(1983) 08 BOM CK 0053

Bombay High Court (Goa Bench)

Case No: Spl. Civil Application No''s. 73 and 74 of 1972

Manoel Francisco Agremiro Da Conceicao Fernandes and etc.		APPELLANT
	Vs	
Collector of Daman and Others		RESPONDENT

Date of Decision: Aug. 17, 1983

Citation: AIR 1984 Bom 461 : (1984) MhLj 144

Hon'ble Judges: G.F. Couto, J; A.A. Ginwala, J

Bench: Division Bench

Advocate: S. Chinnoy, for the Appellant; J. Dias, Goveronment Advocate, for the Respondent

Judgement

Ginwala, J.

these two writ petitions can be disposed of by one judgment since they raise a common question about the validity f o the Daman (Abolition of ..... Regulation, 1962 (hereinafter referred to as "the Regulation") and the orders passed by the collector of Daman under it.

2. In order to appreciated properly the various contentions which have been urged on behalf of the petitioners,s it would be convenient at the outset to take not of the legislative and judicial history of the regulation and its salient features. The territories which immediately before 20-12-1961 were declared as Union territory by including there in Part 11 of the First Sch of the Constitution by the Constitution (''''Amendment) Act, 1962, By the said Amending Act this Union Territory was included in cl. (1) of Art 240 of the Countitution, thus enabling the president of India to make regulations for its peace. Progress and good government In exercise of the powers so cinferred on him by the said clause, the President Promulgated the Regulation to provide for abolition of proprietorship of villages in the Daman District in the Said Union Territory. It was to come into force on such date as the Central Government was to appoint and this date being the 13th day of July, 12962 was to be the "appointed date" with in the meaning of cl. (b) of S. 2 of the Regulation. Under Cl. (g)

of S. 2 of the Regulation as originally promulgated "land" was defined to mean every class or category of land including benefits to arise out of such land and, things attached to earth. S. 2 (h) defines :proprietor" to mean a person who holds any village or villages granted to him or any of his predecessors-in-interest by the former Portuguese Government by way of gift, sale or otherwise including his co-sharers. Under s. 3 all rights, title and interest every proprietor in or in respect of all lands his village or village are deemed to have been extinguished on and from the appointed date and they stand transferred to and vest in the provisions contained in s. 3 a proprietor is entitled to retain with effect from the appointed date lands under its personal cultivation not being passure or grass lands, as also homesteads.together with the lands appurtenant thereto. S. 5 authorises the Collector to take charge of all lands and of all rights, title and interest therein of a proprietor vested in the government under S. 3, but does not authorise him to take possession. Of any land or of any right of properitor, which maybe be retained by him under S. 4. S. 6. subjects all lands in villages, therights, title and interests in which have vested in the Government under s. 3 to payment of land revenue to the Government in accordance with revenue surveyand settlement of land revenue with have effect on and form the appointed date. A provision had been made in this section for assessing and recovering the land revenue payable in respect of such lands until revenue survey and settlement of lands revenue in respect of such land share mae.Ss. 7 provides for restoration of possessing of their lands to certain cultivating tenants. Under sub-sec (1) of s. 8 every cultivating tenant holding land of which he was in actual possessing on 20-12-1961, became the occupant thereof on payment of land revenue ot the Government under s. 6 as from the appointed data. Similarly under sub-sec. (2) of S. 8 every proprietor holding the land which he was personally cultivating on 20-12-1961 and the possession of which had not ben restored to the cultivating tenant under s. 7, 6. S. 9 provides for payment of compensation to proprietors whose rights, title and interest in respect of their lands vest in the government under s. 3 This compensation is to be computed at the rate of twenty times the annual payment (Contribucao Predial)which the proprietor was liable to make ot the former Portuguese government in respect of such land imediatelybefore 20-12-1916 Sec. 10 provides for method of payment of compensation. Any person entitled to compensation under s. 9 had to make an application to the Collector in the precribed form for its Administrator was to specifying his behalf from time to time by notification in the official gazette. On receipt of the applicants the "Collector has to determine the amount of compensation and he has to apportion the compensation where there are more persons than one entitled to if. Sec. Ii than provides as to how the payment of compensation has to be made. these are the salient features of the regulation as it was originally promugated.

3. In Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, , the Constitutional validity of the Regulation was challenged in a buch of five writ

petitions on the ground that its provisions violated Arts. 14, 19 and 31 of the Constitution. The Central Government sough to bring it under the protective umbrella of Art. 31f A. Relying on the definition of "estate" in Art. 31A(2)(a) as substituted by the Constitution (Seventeenth Amendment) Act, 1964 retrospectively, it was submitted on its He half that proprietory interest abolished by the Regulation was (a) :estat: or (b) :a jagir, inam or mualfi or other similar grant: or (c) "land held or let for purposes of agriculture or purposes ancillarythereto". The Supreme Court held that before "estate" or its equivalent can be ound, there must be land which pays land revenue and is held in accordance with law relating to land tnures. It found that the expression :estate" in that sense cannot be said to have had an equivalent in daman District. It also found that he lands involved in the petitions except one village were not jagir inam or mualfi and that none of them were held under ryotwari or tenure. While considering the question whether the lands afected by the regulation answered the description of lands given in Art. 31a(2)(a)(iii), it found that the definition of land in s. 2 (g) of the Regulation was wider than the definition of "estate" in art. 31 a and that this definition of land as including all categories of lands could not ne used in the teeth of restricted definition of "estate" It then proceeded to consider whether the definition given in s. 2 (g) of the Regulation was severable. After reviewing some authorities on this issue it concluded as follow

