

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

Court: Bombay High Court (Goa Bench)

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, Government 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 of 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 appreciate properly the various contentions which have been urged on behalf of the petitioners, it would be convenient at the

outset to take note 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 (11th Amendment) Act,

1962, By the said Amending Act this Union Territory was included in cl. (1) of Art 240 of the Constitution, thus enabling the president of India to

make regulations for its peace, progress and good government. In exercise of the powers so conferred 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, 1962 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. li 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

series of five writ petitions on the ground that its provisions violated Arts. 14, 19 and 31 of the Constitution. The Central Government sought to bring it

under the protective umbrella of Art. 31A. 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 behalf that proprietary interest abolished by the Regulation was (a) *estate*: or (b) *a*

jagir, *inam* or *mualfi* or other similar grant: or (c) "land held or let for purposes of agriculture or purposes ancillary thereto". The Supreme Court held

that before "estate" or its equivalent can be found, there must be land which pays land revenue and is held in accordance with law relating to land

tenures. It found that the expression *estate* in that sense cannot be said to have had an equivalent in Daman District. It also found that the 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 affected 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. 31A and that this definition of land as including all

categories of lands could not be 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 follows

That result, therefore, is that the definition of "land" in the Regulation being at variance with the definition of "estate" cannot stand with it. 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. 31A. In other words, "land" would include not every class or category of land but only lands held for purposes

ancillary thereto, including waste land, forest land, land of pastures or sites of buildings and other structures occupied by cultivators of land,

agricultural labourers 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 Supreme Court,

the figuration in so far as it operated on lands held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest

land, land for pasture or sites of buildings and other structures occupied by cultivators of land, Agricultural labourers and village artisans, but

excluding hilly land, quarries, sold lands, and salt pans, was immune to the challenge on the ground that it is inconsistent with or takes away or

abridges any of the rights conferred by Arts. 14, 19 and 31 of the Constitution.

4. In the wake of this decision of the Supreme Court, the Legislative Assembly of Goa, Daman and Diu 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, 1968") to carry out some material

amendments in the Regulation. By thisdefinition of "land" inline with the decision of Supreme Court in Gulabhai Vallabhbai

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 cases, restrictions on sale etc. of land and amendments, 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

exchange or lease or assignment or mortgage of any land in respect of which, any person has become an occupant under s.8 shall be made,

except with the previous permission in writing of Collector, who may grant such permission in such circumstances and subject to such conditions as

may be prescribed. 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 conferred etc. In order to fill up this lacuna in the

Regulation Ss. 12A to 12-F were inserted to require the Mamlatdar to 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 revisionary powers on him. The jurisdiction of Civil Courts

to settle, decide or deal with any question, which by or under the Regulation is required to be settled, decided or 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 provisions and changes which have

been made in the original Regulation.

5. the Administrator in 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.8-B of the

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 for

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 to the Government a Nazarana equal to twenty-five per cent of the 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 into 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 without prejudice. 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 as 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 under 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) contribuicao rustic. The amount

of Rs. 43. 67 is shown against the contribuicao 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 as industrial income.

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

the Collector set down this application for hearing on 27-5-1969 with due notice to the claimants. On 24-5-1969 one of the claimants namely,

Josefa Maria who claimed half share in the compensation wrote to the Collector on 24-5-1969 to adjourn the hearing of the application sine die

on the ground that since the filing of the said application it had been found that part of the village Damao de Climate belonged to the village Damao do

Climate belonged to the heirs of Canji Danhi and that the applicability of the Regulation and the amendment thereto, the proprietors who owned only

part of the village had been challenged in the Court of the Judicial Commissioner 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 from that Court and that the definition of "village" in the 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 proprietors of 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 there was no hilly land in the

village and had also stated that there was no land in the category of salt pans, salt lands. Quarries or under 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 time and the land shown as hilly lands in the ex-Portuguese record were subsequently recorded were subsequently brought under

cultivation. He therefore, held that entire area held by the claimants as proprietors had therefore 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 compersnation. 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 for changing the On situational validity of the regulation. We

shall state this ground when we deal with the submissions made before 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 co-sharers 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 without prejudice to their rights. The total area of the

village is shown as 610 hectares, out of which an area of 590 hectares is shown as agricultural use, which according to the 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 as 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 contribuição urban and Rs. 10, 254/- as contribuição 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 out as under :-

