maharashtra Certified Auditors Association (Regd.)

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 13-08-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6), 226, 265

Citation : AIR 2005 Bom 70 : (2004) 4 ALLMR 490 : (2005) 1 BomCR 128 : (2004) 4 MhLj 819

Hon'ble Judges : S.U. Kamdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : R.P. Sabban, for the Appellant; V.P. Malvankar, AGP, for the Respondent

Judgement

S.U. Kamdar, J.—These two writ petitions are raising substantially a similar of law in so far as the audit work undertaken by the Chartered Accountants of the Co-operative Societies is concerned, and since the question of law raised is similar in both the petitions, we propose to dispose off both the petitions by our common judgment.

2. Whilst in Writ Petition No. 2632 of 1996, the circular dated 6.3.1996 is challenged, in other Writ Petition being Writ Petition No. 8812 of 2003 challenge is to the circular dated 4.6.01992. Both these circulars are issued by the Commissioner for Co-operation, Pune. However, legal challenge to both these circulars are substantially identical. The material facts in the present petitions briefly stated are as under:-

3. Writ Petition No. 2632 of 1996 has been filed by an association (Regd.) claiming to be the association of Chartered Accountants and Certified Auditors. The members of the petitioners association are engaged in carrying out auditing of cooperative societies. According to the petitioner, their Association has more than 225 members from all over Maharashtra State. The petitioner in the present case earlier filed a writ petition being Writ Petition No. 4900 of 1995 in this

Court. In the said writ petition, an order came to be passed restraining the respondent No. 2 namely, the Commissioner and Registrar, Cooperative Societies, Pune from interfering in any way with the statutory audit undertaken by the members of the petitioner covered u/s 81(1)(b) without recording reasons in writing. It is the case of the petitioner that thereafter the 2nd respondent has issued a circular dated 6.3.1996. Under the said circular a classification is made of the cooperative societies in various categories as "A", "B" and "C". Under the said circular, the Chartered Accountants and Certified Auditors are classified and are permitted to carry on audit only in one of the categories, namely, "A" or "B" or "C". Grade "A" qualifies those Chartered Accountants and Certified Auditors who have more than 15 years of experience after passing the C.A. examination and can carry on audit in respect of Multi-State Co-operative Societies and non-credit societies having an annual turn over working capital of more than Rs. 100 crores. Under grade "B", the Certified Auditors and Chartered Accountants included are auditors who have more than seven years but less than 15 years practice after passing the C.A. examination and are entitled to carry on audit of those societies having credit business turn over/working capital of Rs. 10/- to Rs. 100/- crores and also to conduct audit of housing societies having more than 100 members. In respect of grade "C" classification it covers those chartered accountants/certified auditors who have less than seven years experience as Chartered Accountants and it provides that they would be entitled to carry on audit of those societies whose annual turn over/working capital is upto Rs. 10 crores and also all those societies having less than 100 members. Thus, under the circular, a restriction has been placed on chartered accountants/certified auditors from carrying on audit work of those societies which do not fall under the respective grade or classification.

4. The challenge to the said circular also pertains to the provision providing for levy of 20% of audit fees under Clause 12 thereof. The said Clause 12 provides that all those chartered accountants/certified auditors carrying on audit work of societies have to pay 20% of the fees out of the fees recovered by them from the cooperative societies for rendering their services. This 20% fee is required to be paid over to the Registrar, Co-operative Societies. The said circular, inter alia, says that such fee is required by the Registrar, Co-operative Societies on the ground that it is a fee for rendering administrative services such as administrative control, etc. The petitioners have challenged the said levy of fees on various grounds.

