



**RIGHT TO PROPERTY VIS-À-VIS  
LAND REFORM LEGISLATION:  
SOME CONSTITUTIONAL  
DISCONTENTS WITH THE GOA  
BHUMIPUTRA ADHIKARINI BILL,  
2021**

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*“So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.”*

– William Blackstone

**Abstract:**

In *Dev Sharan v. State of Uttar Pradesh*,<sup>2</sup> Justice A. K. Ganguly, while setting aside the acquisition of agricultural land in the Shahajahanpur district of Uttar Pradesh for the construction of a prison, pithily observed, “Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory.”<sup>3</sup> It is against the backdrop of this right, described by former President and Chief Justice of the United States of America, William Howard Taft as the most important individual right guaranteed by the Constitution next to the right of personal liberty, the two of them unitedly having

contributed more to the growth of civilization than any other institution established by the human race,<sup>4</sup> that the author explores the jurisprudential evolution of land reform legislation in Goa. A conspectus of the relationship between the *Mundkar* and the *Bhatkar*, sui generis classes of persons existing in the state of Goa, and the reciprocal rights and obligations of the agricultural tenant and landlord, is undertaken from a socio-historical perspective, subsequent to which the author delves in to the constitutional challenges undergone by the statutory enactments which serve as their regulatory framework. It is the case of the author that the defensive bulwarks which were used to sustain the validity of the provisions of these laws conferring ownership rights to the transferees of the land do not come to the aid of The Goa Bhumiputra Adhikarini Bill, 2021<sup>5</sup> which was abortively introduced in the legislative assembly of Goa. On the strength of interpretive constraints imposed by constitutional courts on the doctrine of eminent domain and the confiscatory power of the regime, the author critiques this recent legislative attempt by the State Government and argues that granting proprietary status to dwellers of self-occupied housing units does not satisfy the requirements of Article 300A<sup>6</sup> of the Indian Constitution and amounts to an unlawful sequestration of the right to property of the owner whose land is sought to be expropriated.

<sup>1</sup> K. T. Plantation Private Limited v. Karnataka, (2011) 9 SCC 1, ¶ 133 [Hereinafter, “*K.T. Plantation*”]. Cites SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. I, 134-35, 140-41.

<sup>2</sup> *Dev Sharan v. State of Uttar Pradesh*, (2011) 4 SCC 769, (India).

<sup>3</sup> *Id.* ¶ 15.

<sup>4</sup> *Gurley v. M & N Materials, Inc.*, 143 So. 3d 1 (Ala. 2014) (United States of America).

<sup>5</sup> The Goa Bhumiputra Adhikarini Bill, 2021, Bill No. 49 of 2021, Bills of Goa State Legislature (29<sup>th</sup> July 2021) (India).

<sup>6</sup> The Constitution of India, 1950, Act 1 of 1950, (Nov. 26, 1949), art. 300A.



**Key words:** right to property, eminent domain, Bhumiputra, Mundkar, Agricultural Tenant, Goa

Since independence, many Indian states have enacted statutes to implement land reforms as a means of ensuring efficient utilisation of land as well as socio-economic justice, in furtherance of the constitutional ideal of a welfare state.<sup>7</sup> With the attainment of liberation from Portuguese rule and the establishment of a democratically elected legislature,<sup>8</sup> the Government of the then Union Territory of Goa, Daman and Diu also experimented with legislative attempts at distributing ownership and control of agricultural lands by way of conferring property rights on *Mundkars*, a *sui generis* class of persons which lived in the feudal tutelage of a landlord called *Bhatkar*;<sup>9</sup> as well as on agricultural tenants, so as to best serve the common good and in the process

eliminate the concentration of wealth and means of production.<sup>10</sup> In this paper, the author, after providing a brief conspectus of the Goan proprietary laws governing the Mundkarial system and the deemed purchase of agricultural land by the tenants in possession, examines the constitutional challenges The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975<sup>11</sup> and the fifth amendment<sup>12</sup> to The Goa, Daman and Diu Agricultural Tenancy Act, 1964,<sup>13</sup> popularly known as the Land to the Tiller Act,<sup>14</sup> have undergone and the emergent jurisprudence centring around the right to property, which has been shorn of its status as a fundamental right after the 44<sup>th</sup> amendment to the Indian Constitution<sup>15</sup> and is presently a constitutional right enshrined in Article 300A.<sup>16</sup> The author argues that notwithstanding the decisions of superior courts repelling the challenges to these

<sup>7</sup>See generally R.S. Deshpande, *Current land policy issues in India*, Food and Agriculture Organization of the United Nations (accessed on 24<sup>th</sup> Sept. 2022) <https://www.fao.org/3/y5026e/y5026e0b.htm>.

<sup>8</sup>Goa attained liberation from Portuguese rule on 19<sup>th</sup> December, 1961 and became a part of the Indian Union on 20<sup>th</sup> December, 1961. Elections to the legislative assembly of Goa were held for the first time on 9<sup>th</sup> December, 1963 and the first democratically elected government was formed on 20<sup>th</sup> December, 1963 under the Chief Ministership of Dayanand Bhandodkar – See AURELIANO FERNANDES, CABINET GOVERNMENT IN GOA, 1961-1993: A CHRONICLED ANALYSIS OF 30 YEARS OF GOVERNMENT AND POLITICS IN GOA, 2 – 10 (Maureen and Camvet Publishers Priv. Ltd., 1997) [Hereinafter, “*Aureliano Gomes*”]. For a brief account of the events following the annexation of Goa by the Indian armed forces, see *Coutinho v. Pereira*, (2019) 20 SCC 85, ¶15 and *Aureliano Gomes*, 1-2.

<sup>9</sup>C. F. SALDANA, A SHORT HISTORY OF GOA, 12 (Imprensa Nacional, Goa, 1957).

<sup>10</sup>PRASANNA TIMBLE, LAND LAWS OF GOA, 109 (Livro Pub, 1<sup>st</sup> Edn., 2016) [hereinafter, “*Prasanna Timble*”].

<sup>11</sup>The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975, Act No. 1 of 1976, Acts of Legislature of the Union Territory of Goa, Daman and Diu (2<sup>nd</sup> Oct. 1976) (India) [Hereinafter, “*Mundkars Act*”].

<sup>12</sup>The Goa, Daman and Diu Agricultural Tenancy (5<sup>th</sup> Amendment) Act, 1976, Act No. 17 of 1976, Acts of Legislature of the Union Territory of Goa, Daman and Diu (14<sup>th</sup> Oct. 1976) (India) [Hereinafter, “*Land to the Tiller Act*” or “*5<sup>th</sup> Amendment*”].

<sup>13</sup>The Goa, Daman and Diu Agricultural Tenancy Act, 1964, Act No. 7 of 1964, Acts of Legislature of the Union Territory of Goa, Daman and Diu (16<sup>th</sup> Dec. 1964) (India) [Hereinafter, “*Agricultural Tenancy Act*”].

<sup>14</sup>*Prasanna Timble*, *supra* note 10.

<sup>15</sup>The Constitution (Forty-fourth Amendment) Act, 1978, (30<sup>th</sup> Apr. 1979) [Hereinafter, “*44<sup>th</sup> Amendment*”].

<sup>16</sup>The Constitution of India, 1950, Act 1 of 1950, (Nov. 26, 1949), art. 300A [Hereinafter, “*India Const*”].



laws,<sup>17</sup> The Goa Bhumiputra Adhikarini Bill,<sup>18</sup> the most recent land reform legislation which was tabled in the Legislative Assembly of Goa in 2021 with the avowed objective of setting up a mechanism to give ownership rights to self-occupied dwellers of small housing units<sup>19</sup> suffers from some grave constitutional infirmities and cannot be saved by taking recourse to either the defensive grounds which were employed to uphold the impugned provisions of the Mundkars Act and the Land to the Tiller Act or the inherent power of the sovereign to take property for public use without the owner's consent, commonly known as the doctrine of eminent domain, which has been judicially enmeshed into the text of Article 300A.<sup>20</sup>

### Attempts at distributive justice: An overview of the Mundkarial institution and the Goan Agricultural Tenant

With the sole exception of Kerala where there exists a similar class of persons known as *kudikidappukarans*,<sup>21</sup> the Mundkarial system is peculiar to the state of Goa.<sup>22</sup> The term *Mundkar* is used to refer to a person who resides in a house built on the property of a landlord or private owner called *Bhatkar*, for watching and protecting the property.<sup>23</sup> The house would have been either provided by the Bhatkar or the Mundkar would construct it with the consent of the Bhatkar.<sup>24</sup> Very little evidence is available about the origin of this system and even the Committee appointed by the Government of Goa, Daman and Diu in 1966 to undertake studies of the problems of *Mundkars* could not trace their history due to lack of records.<sup>25</sup>

<sup>17</sup>Union Territory of Goa, Daman and Diu v. Patil, (1990) 4 SCC 102; Marques v. Moraskar, (1998) 3 Bom CR 36(Bombay High Ct.) (India) [hereinafter, "*Marques*"], Aggrieved Bhatkars Association v. State, 2001 (1) Goa L.T. 213(Bombay High Ct.) (India) [hereinafter, "*Aggrieved Bhatkars*"].

<sup>18</sup>The Goa Bhumiputra Adhikarini Bill, 2021, Bill No. 49 of 2021, Bills of Goa State Legislature (29<sup>th</sup> July 2021) (India) [hereinafter, "*Bhumiputra Bill*"].

<sup>19</sup>*Id.*, Long title of the Bill; Statement of Objects and Reasons.

<sup>20</sup>*K.T. Plantation, supra* note 6, ¶ 178.

<sup>21</sup>Snehal P. Naik Goltekar, *A Critical Study of Mundkar Act Vis-À-Vis Socio Economic Situation In Goa*, GOA UNIVERSITY, 64 (Sept. 2012), retrieved from <http://hdl.handle.net/10603/273024> [Hereinafter, "*Goltekar*"]; Prasanna Timble, *supra* note 10, 8-10; *Marques, supra* note 17, ¶ 11. For the definition of 'kudikidappukaran', see § 2(25) of the Kerala Land Reforms Act, 1963, Act. No. 1 of 1964 (Acts of Kerala State Legislature) [14<sup>th</sup> Jan. 1964] (India), and for the definition of 'Mundkar', see § 2(p), *Mundkars Act, supra* note 11. The two classes have been regarded as analogous by the Bombay High Court in *Marques, supra* note 17, ¶ 11.

<sup>22</sup>*Prasanna Timble, supra* note 10, 3.

<sup>23</sup>S. R. PHAL, SOCIETY OF GOA, 30 (B. R. Publishing Corporation, Delhi, 1982) [Hereinafter, '*S. R. Phal*'] See also N. D. AGRAWAL, THE GOA, DAMAN AND DIU MUNDKAR (PROTECTION FROM EVICTION) ACT, 1(Valsad Book House, 1997) - "The Bhatkar is the owner of the land (generally coconut gardens) who in English can be termed as Landlord or Proprietor. The Mundkar is the person who lives in a dwelling house constructed on the land of Bhatkar with the consent of the latter and with a view to tender some service such as watch and ward over the land, supply of his or his family's service to the Bhatkar when required by the latter, as agricultural labourers, and even sometimes without any obligation to render any service but allowed to reside on the land as a gesture of goodwill, though with the characteristic of subservience which is inherent in any one who is allowed to occupy land as a matter of grace."

<sup>24</sup>*S. R. Phal, supra* note 23.