"That result, therefore, is that the definition of ''land in the Regulation being at vvariance with the definition og ''estate'' cannot stand with But it is severable it.....of the Regulation which will operate but the protection of Art. 31A will not be available in respect of land not strictly within the definition of Art. 31 a, In other words, ''land'' would include not every class or category of land but only lands held for purposes ancillarythereto, including waste land, forest land, land of passures or sites of buildings annd other structures occupied by cultivators of land, agricultural laboures and village artisans. Land which does not answer this under Arts. 14, 19 and 31 and it is from this point of view that the cases of the petitioners before us must be examined where categories of land other than those stated in Art. 31A(2)(1)(iii) are mentioned."

The Supreme Court then proceeded to examine the facts of each case in the light of the abovesaid decision and held that the regulation would operate upon the proprietorship of village except in the matter of hilly land, salt pans, salt lands, and quarries. This according to the supremeCourt, the figuration in so far as it operated on lands held or let for purposes of agriculture or for purposes ancillarythereto, including waste lannd, forest land, land for passure or sites of buildings and other structures occupied by cultivators of land, Agricultural labourers and village artisand, but excluding hilly land, quarries, sold lands, and salt pans, was immune to the cnallent on the ground that it is inconsistent with or takes away or abridges any of the rights inferred by Arts. 14, 19 and 31 of te Constitution.

4. In rhe wake of this decision of the Supreme Court, the Legislative Assembly of Goa, Daman and Diui with then had come into existence by virtue of the government of Union Territories Act, 1963 made under Art, 239A of the Constitution, enacted the Daman) (Abolition of Proprietorship of Village) Regulation (Amendment) Act, 1968 (hereinafter referred to as "the Amendment Act, 196 ") to carry out some material amendments in the Regulation. By this .....definition of "land" inline with the decision of Supreme Court in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, and Art, 31A(2)(a)(iii) of the Constitution. Ss. 8-B and 8-C were inserted for eviction of occupants of land in certain cese, restrictions on sale etc. of ;amd nu pcci[amts, and forfeiture of land transferred in contravention of such restriction. S. 8-B provides that no sale including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue, gift exchangeeeeee or lease or assignment or mortgage of any land inrespect of which, any persons has become an occupant under s.8 shall be made, except with the previous permission in waiting of Collector, who may grant such permission in such circumstances an subject ot such conditions as may be prescibed. In the Regulation as initially promulgated there was no machinery for deciding various questions which may arise in its implementation such as whether a person is a proprietor, an agricultural labourer, a cultivating tenant, or a landless person or to determine the land in respect of which occupancy rights are conferred under s. 8 and the person on whom they are cinferred etc. In order to fill up this lacuna in the Regulation Ss. 12A to 12-F were inserted to require The Mamlatdar tio decide such matters and to lay down the procedure which he is to follow. these sections also make a provision for appeal to the Collector and also Confer reversionary powers on him. The jurisdiction of Civil Courts tosettle, decide or deal with any question, which by kor under the Regulation is required to be settled, decide dor dealt with by the Mamlatdar or the Collector made under the Regulation can be questioned in any Civil or Criminal Court. these are the material and ions and changes which have been made in the originalRegulation.

5. the Administrator iin pursuance the powers conferred on him by s. 15 read with S. 8-B of the Regulation made rules called the Daman (Abolition of Proprietorship of Village) Rules, 1969 (hereinafter referred to as "the Rules") for land may be permitted under s.s.8-B of th Regulation. Sub-rule (1) of R. 2 of these Rules specifies the circumstances in which the Collector can grant permission for transfer of any land in respect of which any person has become an occupant under S. 8 of the Regulation. Sub-rule (2) of R.2 further provides that where permission ofr sale of any land is given in certain circumstance specified in sub-rule (1), it shall be subject to the condition that the occupant who is granted such permission pays ot the Government a Nazarana equal to twenty-five per cent of th price at which the land is being sold or one hundred times the assessment of the land, whichever is higher.

6. The Supreme Court rendered its judgment in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, The Amending Act of 1968 came into force on

9-8-1968. The rules came in to effect on 16-5-1969. In pursuance of the powers conferred on him by as. 10 (1) of the Regulation the Administrator under his notification specified 30-6-1967 as the date on or before which application in the prescribed form had to be submitted to the Collector. This date was subsequently extended to 30-9-1967.

7. In this context now let us turn to the facts of each petition. The petitioner in Special Civil Application. No. 73 of 1972 was one of the proprietors of village Damao do cima in the district of Daman. In pursuance of the notification issued by the Administrator under s.10 (1) of the Regulation he and other co-proprietors made an application to the Collector of Daman in the prescribed form for payment of compensation of 30-9-1967. This application was purported to have been submitted under protest and withoutprejudice. In the form of the application column 3 is means for stating the total area of the village and there are six sub-columns for stating areas under (1) Municipality, (2) agricultural use, (3) salt lands and salt pans (4) quarries, (5) hillocks and (6) ..... In this application the total area of the village was given as 60 hectares and it was stated that out of this area 54 hectares was under agricultural use including 8 hectares which was under the personal cultivation of the proprietors and .....;..... regime were regarded a industrial property and taxed accordingly. No area was shown as under municipality, salt lands and salt pans, quarries or hillocks. Only 4 hectares are shown as the area unddr tanks. Column No.4 of the prescribed form of the application is meant for stating the amount of predial, which the proprietor used to pay and this again is classified into (a) contributor urban and (b) contibuicao rustic. The amount of Rs. 43. 67 is shown against the contibuicao urban and against the contribuicao rustic the following statement is made:
"Rs 2, 11. 33 np. This is inclusive of Industrial tax - Rs. 1, 970.00 paid in 1961 on Cajuris which are considered agricultural produce in the Union of India whilst the Portuguese classified it is industrial income."