5. In Writ Petition No. 8812 of 2003, the petitioners are challenging the order passed by the Commissioner for Co-operation dated 31.10.2003. Prior to the filing of this writ petition, the petitioners had challenged the circular dated 4.6.1992 under which also the identical provisions of 20% levy of fees by the Government was imposed. The said circular of 4.6.1992 was challenged by filing three writ petitions being Writ Petition No. 243 of 1996, 381 of 196 and 4907 of 195 in this court. In the said writ petitions interim orders were granted restraining the respondents from recovering any amount towards the so called

20% deduction from the audit fees of the Chartered Accountants/Certified Auditors by the respondents herein. On 5.4.2003, the said writ petitions were disposed of by the Division Bench of this Court, inter alia, directing the respondent No. 2 to reconsider the whole matter afresh pertaining to the circular dated 4.6.1992 and recovery of 20% deduction from the audit fees. On 28.4.2003, a letter was sent by the petitioners Association to the authorities challenging the said circular dated 4.6.1992 and reiteration the submissions made by them in the earlier writ petitions. On 31.10.2003, the respondent Commissioner for Co-operation, Pune reconsidered the matter and passed an order upholding the circular dated 4.6.1992 as valid and ordering that 20% deduction should be carried out from the audit fees of the chartered accountants/certified auditors. In view of the said order dated 31.10.2003, the petitioners have approached this court challenging the said order dated 31.10.2003 and also the original circular dated 4.6.1992.

6. The learned counsel for the petitioners has challenged both the said circulars inter alia by contending that the respondents have no authority to issue the said circulars under the provisions of the Maharashtra Co-operative Societies Act, 1960 and the Maharashtra Cooperative Societies Rules, 1961. It was thus contended that the said circulars are contrary to the provisions of the Act and the Rules and in any event beyond the power conferred on the 2nd respondent under the provision of the said statute. It was secondly contended that the circulars which are issued by the respondent No. 2 are infringing the fundamental right of the petitioner's members under Article 19(1)(g) of the Constitution of India in as much as the petitioner's members under Article 19(1)(g) of the Constitution of India in as much as the petitioners have been prevented from carrying out their profession and/or trade in respect of various societies on the basis of the classification contained in the said circular of 1996. It has also been contended that the said circular is arbitrary, discriminatory and in breach of the fundamental rights the petitioner's members also under Article 14 of the Constitution of India. It has been further contended that the said circular also violates Article 265 and Article 200A of the Constitution of India which confers constitutional right on the petitioners herein. It was further contended by the learned counsel for the petitioner that levy of 20% of charges on the petitioners is illegal and unlawful as the respondent No. 2 does not render any service of any nature whatsoever to the petitioner and, therefore, claiming 20% from their audit fees is illegal and unlawful and without jurisdiction. It has been further contended that deduction of 20% of the fees is confiscatory in nature and is not supported by any provision of law and, therefore, also the said levy is illegal, unlawful and without jurisdiction. On the aforesaid submission, the learned counsel for the petitioners has submitted that both the said circular dated 4.6.1992 as well as the circular dated 6.3.1996 are liable to be quashed and set aside by this Honourable court and consequently the petitioners are entitled to refund of the unlawful recoveries of 20% levy by the respondents from their audit fees.

7. On the other hand, the learned counsel for the respondents have, inter alia,

contended that the respondents have power to supervise the audit of the societies and have traced their power to the provisions of Section 81, Section 165 Sub-section (xlv) and (xlvii) of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as the said "Act") and Rules 69 and 74 of the Maharashtra Co-operative Societies Rules, 1961 (hereinafter referred to as the said Rules). Relying upon the aforesaid provisions, the learned counsel for the respondent has contended that the circulars issued by the respondents are within the ambit and power of the respondents and, therefore, they are legal, valid and justified. On merits, the learned counsel for the respondents have contended that the respondents are entitled to levy of 20% of the audit fees towards the services rendered by them to the petitioner which are briefly set out in their affidavit in reply as under:-

"I say that further the Petitioner's contention that the Respondent cannot render any services to the Chartered Accountant and Certified Auditors is also far away from the truth, because the Government/Respondent has to perform the following activities exclusively related to work done by the Chartered Accountants:

- 1) To receive the applications for implement of Certified Auditors.
- 2) To scrutinise such application within prescribed term and conditions.
- 3) To issue necessary orders of enrolment of Certified Auditors by the way of notification as required under Rule 69 of the said Rules.
- 4) To publish the list of Certified Auditors on the panel in official gazette.
- 5) To observe the performance of work allotted to them.
- 6) To revise the list of the panel of auditors periodically i.e. Every 3rd year.
- 7) To pass the challans of audit fee for assessment.
- 8) In case the society does not pay the audit fees to Certified Auditors/Chartered Accountants in that behalf has to take necessary action u/s 155 of the said act for coercive recovery of audit fee as the land revenue is recovered.
- 9) In case the societies fails to produce the record for audit the Registrar has to exercise the powers u/s 79 and 80 of the said Act to make available the record for audit."

8. Before appreciating the rival contentions of the parties, it is necessary for the purpose of determination of issues in the present petition to set out some of the legal provisions of the said Act and the said Rules on which reliance has been placed by both the parties. The said provisions are as under:-

"81. Audit.--(1)(a) The Registrar shall audit, or cause to be audited at least once in each co-operative year, by a person authorized by him by general or special order in writing in this behalf the accounts of every society which has been given financial assistance including guarantee by the State Government, or

Government undertakings, from time to time, and the accounts of the apex societies, State and District Level Federal Societies, District Central Co-operative banks, Co-operative Banks, Co-operative Spining Mills, District and Taluka Co-operative Sale and Purchase Organizations, and any such Society or class of Societies which the State Government may, from time to time by notification in the official Gazette specify.

(b) The Societies other than the societies referred to in Clause (a) shall arrange to get their accounts audited, at least once in each Co-operative year by an auditor from the panel of auditors maintained by the Registrar, or by a chartered accountant holding a certificate in co-operative audit issued by the Institute of Chartered Accountants of India;

Provided that, the Registrar may, for reasons to be recorded in writing audit or cause to be audited accounts of any such societies of any year at any time.

"165. Rules.--

(xlv) prescribe the procedure for conducting an audit, the matters on which the auditor shall submit a report, the form in which the statement of accounts shall be prepared for his audit, the limits within which the auditor may examine the monetary transaction of society, the form of audit memorandum and report and the charges, if any, to be paid by a society for audit;

(xlvii) prescribe the procedure for appointment of auditors u/s 81;"

Rule 69 of the said Rules reads as under:-

"69. Procedure for appointment of auditors and for conduction audit. --(1) The audit of accounts of societies shall be conducted by Departmental Auditors or by certified auditors appointed by the Registrar from time to time on such terms and conditions as he deems fit;

Provided that, any society or class of societies notified by the Registrar may get their account audited by an auditor selected from the panel of certified auditors maintained by the Registrar and published by him in the Official Gazette,

Explanation 1.--For purposes of this chapter, audit shall include annual or periodical audit, continuous or concurrent audit and test or super audit and reaudit.

Explanation 2.--For purposes of this rule, "a certified auditor" includes, -

(a) a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949.

(b) a person who holds a Government diploma in Co-operative Accounts or A Government diploma in co-operation and accountancy, or

(c) a person who has served as an auditor in the Co-operative Department of the State Government.

And whose name has been included by the Registrar in the panel of certified auditors maintained and published by him in the Official Gazette at least once every three years.

(2) The audit u/s 84 shall in all cases extend back to the last date of the previous audit and shall be carried out up to the last date of Co-operative year immediately preceding the audit or where the Registrar so directs in the case of any particular society or class of societies, such other date as may be specified by the Registrar.