<sup>25</sup>TONY FERNANDES ET. AL., REPORT OF THE COMMITTEE ON THE PROBLEM OF MUNDKARS, 3 (Govt. Printing Press, Panaji, Goa, 1966). Also available at <https://dspace.gipe.ac.in/xmlui/bitstream/handle/1097/3/52073/GIPE->



Scholastic opinion traces the word Mundkar to the Konkani word *Mund* which refers to a certain amount in cash or kind given by the landlord as a loan, free from any interest,<sup>26</sup> in addition to providing his land to the person or permitting him to build a house on his property.<sup>27</sup> In case the Mundkar intended to leave or vacate the property, he had to return the Mund earlier received by him, and eventually the term Mund gave rise to the expression Mundkar or the person who took the Mund. Parallely, it has been surmised that the word Mundkar is from the language of “Kols” and “Mundaris” who were reportedly the original settlers of Goa. Mund has been understood to be a variation of the vernacular word *Mull* which means the root of a tree, although by itself, it means the head of an individual. Inferentially, Mundkar refers to a person whose primary job is to plant a tree and nurture it.<sup>28</sup>

The Konkani word *Bhat* denotes a farm or an orchard,<sup>29</sup> leading to the word Bhatkar or owner of the property<sup>30</sup> where the Mundkar raised plantations while doubling up as its caretaker. For this, in return, he would get the permission to construct a dwelling house to

live and remuneration for the work done in the property and the services rendered. Concomitantly, Mundkarship refers to the relationship between the two – the landholder, the Bhatkar; and the person staying in his property, the Mundkar, to maintain his estate.<sup>31</sup>

It is believed that the dynamics of the relationship became exploitative with the Bhatkars compelling the Mundkars to render services for free, accompanied by threats of eviction to those who disobeyed their orders.<sup>32</sup> The deplorable plight of the Mundkars compelled the Portuguese regime to enact a Decree dated August 24, 1901<sup>33</sup> which defined a Mundkar<sup>34</sup> and contemplated a right to receive a six months’ notice before the proposed eviction.<sup>35</sup> Ultimately, the Decree of 1901 was repealed and substituted by Legislative Diploma no. 1952 dated November 26, 1959, known as “*lei do mundcarato*”,<sup>36</sup> which remained in force even after the annexation of Goa by the Indian Union on December 19, 1961 by virtue of section 5<sup>37</sup> of the Goa, Daman and

119471.pdf?sequence=1&isAllowed=y [Hereinafter, “*Fernandes*”].

<sup>26</sup> S. R. Phal, *supra* note 23.

<sup>27</sup> GAURISH N. AGNI & VISHWADH V. N. P. SARDESSAI, GOA MUNDKAR CASES (1975-2020), pg. v (Vasudeva Book Centre (Goa), 2021 Edn.).

<sup>28</sup> *Ibid.*

<sup>29</sup> MUKESH P. THALI & DAMODAR K. GHANEKAR, RAJHAUNS NEW GENERATION KONKANI ENGLISH ILLUSTRATED DICTIONARY, 467 (Rajhauns Vitaran, 2<sup>nd</sup> Edition 2004, Reprint 2007).

<sup>30</sup> *Ibid.* See also *Mundkars Act*, *supra* note 11, § 2(f) which defines “bhatkar” as “a person who owns the land on which the mundkar has a dwelling house”.

<sup>31</sup> GAURISH N. AGNI & VISHWADH V. N. P. SARDESSAI, GOA MUNDKAR CASES (1975-2020), pg. v (Vasudeva Book Centre (Goa), 2021, 1<sup>st</sup> Edn.).

<sup>32</sup> *Prasanna Timble*, *supra* note 10, 3-4.

<sup>33</sup> Royal Decree dt. 24<sup>th</sup> August 1901 (Gov. General of Goa), accessible at *Goltekar*, *supra* note 21, 456.

<sup>34</sup> *Id.*, art. 2.

<sup>35</sup> *Id.*, art. 3.

<sup>36</sup> Legislative Diploma No. 1952, 26<sup>th</sup> Nov. 1959 (Governor General of Goa) published in Govt. Gazette No. 48 Series I dated 26-11-1959. Accessible at *Fernandes*, *supra* note 25, 43-46. The Portuguese term “lei” means law or rule and the English equivalent of the Portuguese word “do” in this context would be “of”. Thus, the term “lei do mundcarato” literally means “Law of Mundkars”. See *Texto Editora*, *Dicionário Universal de Português*, 265, 418 (Texto Editora, 1<sup>st</sup> Edn. 1998). See also *Prasanna Timble*, *supra* note 10, 4.

<sup>37</sup> The Goa, Daman and Diu (Administration) Act, 1962, Act 1 of 1962, Acts of Goa State Legislature, (27<sup>th</sup> Mar. 1962) (India), §5.



Diu (Administration) Act, 1962<sup>38</sup> which retained on the statute books all pre-colonial laws, including the Diploma of 1959.

In pursuance of his socio-economic programme which included providing relief to landless Mundkars through appropriate legislation,<sup>39</sup> The Goa Daman and Diu (Protection from Eviction of Mundkars, Agricultural Labourers, and Village Artisans) Act, 1971<sup>40</sup> was promulgated by the cabinet ministry of Dayanand Bandodkar, the first chief minister of Goa,<sup>41</sup> only to be repealed by The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975<sup>42</sup> under the chief ministership of his daughter and successor, Shashikala Kakodkar.<sup>43</sup> The Act of 1975 serves as the extant legislative framework regulating Mundkarial rights and encompasses a host of protective measures including safeguards against unlawful eviction,<sup>44</sup> enjoyment of electricity, water supply and customary easement,<sup>45</sup> and the right to purchase the dwelling house in which the Mundkar resides.<sup>46</sup>

Historically, akin to the Mundkar, agricultural tenants in Goa constituted an oppressed class with no right to even a subsistence share in the produce of the land they tilled, high rents payable to the landlords who had no obligation to pay them for their labour and at whose residence their families often worked for free, and no security of status as tenants, liable to be evicted by the landlords at whim.<sup>47</sup> The Goa Daman and Diu Agricultural Tenancy Act, 1964 can be seen as a fulfilment of Dayanand Bandodkar's pre-electoral promise to the tenants<sup>48</sup> as it not only guaranteed them protection from dispossession, whether actual<sup>49</sup> or threatened<sup>50</sup> and restricted the scope for termination of tenancy,<sup>51</sup> but also made the rights of a tenant heritable.<sup>52</sup> Radically widening its protective scheme, the Fifth Amendment to the Agricultural Tenancy Act was, not unlike the Mundkars Act, the brainchild of Shashikala Kakodkar,<sup>53</sup> popularized by the Marathi slogan *Kasel Tyachi Zameen* (land to the tiller).<sup>54</sup> The Amendment incorporated chapter IIA<sup>55</sup> in the parent Act which made the tenants deemed

<sup>38</sup>The Goa, Daman and Diu (Administration) Act, 1962, Act 1 of 1962, Acts of Goa State Legislature, (27<sup>th</sup> Mar. 1962) (India).

<sup>39</sup>N. Radhakrishnan, *Dayanand Balkrishna Bandodkar: The Architect of Modern Goa*, GOA UNIVERSITY, 122 (1994), retrieved from <http://hdl.handle.net/10603/31703>.

<sup>40</sup>The Goa, Daman and Diu (Protection from Eviction of Mundkars, Agricultural Labourers and Village Artisans) Act, 1971, Act 12 of 1971, Acts of Legislature of the Union Territory of Goa, Daman and Diu, (India).

<sup>41</sup>*Aureliano Gomes*, *supra* note 8, 50.

<sup>42</sup>*Mundkars Act*, *supra* note 11.

<sup>43</sup>Repealed by §41(c) of *Mundkars Act*, *supra* note 11. See *Aureliano Gomes*, *supra* note 8, 78.

<sup>44</sup>*Mundkars Act*, *supra* note 11, §4(1).

<sup>45</sup>*Id.*, §6.

<sup>46</sup>*Id.*, §15. However, in *Bandodkar v. Rodrigues*, 1998 (5) Bom CR 838 ¶ 9, the Bombay High Court held that

certain words/terms in the Agricultural Tenancy Act could not be used to interpret the provision in the Mundkar Act. The two statutes are not in *pari materia* with each other in the strict sense since the classes of people that are afforded protection under the Agricultural Tenancy Act are different from the ones given protection under the Mundkar Act.

<sup>47</sup>*Prasanna Timble*, *supra* note 10, 77-78.

<sup>48</sup>*Aureliano Gomes*, *supra* note 8, 5.

<sup>49</sup>*Agricultural Tenancy Act*, *supra* note 13, §8.

<sup>50</sup>*Id.*, §8A.

<sup>51</sup>*Id.*, §§9-12.

<sup>52</sup>*Id.*, §14.

<sup>53</sup>*Aureliano Gomes*, *supra* note 8, 78.

<sup>54</sup>Basuri Desai, *The Tale of Two Associations*, O HERALDO [Sept. 9, 2017] <https://www.heraldgoa.in/Perspective/The-tale-of-two-associations/119875>.

<sup>55</sup>*Agricultural Tenancy Act*, *supra* note 13, Ch. IIA, (§§18A to 18L).



owners of the land in their cultivating possession<sup>56</sup> subject to the payment of a purchase price, which was to be determined by a revenue officer known as the Mamlatdar, to the landlord.<sup>57</sup>

Multiple rounds of constitutional litigation ensued the attempts by the Maharashtra Gomantak Party to model Goan society on socialist lines and in accordance with agrarian reforms in other Indian states.<sup>58</sup> With the exceptions of the order of the Judicial Commissioner declaring the entire Fifth Amendment to the Agricultural Tenancy Act as void,<sup>59</sup> which was ultimately reversed by the Supreme Court,<sup>60</sup> and the judgment of the Division Bench of the High Court of Bombay at Goa in *Dr. Vasudeo Rajendra Deshpabhu v. State of Goa*,<sup>61</sup> interpretive jurisprudence has deferred to governmental intervention aimed at minimising the accumulation of land in the hands of the landlord class.<sup>62</sup> However, over the decades, the narrative shifted from a shortage of cultivatable land to a dearth of

housing accommodation in the state, attributed by *Niz Goemkars* or indigenous Goans<sup>63</sup> to the influx of migrants in the state.<sup>64</sup> It is against the backdrop of such demographic conditions that the legislative assembly of Goa passed The Goa Bhumiputra Adhikarini Bill, 2021, after it was introduced by the Chief Minister of the state, Dr. Pramod Sawant.<sup>65</sup>

### **A schema of The Goa Bhumiputra Adhikarini Bill: Home for the homeless or rewarding an encroacher?**

For an enactment which has the potential to divest legitimate rights over residential structures, The Goa Bhumiputra Adhikarini Bill, 2021, is a brief legislation embodying not more than eleven provisions. Though the term “Bhumiputra”, when literally translated means “son of the soil”,<sup>67</sup> section 2(a) of the Act<sup>68</sup> lists out the twin conditions which must be fulfilled by a person to claim the nomenclated status – firstly, he must have been residing in Goa for at least thirty years

<sup>56</sup>*Id.*, §18A.

<sup>57</sup>*Id.*, §§18C, 18D.

<sup>58</sup>N. RADHAKRISHNAN, DAYANAND B. KRISHNA BANDODKAR: THE ARCHITECT OF MODERN GOA, 259, 288 GOA UNIVERSITY (1994), retrieved from <http://hdl.handle.net/10603/31703>.

<sup>59</sup>Lakshmibai v. India, AIR 1979 Goa 21 (India) [Hereinafter, “Lakshmibai”].

<sup>60</sup>Union Territory of Goa, Daman and Diu v. Patil, (1990) 4 SCC 102 [Hereinafter, “Patil”].

