

Struggles for the Legal Protection of Housing Rights
In India and Responses by the Courts

-- By Justice H. Suresh (Retd.)

Is there any doubt that housing is a human right?

Art. 25.1 of the Universal Declaration of Human Rights 1948 proclaims: "Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care....."

The International Covenant on Economic Social and Cultural Rights 1966 has been ratified and acceded to by us in 1976. This text contains the most significant foundation of the right to housing found in the entire body of legal principles, which comprise International human rights law. Art. 11.1 of the Covenant declares that: "The States Parties to the present covenant recognise the right of everyone to an adequate standard of living for himself including adequate food, clothing, and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right....."

In addition to these two sources both the U.N. Declaration on Social Progress and Development (1969) and the U.N. Vancouver Declaration on Human Settlements (1976) recognise the right of everyone to adequate housing. So also, several other International Documents provide for the right to housing. Intl. Convention on Elimination of all forms of Racial Discrimination, provide for the elimination of racial discrimination and guarantee the right of everyone.....the right to housing (Art.5(e)). So also Convention on the Elimination of all forms of Discrimination Against Women guarantees the women without discrimination.....the right to housing, sanitation electricity, and water supply (Art.14). We find a similar provision in the Convention on the Rights of the Child (Art.27). Intl. Convention on the protection of all Migrant Workers also provide for access to housing, including social housing schemes and protection against exploitation in respect of rents (Art.43). Intl. Labour Organisation Recommendation No. 115 provide for adequate and decent housing accommodation for all workers.

There are several resolutions U.N. decision-making bodies. While such resolutions are not legally binding, they serve the important function of articulating the internationally accepted standards and the global concern for the right to adequate housing. In particular I would like to refer to two of them, one of the U.N. General Assembly (7th Dec., 1987) And the other the U.N. Commission on Human Rights (10th Mar., 1993). The first one calls upon "all States.....to special attention to the realisation of the right

to adequate housing in carrying out measures to develop national shelter strategies....." The other says: ".....that practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing;

".....urges governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions....to confer legal security of tenure on all persons currently threatened with forced evictions;

".....recommends that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land...to persons that have been forcibly evicted;"

In other words, there can be no forced evictions without negotiations, or without compensation or without alternate accommodation. By this standard, I have no hesitation in proclaiming that the Bombay High Court could be considered as having committed "gross violation of human rights" in the matter of its Order relating to the slums around Sanjay Gandhi National Park. I will come to that little later, but before that to certain fundamentals.

Firstly: All human rights are obligations of States. The State would mean and include every organ of the State, the executive the legislature, and the judiciary. The State has a duty to recognise, to respect, to protect and to fulfil its obligations. To recognise would mean to identify a human right and to understand its dimensions. To respect would mean to take no measure with intention of eroding the legal status of this right. In the matter of housing the States must abstain from carrying out or otherwise advocating the forced arbitrary eviction of persons and groups from their homes. To protect would mean taking effective measures against violation of human right. It would also mean the use of judicial, quasi-judicial, administrative and other measures to protect the victims of violation of human rights. To fulfil would include various strategies and measures, including international cooperation for realisation of rights for all people.

Secondly: How do we achieve this? The answer is in Art.2.1. of ICESCR: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation,.....to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The key words are "to take steps," "individually and through international co-operation", "to the maximum of its available resources," "achieving progressively the full realisation of the rights" "by all appropriate means". This covenant is of great importance particularly when people are denied the basic needs, such as food, water, shelter, health care and education. Whenever such a situation is brought to the notice of the Court, the court has a duty to insist upon the Government to demonstrate, year to year, what steps it had taken to the maximum of its available resources, with a view to achieve progressively the full realisation of the rights .In 1976 we ratified this Covenant. Could it be said, as against the undertaking in the Covenant, 26 years was not sufficient to fulfil these rights? Did the Court ever ask any such question to any Government? On the contrary the Court became a convenient instrument in forcible evictions and to deny the right to housing to a large number of people.

Thirdly: It is wrong to assume that certain human rights are perfect and some are imperfect, and that certain human rights are enforceable and that some are not enforceable. All human rights are enforceable. That is how we have now a Petition pending for enforcing the right to food.

Fourthly: All human rights are inter-dependent and indivisible. You take away any one human right; it affects all others. You take away one's right to shelter; it affects several other human rights. Ultimately it takes away his right to live with human dignity.