(3) The auditor shall submit memorandum to the society and to the Registrar in the Form specified by the Registrar, on the accounts examined by him and on the balance sheet and profit and loss account as on the date and for the period up to which the accounts have been audited, and shall state whether in his opinion, and to the best of his information and according to the explanation given to him, the said accounts give all the information required by the Act in the manner so required and give true and fair view.--

(i) in the case of the balance sheet of the State of society's affairs as at the end of the financial year or any other subsequent date up to which the accounts are made up and examined by him; and

(ii) in the case of the profit and loss account, of the profit or loss for the financial year, or the period covered by the audit, as the case may be

(4) The audit memorandum shall state.--

(i) Whether the auditor had obtained all the information and explanations when to the best of his knowledge and belief were necessary for the purpose of his audit;

(ii) Whether in his opinion proper books of accounts, as required by the Act, the society have been kept by the society so far it appears from the examination of these books; and

(iii) Whether the balance sheet and profit loss account examined by him are in agreement with the books of accounts and returns of the society.

(5) Whether any of the matters referred to in Sub-rule (4) are answered in the negative or with a qualification, the audit memorandum shall specify the reasons for the answer.

(6) The audit memorandum shall also contain schedules with full particulars of,--

(i) all transaction which appear to be contrary to the provisions of the Act, the rules or the bye-laws of the society;

(ii) all slums which ought to have been but have not been brought into account by the society;

(iii) any material impropriety or irregularity in the expenditure or in the

realization of moneys due to the society;

(iv) any money or property belonging to the society which appears to the auditor to be bad or doubtful debt; and

(v) any other matters specified by the Registrar in this behalf.

(7) The summary of audit memorandum as prepared by auditor shall be red out in a general meeting. The audit memorandum together with its accompaniments shall be open to inspection by any member of the society. The Registrar may however, direct, that any portion of the audit memorandum which appears to him to be of objectionable nature or not justified by facts shall be expunged and the portion so expunged shall not form part of the audit memorandum.

(8) The Registrar may from time to time specify the form or forms in which the statements of accounts and information shall be prepared for audit, by the society.

(9) On completion of his statutory audit, the auditor shall award and audit classification letter to the society whose accounts he has audited in accordance with the instructions issued by the Registrar from time to time. The list of societies to be published under Sub-section (3) of section 12 shall also specify the audit class of the society."

Rule 74 of the Rules reads as under:-

"74. Levy of audit charges and supervision charges.--(1) The Registrar may levy audit charges and supervision charges payable annually on or before a specified date by all or any class of societies including the societies in liquidation at such rate as may be fixed by him with the approval of the State Government. Such charges, if not paid, by the specified dated, shall be recoverable under Sub-section (2) of Section 155.

(2) The State Government may authorize the Registrar to grant total or partial exemption from the payment of audit charges and/or supervision charges assessed to any society or class of societies."

9. The first contention raised by the petitioner that the said circular is contrary to the provisions of Section 18(1)(b) of the said Act is concerned, we find substantial merit in the said arguments. However, the respondents have also relied upon the very same provisions for the purpose of tracing the source of power for issuing the impugned circulars. The provisions of Section 18(1)(a) inter alia provides for the Registrar to carry out the audit by himself or the same to be caused to be audited at lest once in each co-operative year in respect of class of societies which are enumerated u/s 81(1)(a) of the said Act. Section 81(1)(b) of the said Act provides that the Societies other than those referred to in Clause (a) shall arrange to get their accounts audited, directly from the chartered accountant or a co-operative auditor once a year. Section 81(1)(b) further provides that these audits can be carried out by the society by an auditor from