<sup>61</sup>Deshprabhu v. Goa, Writ Petition No. 86 of 1997, (16<sup>th</sup> Dec. 2003) (Bombay High Ct.) (India) [Hereinafter “Deshprabhu”].

<sup>62</sup>See *Patil*, *supra* note 60; *Marques*, *supra* note 17; *Aggrieved Bhatkars*, *supra* note 17.

<sup>63</sup>*Niz Goemkars object to use of ‘bhumiputra’ for all Goans*, THE TIMES OF INDIA (Aug. 2, 2021) <https://timesofindia.indiatimes.com/city/goa/niz-goemkars-object-to-use-of-bhumiputra-for-all-goans/articleshow/84958833.cms>

<sup>64</sup>Vivek Menezes, *Who belongs to Goa? This question resurfaces as the State battles the raging pandemic*,

THE HINDU (May 15, 2021) <https://www.thehindu.com/society/who-belongs-to-go-a-this-question-resurfaces-as-the-state-battles-the-raging-pandemic/article34554870.ece>. *But see* Prashant Kadam, *Socio-Economic Analysis of the Migrants of Select Hotels in North Goa*, PJAAE, 17(7) 2020, 4 for the view that access to affordable housing is a challenge also faced by people who migrate for work.

<sup>65</sup>Mayura Janwalkar, *Goa Assembly Passes Bhumiputra Adhikarini Bill Amid Opposition Walkout*, INDIAN EXPRESS (Aug. 6, 2021) <https://indianexpress.com/article/cities/goa/goa-eases-home-ownership-for-sons-of-the-soil-assembly-passes-bhumiputra-adhikarini-bill-amid-opp-walkout-7430982/>. [Hereinafter, “Mayura Janwalkar”].

<sup>66</sup>*Bhumiputra Bill*, *supra* note 18.

<sup>67</sup>R. S. MCGREGOR, THE OXFORD HINDI-ENGLISH DICTIONARY, 636, 772 (OUP, 32<sup>nd</sup> impression, Aug. 2008).

<sup>68</sup>*Bhumiputra Bill*, *supra* note 18, § 2(a).



before the date on which the application is made to the Bhumiputra Adhikarini, a quasi-judicial authority constituted under section 3 of the Act;<sup>69</sup> and secondly, he must have been in occupation of a dwelling unit. Pertinently, it is not a pre-requisite that he should have occupied the dwelling unit for thirty years. The term, place, and duration of “occupation” having been left undefined, it is envisageable to have a person who might have resided anywhere within the territorial boundaries of the state for the last thirty years but has been associated with the dwelling unit for only a few months, weeks, or even days – such a person could rightfully assert his status as a Bhumiputra. April 1, 2019 has been laid down by Section 2(c) of the Act<sup>70</sup> as the prescribed date on or before which the dwelling unit, a permanent structure having plinth area delimited at two hundred and fifty square metres,<sup>71</sup> must have been constructed or in existence. However, there is no requirement for the dwelling unit to be assessed for house tax by a local authority or possess an electricity connection in the name of the Bhumiputra, or for that matter even have been built by the Bhumiputra – resembling the clarificatory amendment to section 2(i) of the Mundkars Act in 1985<sup>72</sup> after the definition of “dwelling house” was

interpreted by a single judge Bench of the Bombay High Court in *Santana Furtado Dias v. Uttam Tari*<sup>73</sup> to mean a dwelling house constructed by the Mundkar himself and not otherwise,<sup>74</sup> the constitutional validity of which was discussed and upheld by a Division Bench in *Maria Marques v. Madhukar Moraskar*.<sup>75</sup>

The Bhumiputra Adhikarini has also been empowered by section 4<sup>76</sup> to declare a Bhumiputra as the owner of the dwelling unit once an amount equivalent to the market price of the land has been paid by him to the erstwhile owner. A rudimentary procedure for the conduct of an enquiry by the Adhikarini Committee is contemplated by sections 5 and 6,<sup>78</sup> subsequent to the receipt of an application by a Bhumiputra within six months from the date of commencement of the Act. A public notice to all interested persons, necessarily including the owner of the land, has to be given within a period of thirty days,<sup>79</sup> inviting objections limited to the ownership, time of construction, and occupation of the dwelling unit by the Bhumiputra.<sup>80</sup> Curiously, fetters have been imposed on the powers of the Adhikarini Committee to adjudicate after considering the objections, insofar as its jurisdiction has been

<sup>69</sup>*Id.*, § 3.

<sup>70</sup>*Bhumiputra Bill*, *supra* note 18, § 2(c).

<sup>71</sup>*Ibid.*

<sup>72</sup>*Mundkars Act*, *supra* note 11, §2(i) amended vide The Goa, Daman and Diu Mundkars (Protection from Eviction) (Amendment) Act, 1985 (Act No. 10 of 1985) [17-04-1985] published in the Official Gazette, Series I No. 6 dated 09-05-1985 and came into force with effect from 12-03-1976. [Hereinafter, “1985 Amendment”]. The Amendment deleted the words “whether such house was constructed by the mundkar at his own expense or at the bhatkar’s expense or with financial assistance from the bhatkar” from §2(i) which defined “dwelling house”. The Statement of Objects and Reasons appended to The Goa, Daman

and Diu Mundkars (Protection for Eviction) (Amendment) Bill, 1985 makes it evident that its purpose was to undo the effect of the decision in *Santana Furtado Dias v. Uttam Tari* (Dias v. Tari, 1985 Mah LJ 211(Bombay High Ct.) (India). In this regard, *see Marques*, *supra* note17, ¶ 6

<sup>73</sup>*Dias v. Tari*, 1985 Mah LJ 211(Bombay High Ct.) (India).

<sup>74</sup>*Id.*, ¶ 11.

<sup>75</sup>*Marques*, *supra* note 17.

<sup>76</sup>*Bhumiputra Bill*, *supra* note 18, § 4.

<sup>77</sup>*Id.*, §5.

<sup>78</sup>*Id.*, §6.

<sup>79</sup>*Id.*, §6(1).

<sup>80</sup>*Id.*, §6(3).



limited to deciding the value of the land and other concomitant financial obligations payable by the Bhumiputra such as conversion charges and infrastructure tax,<sup>81</sup> subsequent to which the authority is bound to issue an Ownership Sanad to the applicant,<sup>82</sup> based on which an entry is to be made ex parte in the Record of Rights.<sup>83</sup> Though orders of the Adhikarini Committee are appealable before the Administrative Tribunal,<sup>84</sup> the overall structure of the Bill is in consonance with its purported objective as spelled out in the long title<sup>85</sup> and Statement of Objects and Reasons,<sup>86</sup> which is to give ownership rights to occupiers of self-occupied dwelling units, redolent of what has been described by Shruti Rajagopalan as “Robin hood land reforms”<sup>87</sup> rather than a slant towards the utilitarian agenda of conventional estate acquisition involving construction of bridges, roads, dams or other projects of public infrastructure undertakings for larger societal welfare.<sup>88</sup>

### **A few pyrrhic victories: How Goa fared in the constitutional experiments with the right to property**

Faced with an independent judiciary, which had come down heavily on the side of the citizens and struck mighty blows against the government and was seen as a stumbling block in the first Parliament’s roadmap towards Zamindari abolition, nationalisation of industry, and reservations for backward classes in educational institutions, the First Amendment to the Constitution<sup>89</sup> was passed in 1951, inserting inter alia Articles 31A,<sup>90</sup> 31B,<sup>91</sup> and the Ninth Schedule<sup>92</sup> into the Constitution, conferring on land acquisition laws immunity from judicial challenges on the cornerstone of violation of fundamental rights.<sup>93</sup> Undeterred by the constitutional amendments circumscribing the right to property, the court of the Judicial Commissioner in Goa invalidated the entire Land to the Tiller Act in *Lakshmibai v. Union of India*<sup>94</sup> holding that the 5<sup>th</sup> Amendment to the Agricultural Tenancy Act does not constitute an agrarian reform for the purpose of Article 31A(1)(a),<sup>95</sup> which legitimizes laws acquisitioning estate or extinguishing or modifying a person’s rights therein and is, consequently, beyond its protective

<sup>81</sup>*Id.*, §6(4).

<sup>82</sup>*Id.*, §6(5).

<sup>83</sup>*Id.*, §6(6).

<sup>84</sup>*Id.*, §7.

<sup>85</sup>*Id.*, Long title of the Bill.

<sup>86</sup>*Id.*, Statement of Objects and Reasons of the Bill.

<sup>87</sup>Shruti Rajagopalan, *Reverse Robin Hood Land Reform*, MINT (Feb. 6, 2007) <https://www.livemint.com/Opinion/Lu1sXaP9TvLxSUiEwD0rDO/Reverse-Robin-Hood-land-reform.html>

<sup>88</sup>*Ibid.*

<sup>89</sup> The Constitution (First Amendment) Act, 1951, (30<sup>th</sup> Apr, 1979)[Hereinafter, “*First Amendment*”].

<sup>90</sup>*India Const, supra* note 16, art. 31A. Inserted by *First Amendment, id.*, § 4.

<sup>91</sup>*India Const, supra* note 16, art. 31A. Inserted by *First Amendment, supra* note 89, § 5.

<sup>92</sup>*India Const, supra* note 16, Ninth Schedule. Inserted by *First Amendment, supra* note 89, §14.

<sup>93</sup>See TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT TO THE CONSTITUTION OF INDIA, pg. vii-ix (Vintage Penguin Random House India, 2020).

<sup>94</sup>*Lakshmibai, supra* note 59.

<sup>95</sup>*India Const, supra* note 16, art. 31A(1)(a).



umbrella,<sup>96</sup> rendered unconstitutional by the illusory compensation payable to the petitioners.<sup>97</sup> However, on appeal, the decision was overturned by the Supreme Court<sup>98</sup> by taking the view that it is not necessary for a statute to lay down a ceiling limit for the maximum permissible land which can be held by a tenant in order to qualify as a measure of agrarian reform, repudiating the reasoning of the Judicial Commissioner that fixation of a statutory land ceiling constitutes the “heart and soul” of agrarian reform, by drawing analogies with the Bombay Tenancy and Agricultural lands (Amendment) Act, 1956<sup>99</sup> on the lines of which the Land to the Tiller Act had been drafted.<sup>100</sup>

Though the Mundkars Act found a place in the Ninth Schedule,<sup>101</sup> a constitutional challenge on the anvil of Articles 14<sup>102</sup> and

300A,<sup>103</sup> capitalized by legislative inadvertence to similarly immunize the 1985 Amendment<sup>104</sup> to the parent Act<sup>105</sup> was dismissed in *Maria Eliza Marques v. Madhukar Moraskar*.<sup>106</sup> The argument that a statutory infringement of Article 14 was not shielded by Article 31A and 31B and the creation of two classes of *Mundkars*, namely, one having constructed the houses from their own expenses and the other in the occupation of dwelling houses which were constructed by Bhatkars was rejected<sup>107</sup> by placing reliance on *Malankara Rubber and Produce Co. Ltd. v. State of Kerala*<sup>108</sup> in which a Constitution Bench of the Supreme Court ruled that the problem of Kudikidappukarans, a class of people in the state of Kerala permitted by the landowners to reside in their estates in return for their services as watchmen of the *parambas*<sup>109</sup> and coconut

<sup>96</sup>*Lakshmibai*, *supra* note 59 ¶ 44. Although Article 31A(1)(a) does not by express language restrict its application to a particular nature of law, it has been held that the protection of the Article is limited to laws which serve the purpose of agrarian reform. *See Godavari Sugar Mills Ltd. v. Kamble*, AIR 1975 SC 1193, ¶ 21 - “It is now well-established that before the protection of article 31A can be afforded to the acquisition of any land by the State, the acquisition should be for the purpose of agrarian reform.” *See also Kochuni v. Madras* (1960) 3 SCR 887, ¶¶ 21, 23 (*per K. Subba Rao, J.*).