"Rs. 2, 111x 20= Rs. 42,2220.00 Less for lands vested in the proprietors (1/5area) Rs. 8, 440.00."

the Collector set down this application for hearing on 27-5-1969 with due notice ot the claimants. On 24-5-1969 on of the claimants namely, Josefa Maria who claimed half share in the compensation wrote ot the Collector on 24-5-1969 to adjourn th43 hearing of th application sine die on the ground that since the filing of the said application it had been found that part of th village Damao de Climate longed to the village Damao do Climate longed to the heirs of Canji Danhi and that the applicability of the Regulation and kthe amendment thereto, the proprietors who wined only part of the village had been challenged in the Court of the Judicial Commisssioner at Goa. The Collector received this letter for postponement of the hearing on 26-5-1969 and on the same day he informed the said Josefa under his letter that her application had been received and was kept with papers for action.

On 27-5-1961 none of the claimants appeared before the Collector The latter under his order passed on 28-5-1969 considered the application D/- 24-5-1969 considered the applicant D/- 24-5-1969 of the Judicial Commissioner and had not produced any stay order form that Court and that the definition of "village" in te Regulation includes part of the village and the definition of the word "Proprietor" would therefore include holders of part of the villages. Having rejected this application by the said order the Collector. Proceeded to determine the compensation. He found that the claimants held 63.20 hectares of land as propritors ot the said village and in the record maintained by the Portuguese Government an area of 7. 47 was shown as hilly land though claimants had stated in their application that here was no hilly land in the village and had also stated that here was no land in thr category of salt pans, salt lands. Quarries kor unddr municipality. The Collector further observed that according to the survey recently carried out by the Government there is no area in the said village falling within the categories to which, according to the judgment of Supreme Court, the Regulation does not apply. He found that the topography underwent changes over a period of tuime and the land shown as hilly lands in the ex-Portuguese record were subsequently record were subsequently broughttttt under cultivation. He therefore, held that entire area held by the claimants as proprietors had there fore vested in the Government under S. 3 of the Regulation. He determined the compensation payable to the claimants at Rs. 3700/- being twenty times the amount of Rs. 185/- which according to him was the contibuicao predial paid by the proprietors. In doing so, the Collector ignored the industrial tax amounting to Rs. 1,970/- paid in 1961 out of the mount of Rs. 2, 111.33 stated by the claimants as contribuicao rustic. The said amount of Rs. 37000/- payable as compensation was apportioned amongst the three claimants. According to the shares stated kby them. The petitioner received the compensation amounting to Rs. 2775/- under prejudice and without prejudice to the rights of the claimants on 19-2-1971.

8. It seems that the Collector had communicated his decision to the claimants by his notice D/- 9-6-1969, but since the claimants stated that they had not received the decision, the collector sent it again under his letter D/- 20-8-1970.

9. By their application D/- 10-5-1971 the claimants requested the Collector to review his order D/- 28-5-1969 on various grounds. Since the Collector did not attend to this request for a considerable time, the claimants moved the Revenue Secretary, who directed the Collector to expedite tha matter and Consequently by his order D/- 5-5-1969 the Collector rejected tha application ofr review on the ground that there was no provision in the regulation for review of the order passed by the Collector determining compernsation. It is thereafter that the petitioner filed the present writ petition in the Court of th Judicial Commissioner at panaji on 5-8-1972.

10. In this writ petition the petitioner has challenged the validity of the Regulation on the ground that in making the Regulation under Art. 240 of the Constitution the

President had exceeded his legislative competence and that it was violative of Arts. 19(1)(f) and 31 and was not protected by Art. 31A of the Constitution. The petitioner also challenges the constitutional validity of Ss. 3 (1) (ii) 4, 4 (2) and Cl. 9g) of S. 2 as amended by the Amending Act of 1968 as being viola give of the second proviso of Art. 31A of the Constitution. Besides these legal challenges the petitioner also challenged the orders passed by the Collector on 28-5-1969 and 25-5-1972,. While challenging the order d/- 28-5-1969 under which the Collector determined the compensation the petitioner contends that the Collector had erred in not excluding that the Collector had erred in not excluding that the Collector had erred in not excluding certain areas of land whichever hilly, sanddy, hilock, under Chair trees, included in the municipal directing the first respondent, namely, the Collector of Daman to exclude these areas and to pay market value for the agricultural lands and to carryout a proper survey to determine the actual extent of village or in the alternative to exclude r7.4. hectares of hilly land.

11. Pursuant to the deletion of Arts. 19(1)(g) and 31 of the Constitution under the Constitution (Forty-fourth Amendment) Act. 1978 with effect ... 20-6-12979 the petitioner ..... the petition on 27-11-1980 ..... on more ground fro changeing the On situational validity of the regulation. We shall state this ground when we deal with the submissions made befor us. The first respondent has filed an affidavit in reply to the petition.