the panel of the auditors maintained by the Registrar, or by a chartered accountant holding a certificate in co-operative audit issued by the institute of Chartered Accountants of India. Thus, on a plain reading of Section 81(1)(a) and 81(1)(b) it is clear that both operate in different fields. The provisions of Section 81(1)(a) with which we are not concerned in the present petition deals in respect of the societies of which audit is carried out by the Registrar himself or his appointed auditors whereas Section 81(1)(b) deals with other classes of the societies whose audit is not directly placed under the Registrar or his appointed auditors. Thus, on a plain reading of Section 81(1)(b) it is clear that the Registrar of Co-operative Societies and/or the respondents herein have no role whatsoever to perform in getting the audit done of the societies other than the societies mentioned in Section 81(1)(a). The provisions of Section 81(1)(b) provides that the societies themselves have to arrange to get their accounts audited from chartered account or cooperative auditor subject to his qualification. Only for the purpose of guidance a panel of the chartered accountants is specified u/s 81(1)(b) which a Registrar can maintain. The provisions of Section 81(1)(b) further state that even in respect of the societies who do not desire to have a chartered accountant from the panel of the auditors maintained by the Registrar they can get the same audited from a chartered accountant holding a certificate in co-operative audit issued by the institute of Chartered Accountants of India. Thus, in our view provisions of both i.e. Section 81(1)(a) and 81(1)(b) operates in different fields and in respect of different classes of the societies. The provisions of Rule 69 on which stress is placed by the respondents inter alia provides once again that the audit of the accounts of the society has to be conducted by Department Auditors or by certified auditors appointed by the Registrar. However, the said Rule 69 has a proviso which provides that any society or class of societies notified by the Registrar may get their accounts audited by an auditor selected from the panel of certified auditors maintained by the Registrar and published by him in the Official Gazette. The said proviso is an enabling provision so as to give guidelines to the societies for the purpose of names of auditors available who, according to the Registrar of Co-operative Societies are available for carrying on the audit work. In our view, neither reading of provision of Section 81(1)(b) of the said Act or the reading of Rule 69 of the said Rules empowers the Government to prepare a panel of the auditors in such a manner so as to prevent them from carrying out audit in respect of certain class of societies merely on the basis of their experience. The power conferred u/s 81(1)(b) read with Rule 69 to prepare a panel does not give a power to the respondents to classify the chartered accountants with the classification of the societies and provides by a circular that a particular class of chartered accountants or an auditor can carry out audit work of only a particular class of the societies. By the present circular the respondents have prevented chartered accountants or certified auditors from carrying out the work of auditing in respect of all kind of societies. Take a case of a person who is in a case "A" and having experience of more than 15 years. By virtue of the circular though he is competent and is empowered under the circular itself to carry out the audit work

of a big society, however he will not be permitted to carry out the audit work of a small society even if the society desires to employ him to carry out such an audit work. In our opinion, such restriction is illegal and unlawful and is not supported by the provisions of Section 81(1)(b) of the said Act or Rule 69 of the said Rules. A small society in fact would be more desirous to get all the audit work carried out by much more experienced chartered accountant and preventing such chartered accountant to carry out the audit work even though the smaller society is desirous of hiring his services would tantamount to prevent the said members of the Petitioner Association, by placing them in a particular class, from carrying on their business or profession freely in respect of other kind of societies. This restriction is arbitrary and discriminatory. It is not supported by the provisions of Section 81(1)(b) or Rule 69 of the said Rules. We also find great substance in the argument of the learned counsel for the petitioner that such restriction is unreasonable and arbitrary and has no nexus with any object sought to be achieved. We thus find that the said circular is violative of Article 14 of the Constitution of India. It tantamounts to interference with the trade or profession, which the law permits, a chartered accountant to carry out freely once he is so qualified. In our view, the said circular is also liable to be struck down as in breach of the fundamental rights under Article 19(1)(g) of the Constitution of India. It is now well settled that reasonable restrictions can only be imposed by a Legislature or Parliament by enacting a valid law under Article 19(6) of the Constitution of India. The Honourable Supreme Court in the case of Mohammad Yasin v. Town Area Committee, Jalalbad and Anr., reported in 1982 S.C.R. 572, has inter alia held as under:-

"In our opinion, the bye-laws which impose a charge on the wholesale dealer in the shape of the prescribed fee, irrespective of any use or occupation by him of Immovable property vested in or entrusted to the management of the Town Area Committee including any public street, are obviously ultra vires the powers of the respondent Committee and, therefore, the bye laws cannot be said to constitute a valid law which alone may, under Article 19(6) of the Constitution, impose a restriction on the right conferred by Article 19(1)(g). In the absence of any valid law authorising it, such illegal imposition must undoubtedly operate as an illegal restraint and must infringe the unfettered right of the wholesale dealer to carry on his occupation, trade or business which is guaranteed to him by Article 19(1)(g) of our Constitution."