<sup>97</sup>*Lakshmibai*, *supra* note 59, ¶¶ 45, 46.

<sup>98</sup>*Patil*, *supra* note 60.

<sup>99</sup>The Bombay Tenancy and Agricultural lands (Amendment) Act, 1956, Act XIII of 1956, Acts of Bombay State Legislature [India].

<sup>100</sup>*Patil*, *supra* note 60, ¶¶ 9, 14. *See generally* Medhi v. Bombay, AIR 1959 SC 459, where the constitutional validity of The Bombay Tenancy and Agricultural lands (Amendment) Act, 1956 (Act XIII of 1956) was upheld.

<sup>101</sup>*India Const*, *supra* note 16, Entry No. 187, Ninth Schedule.

<sup>102</sup>*Id.*, art.14.

<sup>103</sup>*Id.*, art.300A.

<sup>104</sup>1985 Amendment, *supra* note 72.

<sup>105</sup>*Marques*, *supra* note 17, ¶ 14. Mere inclusion of the Principal Act in the Ninth Schedule does not automatically result in extending the protection of Article 31B of the Constitution, on the ground that the amendments were ancillary or incidental to the principal provision. Inclusion of even the Amendment Acts in the Ninth Schedule to the Constitution, which are passed after the Principal Act was inserted in the Ninth Schedule to the Constitution, is necessary. *See Godavari Sugar Mills Ltd. v. Kamble*, AIR 1975 SC 1193, ¶¶ 14 – 23.

<sup>106</sup>*Marques*, *supra* note 17.

<sup>107</sup>*Marques*, *supra* note 17, ¶¶ 11-18

<sup>108</sup>*Malankara Rubber and Produce Co. Ltd. v. Kerala*, AIR 1972 SC 2027 [Hereinafter, “*Malankara Rubber*”].

<sup>109</sup>The Kerala Agrarian Relations Act, 1960 (Act 4 of 1961), Acts of Kerala State Legislature (3<sup>rd</sup> February 1961)(India), § 2(36) defines “paramba” as dry land on which perennial cultivation exists but shall not include a garden. *See also* The Kerala Tenants and Kudikidappukars Protection Act, 1963 (Act 7 of 1963), Acts of Kerala State Legislature (13 February 1963) (India), § 3(21) for the same definition of the term.



gardens and as agricultural labourers,<sup>110</sup> had always been connected with agricultural land.<sup>111</sup> Given that they had been allowed to settle on the land due to the needs of an agricultural population,<sup>112</sup> the Court held that it would be too late in the day to contend that a scheme which envisages the improvement of their lot and grants permanent rights to them would transgress the limits of agrarian reform.<sup>113</sup> Analogously, the charge of discrimination was rebuffed by holding that the Amendment Act of 1985 was saved by Article 31A as a piece of legislation related to agrarian reform.<sup>114</sup>

In the author's submission, this conclusion is erroneous since the first proviso to Article 31A<sup>115</sup> itself states that an acquisitional law made by a State Legislature will not come within the protective sweep of the Article unless such a law receives the assent of the President,<sup>116</sup> a requirement which was not fulfilled by the 1985 Amendment. Hence, rather than delving into the question of whether Mundkarial laws partake the character of agrarian reforms, the Court ought to have examined whether the classification created between the two

categories of Mundkars was rational and based on any intelligible differentia bearing a nexus with the object of the Act.<sup>117</sup> However, the Bench did not consider it necessary to express any opinion on the issue of whether the 1985 Amendment is a discriminatory piece of legislation as it held that Article 31A would be applicable with all its rigour.<sup>118</sup>

Four years later, in *Aggrieved Bhatkars Association v. State of Goa*,<sup>119</sup> a plea to declare the provisions fixing the price of the land vested in favour of the Mundkar as on 12 March 1976<sup>120</sup> by Amendment Act 6 of 1995<sup>121</sup> dated 31 March 1995 as invalid, mounted by the Petitioners and predicated on the lack of Presidential assent as well as the second proviso to Article 31A(1)<sup>122</sup> which casts a duty on the State to pay compensation as per the market value when land in personal cultivation of the owner is acquired and transferred in favour of a beneficiary.

It is the author's respectful submission that the Division Bench of the Bombay High Court erred in its construction of Mundkarial law and the intrinsic characteristics of agrarian reforms while declaring the 1995

<sup>110</sup>*Malankara*, *supra* note 107, ¶34.

<sup>111</sup>*Id.*, ¶ 37.

<sup>112</sup>*Ibid.*

<sup>113</sup>*Malankara*, *supra* note 107, ¶ 35.

<sup>114</sup>*Marques*, *supra* note 17, ¶¶ 12-13.

<sup>115</sup>*India Const*, *supra* note 16, art. 31A(1), first proviso.

<sup>116</sup>*See Medhi v. Maharashtra*, AIR 1971 SC 1992, ¶ 11.

<sup>117</sup>*Choudhry v. Bihar*, AIR 1955 SC 191, ¶ 7.

<sup>118</sup>*Marques*, *supra* note 17, ¶ 14.

<sup>119</sup>*Aggrieved Bhatkars*, *supra* note 17.

<sup>120</sup> 12 March 1976 is the date on which the Mundkars Act came into force. §2(e) of the Mundkars Act defines "appointed date" as the date on which the Mundkars Act came into force. By Notification No. RD/MND/ACT/241/66-76, dated 18th March, 1976, which was published in official Gazette series I No.

50, dated 11th March 1976, the Government has fixed 12th March 1976 as the appointed date. (*Goltekar*, *supra* note 21, 57)

<sup>121</sup>The Goa, Daman and Diu Mundkars (Protection from Eviction) (Amendment) Act, 1993 (Act No. 6 of 1995), Acts of Goa State Legislature (31<sup>st</sup> March 1995) (India) [Hereinafter "1993 Amendment" or "Amendment Act of 1993"]. The 1993 Amendment inserted the words "as prevailing on the appointed date" in § 15(3) of the Act. The provision after the Amendment read as "The purchase price payable by the mundkar for his dwelling house shall be the market value of the dwelling house purchased as prevailing on the appointed date and the improvement thereon, other than the improvement, if any, belonging to the mundkar."

<sup>122</sup>*India Const*, *supra* note 16, art. 31A(1), second proviso.



Amendment as *intra vires*. Despite the legislative predecessors of the Mundkars Act suggesting the existence of the Bhatkar-Mundkar relationship predominantly in a pastoral milieu,<sup>123</sup> evidenced by defining a Mundkar as an individual who resides with a fixed habitation in a 'rural' property of others,<sup>124</sup> a co-ordinate Bench in *Uttam Pednekar v. Atul Pundalik Bandekar*<sup>125</sup> had held that the register required to be maintained by section 29 of the Mundkars Act<sup>126</sup> is not restricted to Mundkars in possession of dwelling houses situated in villages. The court opined that the word 'village' referred to in section 29 is to be interpreted expansively and includes even towns and cities.<sup>127</sup> Nonetheless, it was

argued on behalf of the petitioners in *Aggrieved Bhatkars Association*<sup>128</sup> that it would be illogical to style a law which includes within its sweep even areas within Municipal limits as an act of agrarian reform.<sup>129</sup> The submission was refuted by highlighting the existence of the Mundkar and Bhatkar classes even before the arrival of the Portuguese in Goa, albeit without referring to any historical writings or other vetted evidence. The Court observed:

“There is no distinction between Mundkars in villages or Mundkars in cities and towns but on the other hand Mundkars are directly connected with Bhatkars, who were the owners of land and who sought the services

<sup>123</sup>N. D. AGRAWAL, THE GOA, DAMAN AND DIU MUNDKAR (PROTECTION FROM EVICTION) ACT, 5 (Valsad Book House, 1997)– “The Diploma No. 1952 was applicable only in respect of the rural property in the District of Goa.”; The Preamble to Diploma No. 1952 states “The law that codified the local usages and customs regulating juridical relationship, between the owner of rural property and the individuals who occupy a parcel of the land for permanent dwelling i.e. the Decree of 24<sup>th</sup> August 1901, is now more than half a century old. The regulation of these relationships has to be recognised as useful for the improvement of rural property and the welfare of working classes constitutes a basic element of rural social economy of the “Estadeo da India” (accessible at *Fernandes, supra* note 25, 43). The Preamble to Decree of 24<sup>th</sup> August 1901 states “The Governor General of the State of India having represented the convenience of codifying the old local uses and practices which regulate in that Province the juridical relations between proprietors of rural properties and mundkars, rural watchmen or guards of the above property where they reside with character of permanency, establishing house, kitchen and family. Whereas this old institution, besides being of good utility for the betterment of rural properties and for the well being of labourer classes, it is an important element of rural and social economy of the Province as it means more than simple relations of permanent juridical nature.” (accessible at *Goltekar, supra* note 21, 456). *But see Fernandes, supra* note 26, 23 for the

identification of 3,658 Mundkars in urban areas by the Committee on the Problems of Mundkars as of 1966 although according to Dr. Snehal P. Naik Goltekar, they constituted a mere 9.7% of the total 41053 Mundkars in Goa. (*Goltekar, supra* note 21, 235).

<sup>124</sup>Article 2 of the Royal Decree dt. 24<sup>th</sup> August 1901 defined Mundkar as “an individual who resides with fixed dwelling in the rural property of others, mainly for the purposes of cultivation or watching and guarding; it may be this dwelling is constructed on his account, receiving or not from the landlord some help in cash or kinds (subsidy of Munda) to its construction and establishment or it may be constructed by the landlord.” (accessible at *Goltekar, supra* note 21, 456). The definition of Mundkar in Diploma No. 1952 dated 16-11-1959 was “Mundkar or occupant is the individual who resides with fixed habitation in a rural property of others, specially with the purpose of cultivation or watch and protection, may such habitation be constructed on his own, or may be constructed on the batkar's or proprietor's account, receiving from him or not any help in money or material for construction and establishment;” (accessible at *Fernandes, supra* note 25, 43).

<sup>125</sup>*Pednekar v. Bandekar*, AIR 2000 Bom 178, (Bombay High Ct.) (India).

<sup>126</sup>*Mundkars Act, supra* note 11, §29.

<sup>127</sup>*Pednekar v. Bandekar*, AIR 2000 Bom 178, (Bombay High Ct.) (India), ¶¶ 5, 8, 10.

<sup>128</sup>*Aggrieved Bhatkars, supra* note 17.