12. The petitioner in Spl. Civil Appln. No.74 of 1972 is one of the twelve cosharers of village Dabhel in the District of Daman. In this ;case also an application for compensation was made to the collector on 30-9-1967 under protest and withoutprejudice to their rights. The total area of the village is shown as 610 hectates, out of which an area of 590 hectares is shown as agricultural use, which according tot he claimants includes an area of 102 hectares under personal cultivation of the proprietors and the area under Cajuri plantation which under the Portuguese regime was regarded a industrial property and taxed accordingly. The areas under quarries, hillocks, tanks and regulates are shown as 2, 3, 4, and 9 hectares respectively,. No land is shown as municipal area, salt pans. The amount of pre deal which the proprietor used to pay is shown as Rs. 10, 25.50 as contibuicao urban and Rs. 10, 254/- as contribuicao to have been paid as industrial tax in 1961 on Cajuri trees which, as stated in the application, are considered as agricultural produce in the Union of India, while the Portuguese classified it as industrial income. The amount of compensation is worked doubt as under :-

"Rs 10, 254/-x = Rs. 1,05,080/- Less for lands vested in the proprietors 91/5) Rs. 41.216/-

After the filling the this application the petitioner wrote to the Collector on 5-12-1967 stating that it was found that part of the village Dabhel belonged to the Government and hence the Regulation was not applicable to the remaining part of the village as the claimants were not the proprietors of the whole village.

She,therefore, contended that any action with regard to the part of the village which belonged to the proprietors was contrary to law. By his letter D/- 14-3-1969 the Collector informed the claimants that the application for compensation was fixed for hearing on 18-3-1969 in his office. In reply to this letter, the petitioner by her letter D/- 17-3-1969 informed the Collector that villages had challenged the applicability of the Regulation to them in the Court of te Judicial Commissioner at Goa And the decision in that case would upheld the interest of the claimants in this case also.She, therefore, requested the Collector to postpone that hearing sine die pending the final decision in the above said cases. It seems that one of the claimants appeared before the Collector on 18-3-1969 and he proceeded to determine compensation under his order D/- 22-5-1969. Under this order the Collector rejected the request of the petitioner expressed in the letter D/- 17-3-1969 for postponing the hearing of the application on the ground that she had not obtained any stay form the court of the Judicial Commissioner and the definition of "proprietor" included proprietors of part of villages in view of the definition of "village"which includes part of village. Having rejected this objection. The Collector proceeded to determine the compensation. As regards the extent of land Which vested in the Government. He found that according to the recent Survey which had been carried out ot ascertain the up-to-date position regarding the areas under hills, quarries, salt land and salt panns, and ara of 51.84 hectare in the village of Dabhel consisted of hills, and quarries and hence it did not vest in the Government according to the decision of the Supreme Court in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, . Thus even Though the claimants had showman area of 56 hectares only as under the quarries and hilocks, the Collector, allowed a much large area on this ocunt. He determine the total compensation at Rs. 14.113.60 In doing, so he held that the Contributes redial payable for the entire area of 610..... hectares was, according to the revenue records, Rs. 771/- and deductingRs. 65.32 in respect of the ara of 51.84 hectares which did not vest in the Government and for which the claimants were not ..... To any compensation. The contribu..... predial in respect of the land which residing the Government was Rs.705.68 The above said amount of Rs. 705.68 by 20. In this case also the Collector was moved to review the said order but the same was rejected on 25-5-1969 on the ground as in the ..... case writ petition on 7-8-1972. The ground of challenge and prayers in this petition are practically identical with those in Spl. Civil Appn. No.73 of 1972. The petitioner claims that the Collector ought to have excluded 435 hectares as hilly land, 337. 26.35 hectare as Cajuri land and 19.66.45 hectares as the land acquired by the Government for an Industrial Estate. She further says that the Collector had omitted to pay compensation at twenty times of Rs. 156/- whichthe proprietors had paid as contibuicao predial 1961. This petition has also been amended on 21-11-1970. The first respondent., namelu, the collector of Daman filed his replyingg affidavit. He refutes the various allegations which have been made in the petition, but admits that through error an mount of Rs. 156/- paid as contibuicao predial was omitted while determining the amount of compensation and ways that the government it

ready wiling to pay this amount to the petitioner.