Further, in the case of Oudh Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, , the Supreme Court has held as under :-

"6. It must be remembered that right to trade is a guaranteed freedom. That right can be restricted only by law, considered by the Courts as reasonable in the circumstances. Not only the law restricting the freedom should be reasonable, the orders made on the basis of that law should also be reasonable. It is clear that the sugar released for sale in the open market will have to be ordinarily sent out of the States in which they are produced. For doing so, the concerned

producers will have to enter into contracts with dealers at far off places. Thereafter the sugar will have to be transported to places of disposal mainly through railways. Taking all the circumstances into consideration, we do not think that the period of 30 days given for disposal of the sugar is in any manner generous. That being so, we are clearly of the opinion that the 26 days time given to the appellants for the disposal of the sugar cannot be considered as reasonable. We think that the second respondent unreasonably rejected the appellants' request to extend the time for the disposal of the sugar released for sale in the open market. He appears to have acted mechanically."

The aforesaid judgments of the Supreme Court makes it abundantly clear that it is not permissible to impose any restriction on the fundamental right of a citizen under Article 19(1)(g) of Constitution of India unless the same is imposed by a valid law duly enacted by the Parliament. It is definitely not permissible to impose such restrictions by way of a circular or an administrative instruction since they are not the law enacted by the Parliament.

10. In our view, once we hold that the provisions of Sections 81(1)(b) or Rule 69 of the said Rules do not empower the Government to issue any such circular, then, obviously the restrictions placed by the respondents by way of a circular which is nothing but administrative instruction is obviously unconstitutional and violative of petitioners fundamental rights under Article 19(1)(g) of the Constitution of India and thus, the circular dated 6.3.1996 is liable to be struck down on this ground alone. It is a settled law that an executive order or administrative instruction in the form of a circular is not a law and the law can be only enacted by the competent legislature and competent Parliament. In the case of *Hindustan Times and Others Vs. State of U.P. and Another*, the Honourable Supreme Court of India has held as under :-

"23. The expression "law", within the meaning of Article 300A, would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law.

24. In *Bishambhar Dayal Chandra Mohan v. State of U.P.* this Court held as under: (SCC p.66 para 41)

"41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300A. The word "law" in the context of Article 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law."

11. The learned counsel for the respondents has sought to contend before us that the circular is valid and in support of the same, the source of power is sought to be traced to Section 165(xlvi) and (xlvii) of the said Act. Firstly, the provision of Section 165 is a rule making power of the Government which is conferred on the Government by the Legislature. The rule making power provides inter alia that the government can prescribe the procedure for conducting the audit, the matters on which the auditor shall submit a report, the form in which the statement of accounts shall be prepared for his audit, the limits within which the auditor may examine the monetary transactions of society, the form of audit memorandum and report and the charges, if any, to be paid by a society for audit. Rule (xlvii) prescribes the procedure for appointment of auditors u/s 81. In exercise of the said power under Rules (xlvi) and (xlvii) of Section 165(2) of the said Act, the Government has already framed Rules being Rules 69 and 74 of the Maharashtra Co-operative Societies Rules, 1961. It is now a settled law that the word "prescribe" means prescribe by rules or regulations. Now this rule making power cannot be extended so as to give power to the government to prescribe such restrictions by issuance of a circular de hors the provisions of the Act and the provisions of the rules already framed thereunder. In any event, we are of the opinion that the rule making power cannot be extended so as to enable Government to frame rules empowering itself to issue circulars of the nature which has been sought to be done in the present case. We do not find any substance in the argument of the learned counsel for the respondent that the circular can be sustained by placing reliance upon the said provisions of Section 165(2) (xlvi) and (xlvii) of the said Act and/or Rules 69 and 74 of the said Rules.