<sup>129</sup>*Id.* ¶ 13.



of the Bhatkar. Therefore, wherever there is land and wherever there is a Bhatkar, then ordinarily there will be a Mundkar. Such a system is in existence for more than 500 years whether the land is in rural or urban area.”<sup>130</sup>

The Division Bench was influenced by the relatively recent origin of a Municipal area in the Goan context in view of the first Municipal law which came into force on 15 November, 1933 in the form of the ‘Reforma Administrative Ultramarina’.<sup>131</sup> In the author’s submission, the issue had been decisively settled by the Constitution Bench decision in *Malankara Rubber Company*<sup>132</sup> wherein a stand had been taken by the Kerala Government that in Kerala, even within cities and towns, there were tracts of cultivated lands and merely because the Kerala Land Reforms Act applied to them, it did not detract from the Act’s essential character as a measure of agrarian reform.<sup>133</sup> Not accepting the defence of the State of Kerala, the Supreme Court observed that the question of whether lands are agricultural or not depends also on their physical properties and situation and resultantly, there may be rocky lands, sandy lands, hill sites, unculturable lands, forests, and lands comprised within a Municipality, especially in towns and cities which cannot be styled as agricultural lands simply because agricultural operations cannot be carried on there.<sup>134</sup> Accordingly, the Constitution Bench held:

“However laudable may be the object of the state legislature in attempting to settle

landless persons on land obtained by the Land Reforms Act, the taking away of such lands in the circumstances mentioned above either from industrial or commercial undertakings or from the owner of house sites within a municipality for distribution among the landless cannot be said to effect agrarian reform. The Act in so far as it purports to acquire these lands cannot be upheld.”<sup>135</sup>

In the light of the unequivocal ruling in *Malankara Rubber Company*,<sup>136</sup> the reliance placed by the Division Bench on the absence of any distinction being made in the Act between a Mundkar in an urban and a rural area and its presupposition that the Mundkar – Bhatkar relationship has existed since time immemorial, or at any rate prior to the statutory creation of a Municipal area<sup>137</sup> is dubious. Apropos the contention that the Act aims at acquisition of land by the State and transfer of the acquired estate in favour of the Mundkars as beneficiaries, thereby necessitating payment of compensation at market value,<sup>138</sup> the freezing of the land prices was found to be constitutionally sound despite the mandate of the second proviso to Article 31A by finding that there is no acquisition of the Bhatkar’s property by the State, either directly or by implication.<sup>139</sup> The author regardfully contends that the High Court’s reasoning is jurisprudentially infirm considering that the Supreme Court had differently construed a homologous provision<sup>140</sup> in *The Bombay Tenancy and Agricultural Lands (Vidharba Region) Act*,

<sup>130</sup> *Aggrieved Bhatkars*, *supra* note 17, ¶ 21.

<sup>131</sup> *Ibid.* The term literally means ‘Overseas Administrative Reforms’. See *Goltekar*, *supra* note 21, 381.

<sup>132</sup> *Malankara Rubber*, *supra* note 107.

<sup>133</sup> *Malankara Rubber*, *supra* note 107, ¶ 54.

<sup>134</sup> *Malankara Rubber*, *supra* note 107, ¶ 55.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Malankara Rubber*, *supra* note 107.

<sup>137</sup> *Aggrieved Bhatkars*, *supra* note 17, ¶ 21.

<sup>138</sup> *Id.*, ¶ 22.

<sup>139</sup> *Id.*, ¶ 30.

<sup>140</sup> *The Bombay Tenancy and Agricultural Lands (Vidharba Region and Kutch Area) Act, 1958, Act No. XCIX of 1958, Acts of Maharashtra State Legislature (India)*, §46.



1958<sup>141</sup> by which the landlord's property was transferred to the tenant. Repelling the objection that there is neither any acquisition of the estate nor extinguishment of any rights therein in favour of the State on account of the fact that there no is express mention of such acquisition by the terms of the statute,<sup>142</sup> the Apex Court in *Laxminarayan Dipchand Maheshwari v. Maharashtra Revenue Tribunal*<sup>143</sup> had held:

“In order to transfer the lands to tenants from the landlords, the first step the State will have to take is to extinguish the right of the tenure holders under the paramount owner. It is only then that the transfer of the same land to the tenants under the landlords will be possible...Once that happens there is in one breath extinguishment of the right in favour of the State and conferment of the said right in favour of the tenant.”<sup>144</sup>

Firstly, the Division Bench distinguishes this decision by observing that that there was no challenge to the constitutional validity of section 46 of the Bombay Act which conferred full ownership on the tenants of the land.<sup>145</sup> This is demonstrably incorrect as the reported judgment itself reveals. “*The learned counsel next contends that section 46*

*of the Act is violative of article 19(1)(f) of the Constitution and is not saved by article 31A which is not applicable*”.<sup>146</sup> So also the acceptance of the Advocate General's submission that the provisions of the Mundkars Act and Bombay Act are different inasmuch as inter alia there is no deeming provision making Mundkars owners of the house from a particular date<sup>147</sup> amounts to nitpicking considering that section 15 of the Mundkars Act<sup>148</sup> gives an absolute right to the Mundkar to purchase the dwelling house which not only includes the edifice but also the land beneath and appurtenant, customary easements, as well as structures connected with the Mundkar's profession such as cattle shed, stable, pigsty and workshop.<sup>149</sup> Moreover, when examining the constitutionality of a statute which is alleged to violate fundamental rights, it is trite to say that it is the substance and not the form of the law which must be scrutinised<sup>150</sup> and from the Court's perspective, the effect and not the object of the law is germane.<sup>151</sup> That being so, the reluctance of the High Court to apply the ratio of *Laxminarayan Dipchand Maheshwari*<sup>152</sup> makes it apposite to quote the observations of a three judge Bench of the

<sup>141</sup>The Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958, Act No. XCIX of 1958, Acts of Maharashtra State Legislature (India).

<sup>142</sup>*Maheshwari v. Maharashtra Revenue Tribunal*, (1975) 1 SCC 487, ¶ 9.

<sup>143</sup>*Maheshwari v. Maharashtra Revenue Tribunal*, (1975) 1 SCC 487 [hereinafter, “*Maheshwari*”].

<sup>144</sup>*Maheshwari*, *supra* note 143.

<sup>145</sup>*Aggrieved Bhatkars*, *supra* note 17, ¶28.

<sup>146</sup>*Maheshwari*, *supra* note 143.

<sup>147</sup>*Aggrieved Bhatkars*, *supra* note 17, ¶29.

<sup>148</sup>*Mundkars Act*, *supra* note 11, §15.

<sup>149</sup>*Id.* §2(i).

<sup>150</sup>*Moons Tech. Ltd v. Union of India*, (2019) 18 SCC 401, ¶62, *Dawakhana v. Union of India*, AIR 1960 SC

554, ¶¶ 20-21; *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305, ¶ 29; *Mehta v. Union of India*, (1987) 1 SCC 395, ¶ 2; *Dana v. Punjab*, AIR 1959 SC 375, ¶ 31 [per K. Subba Rao., J., dissenting].

<sup>151</sup>*Garg v. Hotel Ass'n. of India*, (2008) 3 SCC 1, ¶ 46; *Johar v. Union of India*, (2018) 10 SCC 1, ¶ 428 [per Dr D. Y. Chandrachud, J.]; *Kerala Education Bill, 1957*, In re, AIR 1958 SC 956, ¶ 26 [per S. R. Das, C.J.]; *Cooper v. Union of India*, (1970) 1 SCC 248, ¶¶ 43, 49 [per J. C. Shah, J.]; *Bennett Coleman and Co. v. Union of India*, (1972) 2 SCC 788, ¶39 [per A. N. Ray, J.]; *Gandhi v. Union of India*, (1978) 1 SCC 248, ¶ 19 [per P. N. Bhagwati, J.].

<sup>152</sup>*Maheshwari*, *supra* note 143.



Supreme Court in *Official Liquidator v. Dayanand*:<sup>153</sup>

“We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial

institution and encourages chance litigation.”<sup>154</sup>

In what can be termed as a jurisprudential volte face, the Division Bench in *Vasudeo Rajendra Deshpurabhu v. State of Goa*<sup>155</sup> struck down the provisions introduced by the 1993 and 1995 Amendments<sup>156</sup> to the Mundkars Act which had the effect of pegging down the area of the dwelling house and the purchase price payable to the landlord on the date the Act came into force. Though the maintainability of the writ petition was contested by the State Government on account of the fact that the same provisions had been upheld a mere two years earlier<sup>157</sup>

<sup>153</sup> *Official Liquidator v. Dayanand*, (2008) 10 SCC 1.

<sup>154</sup> *Official Liquidator v. Dayanand*, (2008) 10 SCC 1, ¶ 90. See also *Shah v. L.I.C. of India*, (2008) 4 Mah LJ 106, ¶ 8 (Bombay High Ct.) (India) - “The relevancy of facts is not for the establishment of identical facts but relevancy of facts is primarily for application of principle of law to a subsequent case in hand. Merely by observing that, “the facts of the case decided by the High Court of Bombay are different from the case before me” is not the correct way to read and apply the judgment of the High Court. The law of precedent must be examined in its true spirit as binding precedents are not only for convenience but as a basic requirement for adhering to judicial discipline.” *But see Bharat Petroleum Corporation Limited v. Vairamani*, (2004) 8 SCC 579, ¶¶ 9, 11 - “Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid’s theorems nor as provisions of a statute and that too taken out of their context...Circumstantial flexibility, one additional fact or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.”

<sup>155</sup> *Deshpurabhu, supra* note 61.

<sup>156</sup> The Goa, Daman and Diu Mundkars (Protection from Eviction) (Amendment) Act, 1995 (Act No. 2 of 1996), Acts of Goa State Legislature (19-01-1996) (India) [Hereinafter, “1995 Amendment” or “Amendment Act of 1995”]. The 1995 Amendment

inserted the words “on the appointed date” in §2(i)(i)(a) and the words “as prevailing on the appointed date” in §15(3) of the Mundkars Act. After the 1995 Amendment, §2(i)(i)(a) reads - “the land on which the dwelling house is standing and the land around and appurtenant to such dwelling house, subject to a maximum limit of five meters, if the land is on the appointed date within the jurisdiction of a village panchayat, and two metres, if it is not within such jurisdiction, from the outer walls of the dwelling house:” and § 15(3) reads - “The purchase price payable by the mundkar for his dwelling house shall be the market value of the dwelling house purchased as prevailing on the appointed date and the improvement thereon, other than the improvement, if any, belonging to the mundkar.”

<sup>157</sup> A statutory provision or rule whose constitutionality has been upheld cannot be challenged on a different ground subsequently. In this regard, *see Somawanti v. Punjab*, AIR 1963 SC 151 ¶ 22 - “All the decisions are binding upon us. It is contended that none of the decisions has considered the argument advanced before us that a law may be protected from an attack under Article 31(2) but it will still be invalid under Article 13(2) if the restriction placed by it on the right of a person to hold property was unreasonable. In other words, for the law before us to be regarded as valid it must also satisfy the requirements of Article 19(5) and that only thereafter can the property of a person be taken away. It is sufficient to say that though this Court may not have pronounced on this aspect of the matter we are bound by the actual decisions which



in *Aggrieved Bhatkars Association*,<sup>158</sup> the Bench held that the validity of the 1995 Amendment was not in issue in that case whereas the Amendment Act of 1993 was not tested on the touchstone of Article 14, if at all it was.<sup>159</sup> Given that the Mundkars Act does not vest ownership rights in the Mundkar but merely kindles a right thereby enabling him to purchase the plot, unlike the Agricultural Tenancy Act which conferred the status of deemed purchasers on the tenant,<sup>160</sup> the Bench ruled that the 1993 Amendment effectively amounted to treating unequals equally and equals unequally,<sup>161</sup> from the viewpoint of the Bhatkar as well as the Mundkar. Illustratively, a Mundkar who chooses to buy the estate in 1980 and another Mundkar who defers his option to purchase for say, 30 years, intentionally or otherwise, will have to pay the exact same price which was fixed on the basis of the land prices prevailing on 12 March 1976. Likewise, the same landlord who has two Mundkars is bound to receive identical amounts for extinction of his rights from a Mundkar who paid the price soon after the coming into force of the Act and a different Mundkar who pays an identical amount though he exercises his

right of purchase as per his convenience. Considering that the rupee value would obviously be different in terms of index prices and the fact that the Mundkars Act does not require the land to be purchased within a specified time while also not providing for any consequences in case a Mundkar fails to exercise this right within the prescribed time limit, the Bench had no hesitation in holding that the classification created by the 1993 Amendment was hostile and discriminatory.<sup>162</sup> The 1995 Amendment which froze the purchasable area of the dwelling house as prevalent on the appointed date was similarly held to be unreasonable inasmuch as the contours of the locality might have changed with time and land which was a part of a village Panchayat might now fall within the jurisdiction of a Municipal Council, a distinction which assumes significance considering that the definition of a dwelling house varies accordingly.<sup>163</sup> Allowing a Mundkar to claim a larger tract merely because his homestead was Panchayat territory once upon a time would be absurd, if not unjust,<sup>164</sup> as held in *Fatima D'Souza v. Joint Mamlatdar*<sup>165</sup> and since nothing was placed before the Court to

categorically negative an attack based on the right guaranteed by Article 19(1)(f). The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. That point has been specifically decided in the three decisions referred to above.” (*per* Mudholkar J. speaking for the majority); *See also* *Delhi Cloth and General Mills Ltd. v. Mukherji*, (1977) 4 SCC 415 ¶ 11; *Neotia v. Union of India*, (1988) 2 SCC 587 ¶ 18; *Mudaliar v. Tamil Nadu*, (1973) 1 SCC 336 ¶ 10; *Khan v. Commissioner of Police*, AIR 1965 SC 1623, ¶ 7; *Shri Krishna Investment v. Union of India*, AIR 1976 Cal 333 ¶ 5; *Balsara v. Union of India*, AIR 1992 Bom 375 ¶ 14.