All these concepts are in our Constitution and acknowledged and accepted by the Supreme Court. When we drafted the Constitution we were aware of UDHR. What we did was, we incorporated some of the civil and political and cultural rights in Part III and economic and social rights in Part IV. But both are fundamental with mutual rights against the State. Though we read the two Parts separately for some time, now, for the last two decades or more, we have realised that they have to be read together. That is the principle of interdependence and indivisibility of human rights. In fact as Glanville Austin says the two Parts together constitute the "conscience of the Constitution". That is what Chandrachud. J. said in Olga Tellis (1986): "Deprive a person of his right to livelihood and you shall have deprived of his life." This is the same principle of indivisibility. In Unnikrishnan (1993) the Supreme Court said: "In order to treat a right as fundamental right, it is not that it should be expressly stated as one in Part III of the Constitution. The provisions of Part III and Part IV are supplementary and complementary to each other." That is why the Court has to read the two together.

Right to shelter or right to housing as such has not been expressly provided in our Constitution. But, as we all know, after Francis Coralie (1981) it is not open to anyone to say that such a right is not included in our Constitution. The Court said: "We think that the right to life includes the right to live

with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head....." Again in Shantistar Builders (1990) the Court expressed more emphatically: "Basic needs of man have traditionally accepted to be three—food, clothing, and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food the right to clothing, the right to decent environment and a reasonable accommodation to live in ".....The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect—physical, mental, and intellectual." In Chameli Singh (1996) ".....Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right.....Want of decent residence,frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."

And yet, what have done in recent years? Courts after Courts--many High Courts have passed orders for demolition of poor man's homes, the slums, in several cities.... as if, the poor man has no right to shelter. How many of the judges realise that these orders are contrary to what the Supreme Court had observed as above? How many of you have seen the misery of this large-scale demolition of the poor man's homes? How many of you understood the consequences of forced evictions? When forced evictions take place, it doesn't mean destruction of houses in a slum area. It means removal of individuals, families or their communities from their homes, from their land or neighbourhood. It also means destroying their livelihood, culture, community, and also their possessions and belongings, besides the suffering, the trauma and the feeling of insecurity.

Whenever the right to housing is violated by forced evictions, a number of other rights are also affected. The right to freedom of movement and to choose one's residence, recognised in many international and national constitutions, are infringed when forced evictions occur. The right to security of the person, widely recognised, means nothing when people are forcibly evicted with violence, bulldozers and intimidation. Arrests or killings of those who protested are common and violate the right to life. In all forced evictions, women and children are the worst sufferers. Children lose their right to education. Men and women lose their source of employment, and their right to work is breached. When they are thrown on the streets, their right to health is affected. When families and communities are torn apart, the right to family life is infringed. When the eviction squad enter one's home, the right to privacy, which is a part of the right to life, and the right to security of the home are violated.

Very often these demolitions are done in the name of environment. But what is fundamental is, that in a country like ours, social justice must precede environmental justice. The reason is that many environmental issues are closely interlinked with the living conditions and livelihood of large number of people. For example when the Supreme Court passed an order that all small-scale industries in New-Delhi must be shifted across Jamuna river, it did not realise that over 20 lakh people had to be thrown out of their homes and their jobs. So also when the Supreme Court and later on the Bombay High Court passed orders for replacements of diesel engines by CNG cylinders in all public conveyances, taxis and auto-rikshaws, what was not taken into account was the cost involved and the lack of enough gas out-lets. The result was that large number of people suffered both in Delhi and Bombay. The court should have insisted upon the Government to prepare a scheme for access to funds and to ensure enough number of gas out-lets, first and then ask the vehicles to convert. Similar situation arises in the matter of developmental projects. When the height of the dam over Narmada was permitted to be developed, the Court did not ensure that the large number of tribals who would lose their homes are rehabilitated first before any further construction is carried on.

It is true that when you enforce a human right, it may come into conflict with another human right. What is the solution? It can't be that you enforce one and eliminate the other. All human rights are equally enforceable, and every human right is, in the language of UDHR "a common standard of achievement for all people and all nations". If one reads Art.11 of the ICESCR there are no limitations on the right to housing. Art.4 of the ICESCR says: "The State Parties to the present Covenant recognise that, in the enjoyment of these rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." Thus, even if a law is made, it should be compatible with the right to housing of everyone, and it should be solely for the general welfare in a democratic society.

This is what exactly Justice Yakoob of the Constitutional Court of S. Africa said while enforcing housing rights "of persons forced to live in deplorable conditions" and while giving directions to the Government to make provisions of temporary accommodation before the Govt. requires the land for any purpose. What he said was "It is the floor beneath which the conduct of the State must not drop, if there is to be compliance with the obligation. Each right is a minimum essential level that must be satisfied ". (The case of Irene Grootboom).