12. This takes us to the next argument of the learned counsel for the petitioner that levy of 20% of the audit fee under the circulars from the fee which is paid by the society to the auditors is arbitrary, illegal and without jurisdiction. The respondents have supported the said circular dated 4.6.1996 as well as the order 31.10.2003 by contending that under Rule 74 of the said Rules the respondent has power to levy the fees by deducting audit charges to the extent of 20% received from the societies by the chartered accountants and/or certified auditors. It has been further contended that this levy is in the nature of fees for the various services rendered by the Registrar to the said chartered accountants and/or certified auditors. Firstly, the provisions of Rule 74 which inter alia provides that the Registrar may levy audit charges and supervision charges payable annually on or before a specified date by all or any class of societies including the societies in liquidation at such rates as may be fixed by him with the approval of the State Government does not at all entitle the respondents to issue impugned circulars.

13. Thus, the plain reading of Rule 74 indicates that the power of levy of charges thereunder by the respondents is against all cooperative societies or any class of societies. Rule 74 does not contemplate any levy by way of any deductions from the audit charges or supervision charges of the chartered accountants which carry on the audit work of the societies. Thus, the reliance placed by the

respondents on Rule 74 is in the first place totally misplaced and misconceived. Secondly u/s 81(1)(b) of the said Act liberty has been given to the society to get any auditor or a chartered accountant appointed from the panel or a person holding a certificate in co-operative audit issued by the institute of Chartered Accountants of India to carry on audit of their societies accounts and records. When that is so, then how a chartered Accountant carrying out independent audit is in any manner liable to make payment of any charges to the respondent herein. Thus, we are of the opinion that Registrar has no power to levy audit charges or supervision charges under Rule 74 on the Chartered Accountant or co-operative auditor for work of auditing carried out by them. Rule 74 contemplates levy of audit charges and supervision charges only if the audit is conducted by the respondents through their own departmental chartered accountants or chartered accountants appointed specifically by the respondents for carrying out the audit of any particular society. The rule does not take into account either audit carried out by the societies independently or through Chartered Accountant or Co-operative Auditor named in the panel of the respondents herein. A plain reading of Rule 74 does not contemplate levy of an audit charges unless in fact the audit work is carried out by the respondents themselves. In any view of the matter, Rule 74 does not at all contemplate recovery of such 20% of fees from the audit fees of the auditors. Firstly, that would be plainly arbitrary as there is no provision of law to recover such 20% from the charges or fee which is paid by the society to the Chartered accountant or auditors. Secondly, there is no service rendered by the Registrar to the chartered accountants in cases where the audit is conducted u/s 81(1)(b) by the Chartered accountant directly under a contract with the society. Merely preparing a list of names of the panel does not entitle the respondents to levy of 20% of fees from everybody's audit fees which are received by the chartered accountant from various societies for rendering their services. This action on the part of the respondent is arbitrary, without jurisdiction and totally illegal.

14. We have considered both the circulars from various angles so as to see whether the action on the part of the respondents is justified and/or can be upheld. However, we are unable to uphold the said circulars dated 4.6.1992 and 6.3.1996 because from every angle the said circulars are arbitrary and are contrary to express provision of the statute and thus we hold that the said circulars dated 4.6.1992 and 6.3.1996 are arbitrary and in breach of petitioners fundamental right under Article 14 and 19(1)(g) of the Constitution of India. We further hold that the said circulars are not supported by any valid authority of law and thus are unconstitutional and liable to be struck down.