<sup>158</sup>*Aggrieved Bhatkars*, *supra* note 17.

<sup>159</sup>*Deshprabhu*, *supra* note 61, ¶¶ 6, 16

<sup>160</sup>*Deshprabhu*, *supra* note 61, ¶¶ 7, 17

<sup>161</sup>*Deshprabhu*, *supra* note 61, ¶¶ 11 - 14

<sup>162</sup>*Deshprabhu*, *supra* note 61, ¶ 11.

<sup>163</sup>*Deshprabhu*, *supra* note 61, ¶ 14. According to § 2(i)(i)(a) of the *Mundkars Act*, dwelling house includes the land on which the dwelling house is standing and the land around and appurtenant to such dwelling house, subject to a maximum limit of five meters, if the land is on the appointed date within the jurisdiction of a village panchayat, and two metres, if it is not within such jurisdiction, from the outer walls of the dwelling house.

<sup>164</sup>*Fatima D'Souza v. Joint Mamlatdar*, 1989 (1) Goa L. T. 67, ¶ 10.

<sup>165</sup>*Fatima D'Souza v. Joint Mamlatdar*, 1989 (1) Goa L. T. 67.



suggest that the 1995 Amendment was brought about to undo that decision, the Division Bench concluded that it was repugnant to Article 14 read with Article 13(2)<sup>166</sup> of the Constitution.

The ruling of the Bombay High Court in *Deshprabhu*<sup>167</sup> was nullified vide retrospective amendments to the Mundkars Act in the year 2005,<sup>168</sup> thereby inserting the very same provisions afresh into the Act which were declared ultra vires two years prior in *Deshprabhu*.<sup>169</sup> Such a course of action seems to be a clear instance of legislative overruling of judicial decisions, a practice which has been ironically deprecated by the Division Bench in *Deshprabhu*<sup>170</sup> itself, impelling it to strike down the 1995 Amendment. The Division Bench had caustically observed:

“Indeed the Legislature is competent to undo the efficacy of any judgment of the Court, but

in such a case, it cannot proceed to amend the provision in the manner which will inevitably undo the judgment of the Court, in ignorance or disregard of that decision. The Legislature has to take conscious decision that the *raison d’être* as recorded in the decision of Court would do violence to the existing provisions or that it has different intention than the view already taken by the Court. It is a well-established principle that the Legislature cannot directly override the decision of the Court and pronounce anything done under that statute to have been valid on the date of the Judgment. It is, however, competent for the Legislature to make a fresh law, free from the unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions. No such justification has been pleaded or argued on behalf of the respondents.”<sup>171</sup>

<sup>166</sup>*India Const, supra* note 16, art. 13(2).

<sup>167</sup>*Deshprabhu, supra* note 61.

<sup>168</sup>The Goa, Daman and Diu Mundkars (Protection from Eviction) (Amendment) Act, 2004, Act No. 11 of 2005, Acts of Goa State Legislature (20<sup>th</sup> July 2005) (India) §§2, 3. [Hereinafter, “2005 Amendment”]. § 1(2) of the 2005 Amendment provides that §2 shall be deemed to have come into force with effect from 27-9-1995 and §3 with effect from 16-4-1994. For the statement of Objects and Reasons of the 2005 Amendment, see The Goa Mundkars (Protection from Eviction) (Amendment) Bill, 2004 (Bill No. 8 of 2004), Bills of Goa State Legislature (9<sup>th</sup> February 2004).

<sup>169</sup>*Deshprabhu, supra* note 61.

<sup>170</sup>*Ibid.*

<sup>171</sup>*Deshprabhu, supra* note 61, ¶ 14. This view has been affirmed by the Supreme Court in *Karnataka v. Karnataka Pawn Brokers Ass’n*, [2018]6 SCC 363, ¶¶ 23, 25: “However, the Legislature cannot set at naught the judgments which have been pronounced by amending the law not for the purpose of making corrections or removing anomalies but to bring in new provisions which did not exist earlier. The Legislature

may have the power to remove the basis or foundation of the judicial pronouncement but the Legislature cannot overturn or set aside the judgment, that too retrospectively by introducing a new provision. The legislature is bound by the mandamus issued by the Court. A judicial pronouncement is always binding unless the very fundamentals on which it is based are altered and the decision could not have been given in the altered circumstances. The Legislature cannot, by way of introducing an amendment, overturn a judicial pronouncement and declare it to be wrong or a nullity. What the Legislature can do is to amend the provisions of the statute to remove the basis of the judgment...Therefore, the State, in so far as it has made the amended provisions retrospective, has attempted to nullify the writ of mandamus issued by the Court in favour of the Respondents. This mandamus could not have been set at naught by making the provisions retrospective. This would be a direct breach of the doctrine of separation of powers as laid down in *State of Tamil Nadu (supra)*. We are clearly of the view that the State Legislature could not have nullified the judgment passed in *Manakchand Motilal's case (supra)* by retrospectively amending the



### **Public purpose and Article 300A: Death knells of the Bhumi Putra Bill?**

Radical changes were made to the constitutional landscape of the right to property by the 44<sup>th</sup> (Constitution) Amendment Act<sup>172</sup> by repealing Article 19(1)(f)<sup>173</sup> of the Constitution which guaranteed to every person the right to acquire, hold, and dispose of property and substituting Article 31<sup>174</sup> with Article 300A<sup>175</sup> which would provide that no person shall be deprived of his property save by authority of law. A plain reading of the text of the newly inserted Article might give the impression that the only restriction which has now been placed on the acquisitional power of the State is the existence of a law, dispensing with the requirement of any agrarian reform. By adopting this textual approach, the claim of the petitioners that the 1985 Amendment is hit by Article 300A was rejected in *Maria Eliza Marques*<sup>176</sup> by holding that since the competence of the State legislature to enact the law was not in question, no grievance could be tenably raised.<sup>177</sup>

Nevertheless, the views of jurists such as Prof P. K. Tripathi<sup>178</sup> and Prof. S. P. Sathe<sup>179</sup> that the scope of judicial review in respect of the right to property has increased after the 44<sup>th</sup> Amendment to the Constitution isn't entirely without past judicial favour considering that in *Basantibai Fakirchand Khetan v. State of Maharashtra*,<sup>180</sup> it was held that the word "law" in Article 300A should be taken to mean a law which is just, fair, and reasonable,<sup>181</sup> though the decision of the Bombay High Court was reversed by the Supreme Court on appeal<sup>182</sup> but without expressing any opinion on the applicability of the doctrine of unreasonableness propounded in *Manek Gandhi v. Union of India*.<sup>183</sup> A major fillip, however, was given to the rights of property owners by a Constitution Bench of the Supreme Court in *K. T. Plantation v. State of Karnataka*,<sup>184</sup> adopting nearly in toto the opinion expressed by H. M. Seervai that a law for the "acquisition of private property of persons ('the owners') for the benefit of private persons ('the recipients') would be a law unknown to Indian jurisprudence."<sup>185</sup> The doctrine of eminent domain, though not expressly spelt out, was woven into the fabric

Acts. Therefore, the validating Acts in so far as they are retrospective, are held to be illegal."

<sup>172</sup>44<sup>th</sup> Amendment, *supra* note 15.

<sup>173</sup>*India Const, supra* note 16, art. 19(1)(f). Repealed by 44<sup>th</sup> Amendment, *supra* note 15, §2.

<sup>174</sup>*India Const, supra* note 16, art. 31. Repealed by 44<sup>th</sup> Amendment, *supra* note 15, §6.

<sup>175</sup>*India Const, supra* note 16, art. 300A. Inserted by 44<sup>th</sup> Amendment, *supra* note 15, §34.

<sup>176</sup>*Marques, supra* note 17.

<sup>177</sup>*Marques, supra* note 17, ¶15.

<sup>178</sup>PROF. P. K. TRIPATHI, RIGHT TO PROPERTY AFTER FORTY-FOURTH AMENDMENT – BETTER PROTECTED THAN EVER BEFORE, 49 [AIR 1980 Journal Sec.].

<sup>179</sup>S. P. SATHE, RIGHT TO PROPERTY AFTER FORTY-FOURTH AMENDMENT: REFLECTIONS ON PROF. P. K. TRIPATHI'S OBSERVATIONS, 97 [AIR 1980 Journal Sec.].

<sup>180</sup>*Khetan v. Maharashtra*, AIR 1984 Bom 366(Bombay High Ct.) (India); *But see* DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA, VOLUME 2, 1515 – 1516 [LexisNexis, 15<sup>th</sup>Edn.] for an argument against the invocation of the doctrine of reasonableness for striking down laws compulsorily acquiring private property.

<sup>181</sup>*Khetan v. Maharashtra*, AIR 1984 Bom 366 (Bombay High Ct.) (India), ¶22.

<sup>182</sup>*Maharashtra v. Basantibai Mohanlal Khetan*, (1986) 2 SCC 516.

<sup>183</sup>*Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>184</sup>*K.T. Plantation, supra* note 6.

<sup>185</sup>H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, VOL. 2, 1395 [Univ. Publ'g Co. Pvt. Ltd., 4<sup>th</sup> Edn., 2017].



of Article 300A as a result of which, private property can now be acquired by the sovereign without the owner's consent only if the property is to be utilised for a public purpose and compensation is paid to the deprived owner.<sup>186</sup>

As far as the Bhumiputra Bill is concerned, the safety net of Articles 31A, 31B, 31C<sup>187</sup> and the Ninth Schedule is inapplicable<sup>188</sup> forasmuch as Article 300A is not a fundamental right, but a mere constitutional right and thus, the bone of contention would be whether vesting land belonging to the rightful owner in favour of the Bhumiputra would amount to a taking by the State for a public purpose, in view of the fact that payment of market price of the estate to the original owner<sup>189</sup> would be sufficient compliance with the other requirement of payment of compensation, which at any rate cannot be said to be illusory,<sup>190</sup> thus fulfilling the second validatory requirement for

compulsory acquisition of private property. The clearest exposition of the term "public purpose" can be found in the decision of the Privy Council in *Hamabai Framjee Petit v. The Secretary of State for India in Council*<sup>191</sup> wherein, while holding that building residential quarters for government servants in Bombay would qualify as a public purpose, the Board approved the view expressed by Batchelor J. when he said:

"General definitions are, I think rather to be avoided where the avoidance is possible; and I make no attempt to define precisely the extent of the phrase 'public purpose' in the lease; it is enough to say that in my opinion, the phrase whatever else it may mean, must include a purpose, that is an object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."<sup>192</sup>

<sup>186</sup>*K.T. Plantation, supra* note 6, ¶ 221.