13. To begin with Mr. Chinoy the learned counsel for the petitioners submits that the deletion of sub-cl. (f) of Cl (1) of Art. 19 and Art. 31 of the Constitution and insertion of Art. 300-A by the Constitution (Forty-fourth Amendment) Act, 1978 with effect from 20-6-1979 opens fresh avenues for challenging the cOn situational validity not only of the Regulaion, but also laws dealing with acquisition of private property without the consent of the owner is an inherent attribute of sovereignty but there are two limitations on the use of this poweredd and they are firstly that the acquisitionist be for a public purpose and secondly that just compensation must be paid to the expropriated owner. these are the two inbuilt restrictions on the power of acquisition of private property by the State which have been recongnised both under the doctrine of Englilsh common Law as well as under the continental doctrine of eminent domain subsequently adopted in america. This doctrine of eminent doamin was recognised even prior to the present Constitution as it found place in sub-sec. (2) of s. 299 of the Government of India, Act, 12935 one of fundamental right by inCorporationg it in cl. 2) of Art. 31 of the Constitution as originally enacted. The other limitaition, namely that the acquisition should be for a public purpose, though not specifically put in C;l. (2) of Art. 31, the Supreme court in The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others, read it by implication either in te said clause itself or in entry 33 of th Union List, Entry 36 of the State List of Entry 42 of the Concurrent List, which dealt with the acquisition or requisition of property of the purpose of Union or otherwise, by the Constitution (Fourth Amendment) Act, 1955 which substituted Cl. (2) of Art. 31 the requirement of public purpose for acquisition f private property had been expressly incorporated in Art. 31 By the Constitution (Seventh Amendment) Act, 1956 which came into force from 1-11-1956the above said entries in the three Lists were deleted and Entry 42 azs it presnentlystands, in the Concurrent list was substituted Thus according to Mr. Chinoy, the doctrine of eminent domain had not only been Judiciallyrecognised in Kameshwar Singh''s case, but had found place in Art. 31 of the Constitution. He further submits that consequent to the deletion of Art. 19(1)(f) sand Art. 31 by the Constitution (Forth-fourth amendment) Act, 1978 thr power of the state to acquire private property without the consent of the owner, which flows from the doctrine of eminent domain, is contained in Entry 42 of the Concurrent List read with Art. 246 of the Constitution. In the absence of any express provision limiting conditions, which are inseparable concomitants of the power of eminent domain, they would have now to be read in Entry 42 of the Concurrent List, In other words, though that Entry merely relates ot the power conferred on the Parliament of the Legislatore of any State to make law with respect to acquisition and requisitioning of property, the competence of these Legislatores ot legislate in this matter would be subject to the condition that he acquisition or requisitioning is for public purpose and on payment of just and fair compensation to the expropriated owner. Thus according to Mr. Chinoy with effect from 20-6-1979 when the

competence of the concerned Legislator to legislate in respect of acquisition and requisitioning of property would be subject to the condition that the legislation provides only for a public purpose and on payment of just and fair compensations the expropriated owner. Mr. Chinoy submits that because of these inbuilt limitations on the power of the Legislatore, any enactment which contravenes these conditions would be deemed to be void for want of legislative competence and this holds good not only with respect to the laws, which are made after 20-6-1979 but also to the laws which are made prior ot that in so far as their enforcement and implementation after that date is concerned. It is for his reason that Mr. Chinoy submits that the Regulation cannot operate on land which had not already vested in the Government prior to 20-6-1979 as it does not provide for just and adequate compensation for the acquisition of lands or abolition of proprietor rights since the compensation provided for in sa. 9 thereof computing it ast the rate of twenty times the annual payment is illusory. Mr. Chinoy does not dispute that the abolition of the estate under the Regulation would be an agrarian reform and thus in public interest as held by the Supreme Court in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, Mr. Chinoy challenges the Regulation only on theground that fair and adequate compensatin had not been provided in the Regulation for acquiring rights of the proprietors in the villages, which would vest in the Government.

14. Mr. Chinoy further submits that it would be open to the petitoners to challenge the constitutional validity of the Regulation on the above said grounds for the simple reason that such a challenge was not open to the petitioner in Gulabbhai''s case because that case was decided on the contitutional provisions obtaining prior to 20-6-1979. He submits that the Regulation was challenged in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, on the ground of breach of fundamental rights contained in Arts. 14 19 and 31 of the Constitution and according to the Supreme Court this piece of legislation was protected by Art 31A of the Constitution in so far at the lands concerned. He submits that the present challenge to the constitutional validity of the Regulation is altogether on a different plane, namely, the legislative competency which did not arise in Gulabbhi''s case.

15.In our opinion, it would be open to the petitoners to challenge the validity of the Regulation on the above said ground, irrespective eof its merits; and the decision of the Supreme Court in Gulabbhai''s case alone cannot shout them out. No doubt the argument so elaborately advanced by Mr. Chinoy on the question of survival of the Regulation after the deletion of Arts. 19(1)(f) and 31 and addition of Art. 300A of the Constitution, leads to an interesting debate, and if accepted would sound the death knell not only of this Regulation but also of all laws relating to agrarian reforms m;ade prior to the commencement of the Constitution (Forty-fourth Amendment) Act, 1978. But the question is, are we called upon to entertain to this debate in these wait petitions. The question is whether the Regulationo which had been validly and competently enacted subject to what has beensaidby the Supreme Court in Gulabbhai;s case with regard to the lands which would come within its sweep can

now be struck down for want of legislative competence consequent to the change in the constitutional provisions broughtttt about by the Constitution (forty-fourth Amendment) Act, 1978, assuming but without deciding that such a change affects the legislative competence with regard to laws relating to acquisition and requisitioning of property. In this respect Mr. Chinoy submits that such a challenge would be possible. According tohim though there is no express provision in the Constitution dealing with a law which becomes invalid subsequent to its enactment due to the Legislatore becoming incompetent to make it or to make it on certain conditions, such a provision is not necessary because what is done Incompetently is void ab initio. He submitted that id the Parliament divests itself of its legislative competencey, it does so in respect of the laws already made. He further submits that it by virtue of the doctrine of eclipseeeee, laws which are invalidly enacted can subsequently become valid when the obstacle is removed there is no reason why this were valid when made, but became invalid because of the legislative incompetency. In other words. Mr. Chinoy wants to operate the doctrine of eclipseeeee in the reverse gear. Howerver, Mr. Chinoy is not able ot support this proposition by any authority or judicial pronoiuncement.