Rs 10, 254/- x = Rs. 1,05,080/- Less for lands vested in the proprietors 91/5) Rs. 41,216/-

After the filing of 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 the villages had challenged the

applicability of the Regulation to them in the Court of the Judicial Commissioner at Goa And the decision in that case would uphold 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 from 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 to ascertain the up-to-date position regarding the areas under hills, quarries, salt land and salt

panns, and area 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

shown an area of 56 hectares only as under the quarries and hillocks, the Collector, allowed a much larger area on this count. He determined the total

compensation at Rs. 14,113.60. In doing so, he held that the contribution payable for the entire area of 610..... hectares was, according to

the revenue records, Rs. 771/- and deducting Rs. 65.32 in respect of the area of 51.84 hectares which did not vest in the Government and for which

the claimants were not To any compensation. The contribution..... 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 Caji 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/- which the proprietors had paid as contribution predial 1961. This petition

has also been amended on 21-11-1970. The first respondent., namely, the collector of Daman filed his reply affidavit. He refutes the various

allegations which have been made in the petition, but admits that through error an amount of Rs. 156/- paid as contribution predial was omitted while

determining the amount of compensation and ways that the government is ready willing 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 constitutional validity not only of the Regulation, 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 power 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 built

restrictions on the power of acquisition of private property by the State which have been recognised both under the doctrine of English common

Law as well as under the continental doctrine of eminent domain subsequently adopted in America. This doctrine of eminent domain 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 incorporating it in cl. 2) of Art. 31 of the Constitution as originally enacted. The other limitation, namely that the acquisition

should be for a public purpose, though not specifically put in Cl. (2) of Art. 31, the Supreme court in *The State of Bihar Vs. Maharajahdhiraja Sir*

Kameshwar Singh of Darbhanga and Others, read it by implication either in the said clause itself or in entry 33 of the Union List, Entry 36 of the

State List of Entry 42 of the Concurrent List, which dealt with the acquisition or requisition of property for 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 of private

property had been expressly incorporated in Art. 31 by the Constitution (Seventh Amendment) Act, 1956 which came into force from 1-11-

1956 the above said entries in the three Lists were deleted and Entry 42 as it presently stands, in the Concurrent list was substituted Thus

according to Mr. Chinoy, the doctrine of eminent domain had not only been judicially recognised 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) and Art. 31 by the Constitution (Fourth-fourth

amendment) Act, 1978 the 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 to the power conferred on the Parliament of the Legislature of any State to make

law with respect to acquisition and requisitioning of property, the competence of these Legislatures to legislate in this matter would be subject to

the condition that the 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 Legislature, 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 to that in so far as their enforcement and

implementation after that date is concerned. It is for this 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 at 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

the ground that fair and adequate compensation 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 petitioners 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 *Gulabhai's* case because that case was decided on the

constitutional 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 as 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

Gulabhai's case.

15. In our opinion, it would be open to the petitioners to challenge the validity of the Regulation on the above said ground, irrespective of 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

made 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 writ petitions. The question is whether the Regulation which had been validly and competently enacted subject to what has

been said by 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 brought 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 to him though there is no express

provision in the Constitution dealing with a law which becomes invalid subsequent to its enactment due to the Legislature 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 if the Parliament divests itself of its legislative competency, it does so in respect of the laws already made. He further submits that it by virtue

of the doctrine of eclipse, 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 eclipse in the reverse gear. However, Mr. Chinoy is not able to support this proposition by any authority or judicial

pronouncement.