<sup>187</sup>*India Const, supra* note 16, art. 31C. According to Article 31C, a law which seeks to give effect to any of the Directive Principles of State Policy in Part IV of the Constitution cannot be challenged on the ground that it violates Article 14 or 19 of the Constitution.

<sup>188</sup> Insertion of a law or Regulation in the Ninth Schedule only safeguards it from possible contraventions of Fundamental Rights and not other constitutional rights. This is apparent from a plain reading of Article 31A which states that "...None of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part..."

<sup>189</sup>*Bhumiputra Bill, supra* note 18, § 4(1).

<sup>190</sup>*See generally Hindustan Petroleum Corporation Ltd. v. Darius, (2005) 7 SCC 627, ¶ 6* - "Having regard to the provisions contained in Article 300A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the

same must be for a public purpose and reasonable compensation therefore must be paid." *But see K. T. Plantation, supra* note 6. In one breathe, the Court says "Requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards." ¶ 189, but later says "At this stage, we may clarify that there is a difference between 'no' compensation and 'nil' compensation. A law seeking to acquire private property for public purpose cannot say that 'no compensation shall be paid'. However, there could be a law awarding 'nil' compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the government to establish validity of such law. In the latter case, the court in exercise of judicial review will test such a law keeping in mind the above parameters." ¶ 192.

<sup>191</sup> *Petit v. The Sec'y of State for India in Council, AIR 1914 PC 20 [Hereinafter, "Petit"]*.

<sup>192</sup>*Ibid.*



*Hamabai Framjee Petit*<sup>193</sup> has been repeatedly followed and approved by constitutional courts<sup>194</sup> and acquisition or requisition, as the case may be, has been upheld on the ground that it was for a public purpose if it has been undertaken for, say, widening a lane for the safety and convenience of the public,<sup>195</sup> settlement of refugees,<sup>196</sup> and requisition of a godown for storing government food grains collected for distribution in deficit areas.<sup>197</sup> But as observed by Justice M. C. Mahajan in his concurring speech in *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Dharbanga*:<sup>198</sup>

“Dr Ambedkar is right in saying that in the concept of public purpose there is a negative element in that no private interest can be created in the property acquired compulsorily; in other words, property of A cannot be acquired to be given to B for his own private purposes and that there is a positive element in the concept that the property taken must be for the public benefit.”<sup>199</sup>

The above dicta serve as a complete answer to any defence that could be put up to constitutionally sustain the Bhumiputra Bill,<sup>200</sup> although help could also be taken from the decisions of some High Courts which have

<sup>193</sup>*Petit, supra* note 191.

<sup>194</sup>*See* *Bombay v. Nanji*, AIR 1956 SC 294, ¶12; *Munjee v. Bombay*, AIR 1952 Bom 476 (Bombay High Ct.) (India), ¶ 5; *Somdutt vs. Uttar Pradesh*, 1977 ALL LJ 202 (Allahabad High Ct.) (India), ¶8.

<sup>195</sup>*Kamalamma v. Kerala*, AIR 1960 Ker 321 (Kerala High Ct.) (India).

<sup>196</sup>*Agarwala v. West Bengal*, AIR 1952 Cal 857 (West Bengal High Ct.) (India).

<sup>197</sup>*Jaiswal v. Collector, Damoh*, AIR 1962 MP 146 (Madhya Pradesh High Ct.) (India).

<sup>198</sup> *Bihar v. Maharajadhiraja Sir Kameshwar Singh of Dharbanga*, AIR 1952 SC 252.

<sup>199</sup>*Id.*, ¶ 25 [*per* M. C. Mahajan, J.]

<sup>200</sup> *See also* *Kelo v. City of New London*, 545 US 469 (2005), [*per* John Paul Stevens J.] - “On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation... the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party.”; *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984), ¶ 31 - “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”; *Missouri Pac. Ry. Co. v. Nebraska*, 164 US 403 (1896), ¶ 21 - “This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land

to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.”; *Calder et Wife v. Bull et Wife*, 3 US 386 (1798), ¶ 8 - “An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority....A few instances will suffice to explain what I mean....A law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.”; *Province of Bombay v. Advani*, AIR 1950 SC 222, ¶102 [*per* B. K. Mukherjea J. dissenting] - “but it cannot be to the general interest of the community to requisition the property of one refugee for the benefit of another refugee.”; H. M. SEERVAL, *CONSTITUTIONAL LAW OF INDIA*, VOL. 2, 1413 [Univ. Publ'g Co. Pvt. Ltd., 4<sup>th</sup> Edn., 2017] - “The decision in *Moosa v. State* ('60) A. Ker. 96 upholding the acquisition of a plot of land to house a Harijan who had been staying as a lessee and was liable to be evicted for non-payment of rent is clearly wrong and proceeds upon a misconception of public purpose. No public purpose appears to have been served by acquisition for one single individual who was liable to



struck down a law or nullified a notification when the property sought to be acquired failed to meet the public purpose criteria. Thus, orders for acquisition of a shop for locating a Sarkari Khadi Bhandar when it is already functioning well in another building in the same area,<sup>201</sup> land for the establishment of a private paper mill,<sup>202</sup> and a garden for the construction of houses by a co-operative housing society have been held to be bad in law.<sup>203</sup> Although judicial attitude has preferred to treat the government as the best judges for deciding whether a public purpose is met or not, whose wisdom should not ordinarily be questioned or substituted,<sup>204</sup> but as ruled by the Supreme Court in *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District*,<sup>205</sup> after considering a catena of precedents, though the scope of judicial review is limited, when the power is being exercised mala fide or for collateral purposes, or the purported action is de hors the Act,

be evicted because he had not paid rent.”; *But see James v. United Kingdom*, Eur. Ct. H.R., App. No. 8793/79, ¶ 40 (21<sup>st</sup> Feb. 1986), <https://hudoc.echr.coe.int/eng?i=001-5750>. “The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like “for the public use”, no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties.”; *Province of Bombay v. Advani*, AIR 1950 SC 222, ¶102 [*per B. K. Mukherjea J. dissenting*] - “under certain circumstances even securing a house for an individual may be in the interests of the community”; *Murray v. Laguardia*, 291 N.Y. 320, 329 - “If upon completion of the project the public good is enhanced it does not matter that private interest may be benefited.”

irrational or otherwise unreasonable, or the so-called public purpose is no public purpose at all and fraud on the statute is apparent, there is no bar to its justiciability and the courts will step in to scrutinise the question of whether any public purpose is being served.<sup>206</sup>

The wide definition of the term ‘Bhumiputra’<sup>207</sup> and failure to intelligibly specify what constitutes “occupation”, in a way proves to be the Achilles Heel of the legislation. No attempt has been made to confine its scope to the homeless or otherwise disadvantaged sections of society who had been forced to set up tenements in another person’s premises. The sweepingly inclusive wording permits virtually anyone, even a squatter, encroacher or a rank trespasser who has his own accommodation elsewhere, to grab the property of another, the only prerequisite being his ability to prove the

<sup>201</sup>*Chakravarty v. Assam*, AIR 1958 Assam 140 (Gauhati High Ct.) (India).

<sup>202</sup>*Sahu v. Orissa*, AIR 1958 Orissa 187 (Orissa High Ct.) (India).

<sup>203</sup>*Dayal v. Union of India*, AIR 1959 Punj 544 (Punjab and Haryana High Ct.) (India).

<sup>204</sup>*See Jadhav v. Maharashtra*, (1997) 3 SCC 493, ¶4; *Surana v. First Land Acquisition Collector*, (2007) 1 SCC 641, ¶ 44; *Kote v. Maharashtra*, (1997) 3 SCC 493, ¶ 10.

<sup>205</sup>*Reddy v. District Collector, Ranga Reddy District*, (2008) 9 SCC 552.

<sup>206</sup>*Id.*, ¶ 133. *See also Petit, supra* note 191 - “That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. Prima facie the Government are good judges of that. They are not absolute judges. They cannot say: “Sic volo sic jubeo.”; *Bombay v. Nanji*, AIR 1956 SC 294, ¶ 12 - “Prima facie the Government is the best judge as to whether ‘public purpose’ is served by issuing a requisition order, but it is not the sole judge.”

<sup>207</sup>*Bhumiputra Bill, supra* note 18, § 2(a).



factum of his residence anywhere within the geographical limits of the state.<sup>208</sup> More importantly, state intervention is calculated towards ensuring that the benefits of the deprived property enure exclusively to the Bhumiputra with absolutely no incidental benefit to the community at large. This amounts to essentially “robbing Peter to pay Paul” through State sponsorship and cannot amount to meeting a public purpose by any stretch of imagination.

### **Conclusion: Averting a legislative misstep**

In 2019, New York based jazz artiste Glenn Perry, son of the legendary Goan musician Chris Perry returned to his hometown, Margao, on being invited by the Goa government to perform at a ceremony, only to find, much to his shock and horror, that his father’s flat was being illegally occupied by migrants from Karnataka to whom it had been fraudulently leased out.<sup>209</sup> Pursuant to a public outcry, a police investigation was ordered and on being assured by the two accused that their money would be returned, the tenants vacated the flat.<sup>210</sup> Not wanting to

take any further risks, Glenn announced that he intended to put up the flats, which he had been keeping as a memory of his father, for sale.<sup>211</sup> This is merely one of the several instances wherein members of the Goan diaspora have been victims of land scams, usually involving their unattended ancestral houses.<sup>212</sup>

In one sense, the Bhumiputra Bill can be perceived as a means to regularize the rampant invasions, given the huge demand for housing in the State.<sup>213</sup> But as Prasanna Timble puts it, the land issue in Goa is a mix of economics, environment, and identity with multiple pressures on this scarce resource demanded for agriculture, industry, entertainment and housing.<sup>214</sup> Yet, if history is any indication, constitutional insulations and legal battles notwithstanding, colourable legislations enacted with the purpose of destroying the proprietary rights of a particular class of persons belonging to society and aggrandising of another class rarely produces desirable results. The Agricultural Tenancy Act not only created

<sup>208</sup>See Govind Kamat Maad, *Bhumiputra Bill an Assault on Every Honest Citizen in Goa*, THE TIMES OF INDIA (Aug. 2, 2021) <https://timesofindia.indiatimes.com/city/goa/bhumiputra-bill-an-assault-on-every-honest-citizen-in-go/articleshow/84959627.cms>.

<sup>209</sup>Nisser Dias, *Road Named After Chris Perry, But Family Loses Flat to Conman*, THE TIMES OF INDIA (May 10, 2019) <https://timesofindia.indiatimes.com/city/goa/road-named-after-chris-perry-but-family-loses-flat-to-conman/articleshow/69259048.cms>

<sup>210</sup>*Relief For Glenn Perry As Usurpers Promise To Vacate His Flat*, THE TIMES OF INDIA (May 11, 2019) <https://timesofindia.indiatimes.com/city/goa/relief-for-perry-as-usurpers-promise-to-vacate-his-flat/articleshow/69275399.cms>

<sup>211</sup>Lisa Monteiro, *To Avoid Losing Chris Perry’s Flats Again, Son Feels Best to Sell Them*, THE TIMES OF INDIA (Aug. 30, 2019)

<https://timesofindia.indiatimes.com/city/goa/to-avoid-losing-chris-perrys-flats-again-son-feels-best-to-sell-them/articleshow/70900938.cms>.