16. On the other hand Mr. Dias the learned counsel for the respondents submits that the constitutionalilty of an act must be; judged on the basis of the Constitution as it as on the date Act was passed subject to any retrospective amendment of the Constitution. For the proposition he finds support form the decisions of the Supreme Court in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, , the decision of a full Bench of jammu and Kashmir High Court iin Rehman v. Stare of J & K AIR 1958 J & K 29 and of the Allahabad High Court in U.P. State Road Transport Corporation, Lucknow Vs. State Transport Appellate Tribunal, Lucknow and Others, . We find that the submissions of Mr. Dias are well founded. In Mahendra Lal''s case the Supreme Court was considering the applicability of the doctrine of eclipseeee to a post constitutional legislation. There the question was whether under the Uttar Pradesh Land Tenures (Regulation of Transfers) Act, 1952 which was unconstitutional as it did not comply with Art. 31(2) of the Constitution as it stood at the time when the Act was passed, revived on enactment of the Constitution (Fourth Amendment) Act, by virtue of the doctrine of eclipseeeee. On behalf of th egovernment it was contended that he constitutionality of the Act must be judged on the basis of the Constitution as it stood on the date of the of the said Act and reliance was sought to be placed in support of its propositionon the decision of the Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, . The Supreme Court has dealt with the questioninpara 14 of the reprot. It held that the judgment in the Bombay Dyeing''s casenowhere considers the question whether the constitutionality of an Act has tobe judged on the basis of the Constitution as it stood on the date on which the Act was passed or onthebasis of the Constitutionas it stood on the date the writ petition was made and that the observation in that case that the constitutionality of an Act has to be judged

on the basis of the Constiitution as it stood on the date of the writ petition, cannot be given the meaning whichthe counsel for the respondent wanted to put on it, particularly the Amendment to Art. 31(2) by the Constitution (Fourth Amendment) Act was not retrospective. The Supreme Court went to observe that if the constitutionalityis to be judged by thedate of the writ petition, the result would be that sometime the Fourth Amendment iof Art. 31 would become retrospective and sometimes it would not, depending upojn whether the writ petitinwas filed before the Fourth Amendment Act was passed or after the said amendment. It says that if ;the writ petition was filed before the Constitution (Fourth Amendment Act the same provision of an Act would be constitutionaland such a result is obviously impossible to accept and could not have been meant by the obsevation in Bombay Dyeing case. After making these observations, the Supreme Court in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, laid down the law in the following terms:

"It is in our opinion absolutely elementarythat the constitutionality of an Act must be judge on the basis of the Constitution as it was on the date the Act was passed subjectto anyretrospective amendment of the Constitution."

17. r. Chinoy sought to ditinguishthis dictum by referring us to para 20 of the report in Mahedra Lal''s case. However, we do not find that anything saidby the supreme Court therein in any way detract from what it has obseved and laid down in par 14 of the report. In our view, what has been said by the Supreme Court in para 14 in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, applies with equal force to the present writ petitons. In this connection it ;has to be noted that the deletion of Arts. 19(1)(f) and 31 under the consititutioin (Forty-fourth Amendment) Act, 1978 is not retrospective in the same manner as the Constitution (Fourth Amendment) Act was not so. We are respectfully bound by the law laid down by the Supreme Court in Mahendra Lal''s case.

18. In Rehman v. State of J & K AIR 1958 J& K 29 (cited supra) the question before the Full Bench was whether the Jammu and Kashmir Ememy AgentsOrdinance which was ..... erst whild Maharaja of Jammu and Kashmir lost its validity when the sovereignty of the State passed to the Dominion of India and the erstwhild ruler retired. Relying on the decision of the Supreme Court in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, , the Full Bench said that it was well settled law tha the Constitution is prospective andnot retrospective an dthe genral principle is that if a las is made by a competent authorityit does not cease to esxist becaues that authorityloses its power. In U.P. State Road Transport Corporation, Lucknow Vs. State Transport Appellate Tribunal, Lucknow and Others, a learned singel judge of allahabad High /court has obsevedthat it is wll acceted principle that the validity of a statute is tobe tested by the Constitutionalpower of a Legislatore at the time of its enactment by that Legislatore.

19. It would therefore, appear that there is ample authority for the propostion that te constitutional validity. Of an Act has to tbe tested on the bassis of the Constitution

as it was on the date when the Act was passed subject ot anyretrospective amendment of the Constitution. In view of this clear positin of law, it would lnot be possinle for the prtitiners tochallegnge the constitutional validity of th Regulation of the alleged incompetency of the Legislatore due to changes brought about by the Constitution (forty fourtbh Amendment) Act, 1978, particulary when the amendment, which is relied uponis not retrospective.

20. Mr. Chinoy had been at pains to show hat the petitioners had not been divested of their ownership of the lands inasmuch as the collector had not taken charge as required by s. 5 and no land krevenuehad neen recovered in respect of these land slas required by s. 6 oif the Regulation. He submitted that since there was dispute with regard to the classification of the lands which would vest in the Government, the whole area did not vest unless and until thisdispupt was resolved. He seeks to rely on the dicisino of the Judicial Commissioner in Gulabbjai v. Collector, Danman AIR 1970 Goa 59 Of course this submission is made inorder to anable the petitioners to challenge the constitutional validity of the Regulation as above on the ground that the vested in the Government and continued to be vested in the petitiners. Since as we to be vested in the petitioners. Since as we have held above the petitoners cannot challenge the validity of the Regulation on the abovesaid grounds, the question of considering these submissins of Mr. Chinoydonot arise. Howerver, we mayobseverthat the learned Judicial Commissiner has not land down the proposition that if there is a dispute in regard tot he classification of part of the total lands on which the Regulation operpates, the whole would not vest in the Government unless and until the dispupte is resolved. The discussiojn in para8 of the report in Gulabbji''s case clearlyshow that according to the learned judicial Commissiosner the lands in respect of which there was no dipupte as toclassification had vested in the Government under the Regulation but the lands in respect of whichthere was such a dispute, would vest onlyyafter quasijudicial inquiry interms of the Regulation as amended by the Amending Act, of 1968mis made. We do not pronounce any opinion as regards the orrectness even of this proposition since it is not necessaryfor the decision of the case.