16. On the other hand Mr. Dias the learned counsel for the respondents submits that the constitutionality of an act must be judged on the basis of

the Constitution as it was on the date Act was passed subject to any retrospective amendment of the Constitution. For the proposition he finds

support from 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 in Rehman v. State 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 eclipse 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 eclipse. On behalf of the government it was contended that the constitutionality of the

Act must be judged on the basis of the Constitution as it stood on the date of the said Act and reliance was sought to be placed in support of

its proposition on 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 question in para 14 of the report. It held that the judgment in the Bombay Dyeing's case nowhere considers the

question whether the constitutionality of an Act has to be judged on the basis of the Constitution as it stood on the date on which the Act was

passed or on the basis of the Constitution as 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 Constitution as it stood on the date of the writ petition, cannot be given the meaning

which the 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 constitutionality is to be judged by the date of the writ petition, the result

would be that sometime the Fourth Amendment of Art. 31 would become retrospective and sometimes it would not, depending upon whether the

writ petition was 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 constitutional and such a result is obviously impossible to accept and

could not have been meant by the observation 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 elementary that the constitutionality of an Act must be judged on the basis of the Constitution as it was on the date the

Act was passed subject to any retrospective amendment of the Constitution.

17. Mr. Chinoy sought to distinguish this dictum by referring us to para 20 of the report in Mahendra Lal's case. However, we do not find that anything

said by the Supreme Court therein in any way detracts from what it has observed and laid down in para 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 petitions. In this connection it has to be noted that the deletion of Arts. 19(1)(f) and 31 under the Constitution (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

Enemy Agents Ordinance which was erstwhile Maharaja of Jammu and Kashmir lost its validity when the sovereignty of the State

passed to the Dominion of India and the erstwhile 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 that the Constitution is prospective and not

retrospective and the general principle is that if a law is made by a competent authority it does not cease to exist because that authority loses its

power. In U.P. State Road Transport Corporation, Lucknow Vs. State Transport Appellate Tribunal, Lucknow and Others, a learned single judge

of Allahabad High Court has observed that it is well accepted principle that the validity of a statute is to be tested by the Constitutional power of a

Legislature at the time of its enactment by that Legislature.

19. It would therefore, appear that there is ample authority for the proposition that the constitutional validity of an Act has to be tested on the

basis of the Constitution as it was on the date when the Act was passed subject to any retrospective amendment of the Constitution. In view of this

clear position of law, it would not be possible for the petitioners to challenge the constitutional validity of the Regulation of the alleged incompetency of

the Legislature due to changes brought about by the Constitution (forty-fourth Amendment) Act, 1978, particularly when the amendment, which

is relied upon is not retrospective.

20. Mr. Chinoy had been at pains to show that 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 revenue had been recovered in respect of these lands as required by s. 6 of 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 this dispute was resolved. He seeks to rely on the decision of the Judicial Commissioner in Gulabjai v. Collector, Danman AIR

1970 Goa 59 Of course this submission is made in order to enable 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 petitioners. Since as we to be vested in the petitioners. Since as

we have held above the petitioners cannot challenge the validity of the Regulation on the abovesaid grounds, the question of considering these

submissions of Mr. Chinoy do not arise. However, we may observe that the learned Judicial Commissioner has not laid down the proposition that if

there is a dispute in regard to the classification of part of the total lands on which the Regulation operates, the whole would not vest in the

Government unless and until the dispute is resolved. The discussion in para 8 of the report in Gulabji's case clearly shows that according to the

learned judicial Commissioner the lands in respect of which there was no dispute as to classification had vested in the Government under the

Regulation but the lands in respect of which there was such a dispute, would vest only after quasijudicial inquiry in terms of the Regulation as

amended by the Amending Act, of 1968 is made. We do not pronounce any opinion as regards the correctness even of this proposition since it is

not necessary for the decision of the case.

21. The next challenge to the validity of the Regulation is on the ground that it contravenes the second proviso to Cl. (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

compensation according to the market value thereof. Mr. Chinoy submits that even though under s. of the Regulation the proprietor can retain the

land under the personal cultivation of the proprietor notwithstanding anything contained in S. 3 by virtue of s. 8, the proprietor holds the land

only as 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 restrictions on holding of such lands by the proprietors divest them of their ownership and amounts

to acquisition of the lands by the Government as contemplated by the second proviso to Art. 31A(1) Mr. Chinoy submits that though in Gulabhai

Vallabh Desai etc. Vs. Union of India (UOI) and Others, the Supreme Court has upheld the validity of the Regulation as protected under Art.