<sup>212</sup>See INCREDIBLE GOA, *Many NRI Goans Homeless as Properties Usurped in Their Absence* (June 25, 2019) <https://www.incrediblegoa.org/goans-abroad/many-nri-goans-homeless-as-properties-usurped-in-their-absence/>; Murari Shetye, *UK Home Secretary’s Ancestral Land ‘Grabbed’ In Goa*, THE TIMES OF INDIA (Sept. 10, 2022) <https://timesofindia.indiatimes.com/india/uk-home-secretarys-ancestral-land-grabbed-in-go/articleshow/94107670.cms>.

<sup>213</sup>See *Goa’s Real Estate Not Bullish About 2022, But Will Go Ahead with New Projects*, THE TIMES OF INDIA (March 1, 2022) <https://timesofindia.indiatimes.com/city/goa/goas-real-estate-not-bullish-about-2022-but-will-go-ahead-with-new-projects/articleshow/89907407.cms>.

<sup>214</sup>Prasanna Timble, *supra* note 10, 395.



confusion all over the territory regarding the ownership of the land but also resulted in large scale litigation and large tracts of cultivation land lying idle – as claimed by The Navhind Times, a local daily, in 1967, two years after the Act came into force,<sup>215</sup> “It is learnt that the actual paddy cultivation has fallen, after the application of the Act, though lakhs of rupees are being spent on agriculture every year.”<sup>216</sup> Not too different is the effect of its 1975 successor, going by Professor Aureliano Fernandes’s assessment of the Act:

“Many of the bills were passed hurriedly and without consulting partymen, and therefore proved counterproductive, like the Mundkar Act. The Mundkar Act was a copy of the Kerala Land Reforms Act 1963...It went through 50 amendments resulting in a piece of legislation without head or tail and which proved to be a disaster because it fomented disputes and created small properties within other properties and uneconomic holdings detrimental to economic growth. The legislation not only fragmented land and made small landlords landless but also destroyed the relatively good relations between Bhatkars and Mundkars. It also led to illegal expropriation and involved many legal difficulties.”<sup>217</sup>

The author submits that the Bhumiputra Bill is indicative of a common, consistent, but erroneous belief which prevails among establishments across varied shades of the political spectrum that a certain class of people is universally disadvantaged while associating socio-economic privileges with another. This has been shown to be without any evidentiary basis as proved by the 1963

Report of the Land Reforms Commission prepared under the chairmanship of A. L. Dias which was quoted with approval by the Court of the Judicial Commissioner in *Lakshimbai Narayan Patil v. Union of India*:  
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“On this issue the Planning Commission has observed that the resumption of land for personal cultivation should be permitted particularly in the case of small owners whose economic circumstances are not so different from those of tenants that tenancy legislation should operate to their disadvantage. This observation has special significance in the case of the agrarian structure of Goa where we have a negligible number of large land owners and a large number of small owners whose only or main source of livelihood is their income from land...As the majority of holdings in Goa are small and with a view to minimise the scope for any large-scale ejection of tenants, the maximum area prescribed for resumption by the landlord need not be of the same extent as is permissible in some of the other states like Maharashtra...There is no adequate data regarding the size of holdings...It will be seen from these tables that the size of the majority of holdings vary between 1 to 2 hectares. In the coastal tract, large size holdings are mainly owned by Comunidades but the unit of cultivation is on an average less than 0.5 hectares. Private lands are much fragmented...There is much fragmentation of land and the unit of

<sup>215</sup> The Agricultural Tenancy Act was published in the Official Gazette, Series-I No. 52 dated 24-12-1964 and came into force with effect from 8-2-1965.

<sup>216</sup>1, THE NAVHIND TIMES, 12<sup>th</sup> June 1967, quoted in *Aureliano Gomes, supra* note 8, 50.

<sup>217</sup> *Aureliano Gomes, supra* note 8, 79.

<sup>218</sup> *Lakshimbai, supra* note 59,



cultivation on an average in the paddy land is about 0.5 hectares.”<sup>219</sup>

There can be no doubt that every elected government should be given a free hand in matters of policy which it can and should legitimately pursue. But no government in any civilised society can breach its constitutional guarantee.<sup>220</sup> Accusations of pandering to the migrant vote bank howbeit,<sup>221</sup> the morality or otherwise of the

Bhumiputra Bill is undoubtedly beyond the ken of judicial review<sup>222</sup> but to hope for a hands-off approach in the guise of judicial caution when the legislation flies in the face of Article 300A is tantamount to hoping for judicial shirking, something incongruous with a system where the rule of law prevails.<sup>223</sup>

<sup>219</sup>*Lakshmi Bai, supra* note 59, ¶ 9.

<sup>220</sup>SOLI SORABJEE AND ARVIND DATAR, NANI PALKHIVALA: THE COURTROOM GENIUS, 97 (LexisNexis Butterworths Wadhwa, Nagpur, 2<sup>nd</sup> Reprint, 2012).

<sup>221</sup>*See generally* Everette Assis Telles, *Bhumiputra Adhikarni Bill for Slum Vote Bank*, O HERALDO (Aug. 6, 2021) <https://www.heraldgoa.in/Edit/Bhumiputra-Adhikarni-Bill-for-slum-vote-bank/178390>; Rajan Narayan, *Bhumiputra For Migrants!*, GOAN OBSERVER, (Aug. 6, 2021) <https://www.goanobserver.in/2021/08/06/bhumiputra-for-migrants/>.

<sup>222</sup>*See Ganpatrao v. Union of India*, 1994 Supp (1) SCC 191, ¶¶ 104-105 (*per* S. Ratnavel Pandian, J.) - “The above passages remind us of the distinction between law and morality and the line of demarcation which separates morals from legislation. The sum and substance of it is that a moral obligation cannot be converted into a legal obligation. In the light of the above principle, the Attorney General is right in saying that Courts are seldom concerned with the morality which is the concern of the law makers.”; *See also* Quereshi (Dr.) v. Comm’r of Income Tax, Bhopal, (2007) 2 SCC 759, ¶16; *Garg v. Union of India*, (1981) 4 SCC 675, ¶ 18 [*per* P.N. Bhagwati, J.], ¶ 30 [*per* A.C. Gupta, J. dissenting]. *But see* *Garg v. Union of India*, (1981) 4 SCC 675, ¶ 18 [*per* P.N. Bhagwati, J.] - “There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14.”; *Garg v. Union of India*, (1981) 4 SCC 675, ¶ 30 [*per* A.C. Gupta, J. dissenting] - “However as Friedmann in his ‘Legal Theory’ (page 43) says: ‘There cannot be and there never has been a complete separation of law and morality. Historical and ideological differences concern the extent to

which the norms of the social order are absorbed into the legal order.’ It has been held by this Court in *Royappa and Maneka Gandhi* that the principle of reasonableness is an essential element of equality. The concept of reasonableness does not exclude notions of morality and ethics. I do not see how it can be disputed that in the circumstances of a given case considerations of morality and ethics may have a bearing on the reasonableness of the law in question.”

<sup>223</sup>*Punjab v. Chand*, (1974) 1 SCC 549, ¶ 12 [*per* H. R. Khanna, J.] - “It would be wrong to assume that there is an element of judicial arrogance in the act of the courts in striking down an enactment. The Constitution has assigned to the courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the courts discharge an obligation which has been imposed upon them by the Constitution. The courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the articles of the Constitution... Hesitation or refusal on the part of the courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution.... It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity.”; *See also* *Independent Thought v. Union of India*, (2017) 10 SCC 800, ¶¶ 166, 168 [*per* Deepak Gupta, J.].

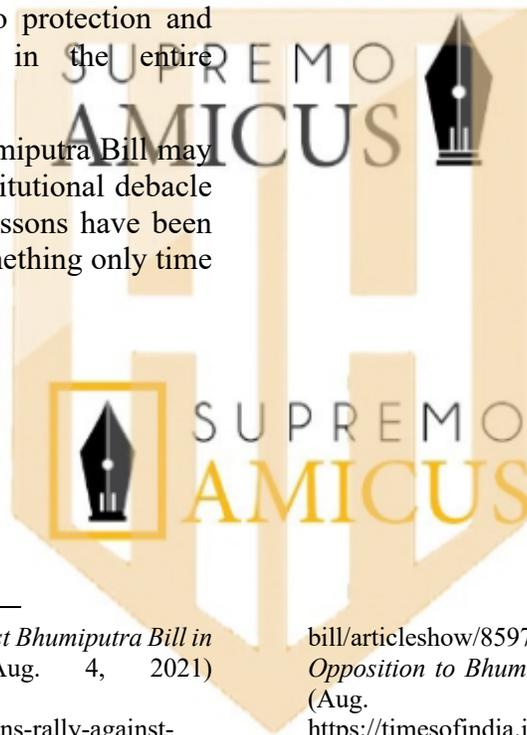


Oppositional<sup>224</sup> and public backlash<sup>225</sup> ultimately impelled the Chief Minister to let the Bhumiputra Bill lapse by not sending it for the Governor's assent.<sup>226</sup> Mercifully, no efforts were made to revive it in the subsequent sessions of the Legislative Assembly and it is yet unclear whether the attention of the Cabinet was drawn to the potentially prophetic words of Justice Dalveer Bhandari in *State of Haryana v. Mukesh Kumar*:<sup>227</sup>

“If the protectors of law become the grabbers of the property (land and buildings), then, people will be left with no protection and there be total anarchy in the entire country.”<sup>228</sup>

The sordid saga of the Bhumiputra Bill may have concluded and a constitutional debacle averted, but whether any lessons have been learnt from the fiasco is something only time will tell.

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<sup>224</sup>See *Congress plans rally against Bhumiputra Bill in Sankhali*, THE GOAN (Aug. 4, 2021) <https://www.thegoan.net/goa-news/%EF%BB%BFcongress-plans-rally-against-bhumiputra-bill-in-sankhali/72674.html>; *Mayura Janwalkar*, *supra* note 65.

<sup>225</sup>See *Goa: Will Protest Till Bhumiputra Bill is Scrapped, Says Sattari Locals*, THE TIMES OF INDIA, (Aug. 25, 2021) <https://timesofindia.indiatimes.com/city/goa/will-protest-till-bhumiputra-bill-is-scrapped-sattari-locals/articleshow/85606343.cms>; *Goa: Will Protest Till Bhumiputra Bill is Scrapped, Say Sattari Locals*, THE TIMES OF INDIA (Sept. 6, 2021) <https://timesofindia.indiatimes.com/city/goa/caveless-im-locals-want-go-to-scrap-bhumiputra->

[bill/articleshow/85972543.cms](https://timesofindia.indiatimes.com/city/goa/comunidades-voice-opposition-to-bhumiputra-bill/articleshow/85082485.cms); *Comunidades Voice Opposition to Bhumiputra Bill*, THE TIMES OF INDIA (Aug. 6, 2021) <https://timesofindia.indiatimes.com/city/goa/comunidades-voice-opposition-to-bhumiputra-bill/articleshow/85082485.cms>.

<sup>226</sup>Bindiya Chari, *Goa Bhumiputra Adhikarni Bill Will Not Be Sent to Governor: CM Pramod Sawant*, THE TIMES OF INDIA (Oct. 19, 2021) <https://timesofindia.indiatimes.com/city/goa/goa-bhumiputra-adhikarni-bill-will-not-be-sent-to-governor-cm-pramod-sawant/articleshow/87140175.cms>.

<sup>227</sup>*Haryana v. Kumar*, (2011) 10 SCC 404.

<sup>228</sup>*Id.*, ¶. 45