21. The next challenge to the validity of lthe Regulation is on the ground that it contravenes the sevond proviso to C1.(1) of Art. 31A of the Constitution inasmuch as the Regulation seeks to acquire even the lands which are under the personal cultivation of the proprietors without paying compensationaccording to the market value thereof. Mr. Chinoy submits that even though under s. of the Regulation the proprietor can retain the land under the personsalcultivation of the propprietor notwithstanding anything contained in S. 3 by virtue of s. 8, the proprietor holds the land onlyuas an occupant on payment of land revenue and under R. 2(2) he has to pay Naxarana to the Government in the event of his transferring such land. Mr. Chinoy contends that these rrestrictions onholding of lsuchlands by the proprietors divest them of their ownership and amounts toacquisitionof the lands by the Government as contemplated by the second proviso to Art. 31A(1) Mr. Chinoy

submits that though in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, the Supreme Court has upheld the validity of the Regulation as proteched under Art. 31 a, this aspect of the case was not considered there and it is now open to the petitiners, who were not parties tot he petition who were not parties tot he petition before the Supreme Court. In support of this decision of a Division Bench of this Court in Ramkrishna Ramnath and Another Vs. The State of Maharashtra and Another,

22. It is true this aspect of the case has not been specifically discussed in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, but the judgment of the Supreme Court would show that at least in one of the give wirit petitins before it, namely Writ Petition No. 148 of 1962 out of 320 acres of cultively land 180 acres were personally cultivatelyby the petitioner and even iwththis ;fact on record the Supreme Court dimissed this petition wholly It could be said that this aspect of the case could have been raised; before the Supreme Court dismissed this petition wholly. It could be said that this aspect of lthe case could have been raised before the Supreme Court in view of the facts o\\in the one writ petitionss, bbut had not lbbeen raised or that if raised the Supreme Court had not accepted the contention. In Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, it has been held that the decision of the Supreme Court. There are similar obsevations in T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others, It is therefore clear that the decision in a judgment of the Supreme Court cannot be assiled on the Ground that certain aspects were not considered or the relevant provisions were not broughttttt tot he notice of that Court. As seen above, the Supreme Court has held that the Regulationis protected by Art. 31A of Constitution. This would mean that it is so in respect of all the provisions including the second proviso contained in that Article. In our opinion, therefore, it is not possibloe for the petitioners tochallenge the validity of the Regulation on this ground also

23.With regard to the orders passed by the first respondent Collector determining the amount of compensation, it is contended onl behalf of the petitionerst that he die so without giving them a proper oportunity of ;being heard and placing .....fell outside the purview of the Regulattion and did not vest in the Government. The petitioner in Spl. Civil Applan, No 73 o1972 submits athat the first respondmetn misled the claimants by stating inhis letter dt 26-5-1969 (Annex 1) that the hearing had been kept with papers for action. It is said that the petitiner and the other claimants wer under the impression that the first respondent would first decide their application and intimate them with regard to the date on which the application for compensation would be heard. In reply the first respondent in para 10 of his counter affidavit has said that the application made by the moter of the petitioner dt. 24-5-1969 2was received by him on 26-5-1969 and that whe was informed that the application waskept for hearing on 27-5-1069 along with the case. The stantemnt does not appear to be correct since his letter dt 26-5-1969 only says that application had been received and was kept with papers for action. It does not

indicate that it would be considered on the next day when the case came up for hearing. There is ;therefore,much substance in the grievance of the petitioner that the claimants did not attend the hearing on 27-5- 1969 under the impression that they would be communicated the date later.

24. Somewhat somliar situation obtains in Spl Civil Appln. No 74 of 1972 there also an applicants was sent prior to the hearing, but no replaywas sent. It is true that the claimants couldl not lhave presumed that because theyhad ;sent the application for postponements of the hearing, it would be allowed and oculd not have remianed absent, but looking to the ground on which the postponement was sought they would be ;under the mistaken belief that the inquiry with regard to compensation would be postponed till the Court of th Judicial Commissioner proprietor of a part of village was a proprietor within the meaning of th Regulation.

25. these grivances of the petitioners need not detain us any longer counsel for the respondents has very fairly conceded thatview, this would be fair and equitable on the part of the respondents. Mr. Dias however, submitted thata in the hearing which the petitioners would be givenm they would be bouond bywhat they had stated in their application regarding the categories and extent of land shwich are exempt form the provisions of the Regulation. Mr. Dias submitted that though the petitioner in Spl Civil Applan No. 73 of 1972 in his application for Compensation had stated that only 4 hectares of land was under tankds, in the petition he has come out with the grievance that large taracts of land were hilly, snddyd, hillocks, under Cajuri trees andmunicipal area. He points out that same is the case in the other petition. He submitts that the Spl Civil Appln No. 74 of 1972 though the claimants had claimed exemption only in respect of 5 hectares of land as quarries and hillocks, the allow much larger area on this count, namely, 51 hectares.