31 a, this aspect of the case was not considered there and it is now open to the petitioners, who were not parties to the petition who were not

parties to the 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 five writ petitions before it, namely Writ Petition No. 148 of 1962

out of 320 acres of cultivable land 180 acres were personally cultivated by the petitioner and even with this fact on record the Supreme Court

dismissed 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 the case could have been raised before the Supreme Court in view of the facts of the one writ

petition, but had not been raised or that if raised the Supreme Court had not accepted the contention. In Ballabhadras Mathurdas Lakhani and

Others Vs. Municipal Committee, Malkapur, it has been held that the decision of the Supreme Court. There are similar observations 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 assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of that Court. As

seen above, the Supreme Court has held that the Regulation is 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 possible for the petitioners to challenge 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 on behalf of the

petitioners that he did so without giving them a proper opportunity of being heard and placing fell outside the purview of the Regulation and

did not vest in the Government. The petitioner in Spl. Civil Appeal, No 73 of 1972 submits that the first respondent misled the claimants by

stating in his letter dt 26-5-1969 (Annex 1) that the hearing had been kept with papers for action. It is said that the petitioner and the other claimants

were 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 mover of the petitioner dt. 24-5-1969 was received by him on 26-5-1969 and that he was informed that the application was kept for hearing

on 27-5-1969 along with the case. The statement 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 propriotor of a part of village was

a propriotor 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, snddy, and

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 description given in 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 the regulation and cannot vest in the

Government by virtue of the decision of the Supreme court in *Gulabhai v. Union of India* AIR 1967 within the purview of the above said

provisions of the Constitution or the Regulation, such expropriation would not have the protection of Art 31A of the Constitution. Hence in our

view, apart from what the petitioners say it is the duty of the Collector to 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 reason that we say that the claimants should not be held bound by what they had said

in their application for compensation with regard to the extent and categories 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 classes or categories of lands. Which were not governed by

the said definition of "land" in the Regulation. In our opinion. It is not possible to make an exhaustive catalogue of categories of lands which fall

beyond the purview of Art. 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 particular piece of land it can be resolved only by taking into consideration several factors relevant for that purpose. No abstract

principles can be laid down in this respect.

28. Mr. Chinoy submitted that all lands situated within the limits of a municipality even though they answer the description 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 *Archdiocese of Goa. V. Union of India* (Writ Petn No.

30-B of 1970 decided on 30-3-1983) requires reconsideration as it runs counter to what has been held by the Supreme Court in *Gulabhai*

Vallabhbai 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 do not find that the Supreme Court has held in *Gulabhai v. Union of India* held

that all lands situated within the municipal area irrespective of the purpose for which they are 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 that petition would be dismissed with the declaration that 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 an area 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 to be 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 proposition in view of what had been said by the Supreme Court.

We therefore, do not think it necessary to reconsider that 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 prayer Cls.

(a) to (c) and (e) in respect of Spl Civil Appln No. 74 of 1972. These petitions are prayer cl. (e) in Spl Civil Appln. No. 73 of 1972 and prayer

clause (d) in respect of Spl Civil Appln. No. 74 of 1972 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 Government on the appointed date under s. 3 of the Regulation having regard 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 opportunity to the petitioners

and the other claimants, if they so desire, of being heard. In the circumstances of the case, there shall be no order as to costs.

30. At the time of pronouncement of the judgment the petitioner in Spl. Civil No. 73 of 1972 prays for a certificate of fitness to appeal to the

Supreme Court. In view of what we have said in the judgment we do not think 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 submitted that pending

admission of the appeal in the Supreme Court the operation of the judgment may be stayed. We direct that the operative part of the present

judgment shall be suspended for two months from today.

31. Petitions partly allowed.