15. The contention of the learned counsel for the respondent that 20% levy is levied because the respondents are rendering the service to the chartered accountants and certified auditors for preparing and maintaining the panel of the said chartered accountants and auditors plainly cannot be accepted. Firstly, it is not necessary in light of Section 81(1)(b) to prepare and maintain any panel of chartered accountants. Assuming that by virtue of the provision of Rule 69 the

Registrar is entitled to prepare a panel then in that event the same is prepared with a view to provide guidance to the various societies of competent chartered accountants available and thus levy of any fees has to be from the societies and not from the chartered accountants or certified auditors. Apart from the aforesaid facts we do not see any question of large amount being spent towards the preparation of the list of chartered accounts which necessitates the respondents to claim 20% of the audit fees of every chartered accountant who undertakes audit work of various societies. It is now a settled law that fees must have some relationship to the services rendered. There may not be an exact quid pro quo but there has to be some element of nexus and co-relation. We do not find any such co-relation to the fees charged from the Chartered Accountant or co-operative Auditor being 20% of their audit fees and any of the so called services rendered by the respondents. Thus, the levy of such fee is unconstitutional. According to us, the said claim as well as the purported circular of levy of 20% of audit fees from chartered accountant is unsustainable in law, arbitrary and it is in any way unconstitutional in light of the aforesaid facts. Accordingly, we strike down the said circular dated 4.6.1992 and a circular dated 6.3.1996. Consequently we also quash and set aside the said order dated 31.10.2003.

16. Once we hold that there is no power in the respondents to levy the said 20% audit fee or charges by virtue of the fact that it is not supported by any authority of law, then, in that event, the said recovery by the respondent has to be held to be illegal and without jurisdiction. Once the recoveries are held to be unsupported by law and illegal, then obviously, the amount is liable to be refunded. In the case of *Salonah Tea Company Ltd., etc. v. The Superintendent of Taxes, Nowgong and Ors. etc.*, reported in : 1988(33)ELT249(SC) , the Honourable Supreme Court has held as under:

"Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate, either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party. It is true that in some cases the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule. It depends upon the facts of each case."

17. In the case of *U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another*, , the Honourable Supreme Court has held as under:-

"It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out

and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which taxes was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity."

18. In the present case, we are informed that during the pendency of the writ petition i.e. Writ Petition No. 2632 of 1996 there was an interim order operating restraining the respondents from recovering the said 20% of the fees. However, the said interim order was restricted only to the chartered accountants who have approached this Court. In light of the view we have taken, we are of the opinion that the recoveries being totally without jurisdiction and unconstitutional, the respondents should be liable to refund the said recoveries of 20% of audit fees. We also find from the records that in Writ Petition No. 3550 of 1995 from 15.9.1995, there has been an interim order restraining the respondents from recoveries the 20% of the audit fees under the said circular dated 4.6.1992. In Writ Petition No. 2632 of 1996 also there has been an interim order dated 26.4.1996 from recovering of any amount towards the said 20% of audit fees from the chartered accountants. We are also informed that pursuant to the said interim orders, no amount is recovered by the respondents from the members of the petitioner and/or other chartered accountants. In light of the view we have taken, it is necessary that the said amount which is recovered under the circular dated 4.6.1992 till the first order dated 15.9.1995 should be refunded. We are conscious of the fact that the claim which is barred by law i.e. for a period of three years prior to the date of filing of the writ petition cannot be granted particularly in view of the judgment of the Supreme Court in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , and thus we restrict the claim of the petitioners for refund of the amount for a period of three years prior to the date of the filing of the writ petition. We also further direct that the refund will be only made to the members of the Petitioners who were members as on the date of filing of these petitions and/or those persons who have approached the Court by filing their, own individual petition. The petitioners in the aforesaid two writ petitions will be at liberty to file an application with respondent No. 2 giving details of the payment/deduction made by the respondents from their audit fees. Such an application will be made by the petitioners within a period of one month from today and on such application being received from the respondents, the respondents shall process the same and grant necessary refund within a period of three months from the date of receipt of the respective applications. However, the refund will be made without any claim of interest.

19. With the aforesaid directions, we make both the petitions absolute in terms thereof. However, there shall be no order as to costs.

Parties to act on an ordinary copy of this order duly authenticated by the Private Secretary of this Court.