26. In our view, it would not lbe fair ;and proper to make the claimants strick to what they had stated in their respective applications with regard tot he categories and extent of the exempted lands. The order passed by the first respondent in Spl. Civil Appln,. No 74 of 1972 itselof indicates that the date which had been furnished by the claimants their application for compensation was not factually correct since though the claimants therein had claimed exemptionfor 5 hectares ad quarries and hillocks the first respondent Collector had allowed 51. 84 hectares on this count. The inquiry which the Collector is supposed to make under subsec. (2) of S. 10 of the Regulation read in the context of the amended definition of "land" in s. 2 (g) would also be for lthle purpose of determining the extent of land which answers the descrption given in this definition and hence vests in the government. It is needless to say that any land which does not answer the desvription givernin Art. 31(2)(a)(iii) of the Constitution or Cl (g) of S. 2 of the Regulation as substituted by the Amending Act of 1968 cannot fall within the purview of theregulation and cannot ;vest in the Government by virtue of the decision of the Supreme court in Gulabbjai v. Union of India AIR 1967 within the purview of the above said provisions of the Constitutionor

;the Regulation, such and expropriation wuld not have the proterctionof Art 31A of the Constitution. Hence in our view,m apart grom what the prtitioners say it is the dutytof theCollector ot determine the extent of land which is covered by the definition in Cl.2 (g) of the Regulation as on the appointed date. It is for this reaosnthat we saythat the claimants should not be ;held bouondbywhat theyhad said intheri applivationfor compensation with regard to the extent and catagories of lands which did not vest in Government on the appointed date.

27. Mr. Chinoy submitted that we should in order to curtail further litigation specify the clases or categories of lands. Which were not governed by the said definition of "land" in the Regulation. In our opinion. It is not possinle to make an exhaustive catalogue of categories of lands which fall beyond the purview of Arty. 31A(2)(a)(iii) of the Constitution or S. 2 (g) of the Regulation. If a dispute arises ;with regard to the nature or category of paricular piece of land it can be resolved only by taking into consideration several factors relevant for theat purpose,. No abstract principles can be laid down In this respect.

28. Mr. Chinoy submitted that all lands situated within the limites of a municipalityeven thoughthey answer the desvcription given by the definition contained in S. 2 (g) of the regulation would not be amenable to the provisions of the Regulation. He submitted that the view taken by a Division Bench of this Court (to which one of us, Namely Couto, j, was a party) In this respect in Archidiocese of Goa. V. Union of India (Wait Ptn No. 30-B of 1970 decided on 30-3-1983) requires reconderation as it uns counter to what has been held by the Supreme Court in Gulabhai Vallabhbhai Desai etc. Vs. Union of India (UOI)and Others, (cited supra) and The Malankara Rubber and Produce Co. and Others, etc., etc. Vs. The State of Kerala and Others, etc., etc., . In the first place we fo not find that the Supreme Court has held in Gulasbbhi v. Union of India held that ;all lands situated within the municipal area irrespective of the purpose for which theyare used are not protected by art 31A. while applying it, in para 19 of the report it stated in relation to Writ Petition No,.216 of 1963 that theat petitionwould be dismissed with the declarationthat the municipal area does not vest in the government under the Regulation and Art. 31A(2) does not lend its protection to this ;expropriation. This order is made on the facts of that particular case because aan ara of 100 areas in respect of which a Municipality was established was covered by 600 houses including markets and a cemetery. No such proposition as is sought tobe read by Mr Chinoy can be deduced from the decision of the Supreme Court in Gulabbha''s case. In the above quoted writ petition the Division Bench of this Court has considered the observations of the Supreme Court in the case of Malankara Rubber Company and laid down the propositionin view of what had been said by the supreme Court. We therefore, do not think it necessary to reconsiderthat decision.

29. in view of the above discussion, the petitions fail in respect of prayer. Cls. (a) to (d) and (f) in Spl Civil Appln. No. 73 of 1972 and prayar Cls. (a) to (c) and (e) in respect

of Sp;l Civil Appln No. 74 of 1972. these petitiones are prayer cl. (e) in spl Civil Appln. Npo 73 1972 and prayer clause (d) in respect of Spl Civil Appln. No. 74 of 10972 and the Collector of Daman (respondent no.1) is hereby directed to hold an inquiry to determine the extent of land which vested in the Govoernment on the appointed date under s. 3 of the Regulation having refgard to the definition of "land" in s. 2 (g) of the Regulation as amended by the Amending Act of 1968 after giving a reasonable and proper ;opportuonity to the petitioners and the other claimants, if they so desire, of bding heard. In the circumstances of the case, there shall be no order as to costs.

30. At the time of pronouoncemnt of the judgment the petitioner in Spl. Civil No. 73 of 1972 prays for a cerftificate of fitness to appeal to the Suprme Court. In view of what we have sadi in the judgment we do not thingk that the case involves a substantial question of law of general importance, which needs to be decided by the Supreme Court, The request is, therefore, rejected the petitioner also sumitted that pending admission of the appeal in the Supteme Court the operation of the judgment may be stayed. We direct that the operative part of the present judgement shall be suspended for two months from today.

31. Petitions partly allowed.