This takes me to what the Bombay High Court did in Writ Petition No. 305 of 1995. That was filed by the Bombay Environmental Action Group as against the Govt., its officials, Forest Officers,

State Wildlife Advisory Board, The Bombay Municipal Corporation, Union of India and against one Ramchandra Kadam (Resp.7) and Ramdas Shirke (Resp.8) who are supposed to be parties as "some persons who have illegally encroached and created unauthorised structures on lands belonging to the Sanjay Gandhi National Park (SGNP)". Respondents 7 and 8 were neither the representatives of slum dwellers nor could it be said they were the creators of the slums at SGNP. As far as I know no leave under O.1.r.8.C.P.C. was obtained. At no time did they appear before the Court, though all orders were to be obtained against them. For aught we know they could as well be imaginary persons. In fact the petition did not even contain their address. The petition inter alia sought a direction to the respondents to forthwith remove all encroachers from the SGNP and relocate them in non-forest areas and remove all unauthorised structures within a period of six months. It also sought various other interim directions, which would vitally affect the slum dwellers. The sum and substance of the petition is that the occupation of the forest areas by a large number of slum dwellers has resulted in ecological disaster.

The petition contained several incorrect statements—some half true, some patently false. The petition created impression that there is still a large forest area with trees and wild animals and since about 1994 at the instance of politicians a large number of people have occupied these areas which otherwise would have been the natural habitat for wild animals and vegetation. If only the Court had paid a visit to the area one could have seen that it had ceased to be any forest for more than 40 to 50 years. There is not a single tree nor is there is any wild life. Only on record, it had remained a forest area. But that was enough for the Court and the petitioners. Human beings and human rights did not matter. Environment became more important! In fact a Division observes at an interim stage observes: "...everyone is mindful of the human problems but for the National Park in question, unfortunately very little has been done." Now that over 4 lakh people have been forcibly dis-housed has any thing been achieved for the National Park?

Initially the Government had placed all the correct facts before the Court. It was stated that SGNP measures 103 sq kms. The Park is divided into three parts, viz.(1) core area admeasuring 28.18 sq kms, (2) tourism zone admeasuring 8.66 sq kms., and (3) buffer zone admeasuring 66.25 sq kms. The Park spreads across the Western suburbs of Goregaon, Malad, Kandivili, and Borivili, and includes parts of Mulund and Thane on the East. The actual Park is in the core area and is fenced and is being fenced. It is the buffer zone that surrounds the core area and it separates the core zone from the thickly populated area of Bombay Suburban District and Thane city. In this buffer zone 1.87 sq kms is under occupation of slum dwellers. About 7.73 sq kms of the land is used for quarrying and agriculture.

A physical survey done by the forest dept. showed as of 1995 that there were 78,000 to 86,000 structures i.e. between 3,90,000 and 4,30,000 people in this area. The conservator of forest has stated in his affidavit: "The problem of encroachment on forest and the consequent deforestation is a matter of grave complexity involving human, political, social and economic angles and cannot be looked at only from the limited point of view of removing such encroachments en masse, as is suggested by the petitioners....." "..... because of the complexities involved and the human aspect of encroachment, a large number of people cannot be uprooted overnight by use of force."

The Notification declaring an area of 86.96 sq kms of SGNP, as a "National Park" was issued some time in 1983. But much before this date, large number of 'pucca' structures had already come into existence. In some of these areas there have been in existence regular Municipal schools, including High Schools, ration shops, dispensaries, temples, Gurudwaras, mosques etc. All these areas had roads, electricity, water supply, telephones, regular bus service, and all other amenities, which anyone would find in any settlement or housing colony. All these things were of no consequence when it was determined to save non-existing trees and wild animals and eliminate human beings!

After the petition was filed certain interim orders were passed. On 15th January 1997, a statement was made by the Govt. Pleader that the Govt. would evolve a scheme for shifting the unauthorised occupants. By an Order dated 12th February 1997, a committee was formed to suggest measures for preventing encroachment and destruction of forest area. It appears that Mr. D.T. Joseph CEO of Slum Rehabilitation Authority had in the reported dated 13th March, 1997, noted that "it would be necessary for the SGNP authorities to consider identifying adequate land at the rate of 500 tenements per hectare from within its boundaries and offer it for rehabilitation of these slum dwellers." It is interesting to note that much later, on 11th Nov. 1998, the Chief Secretary to the Govt. of Maharashtra, realising the difficulty in rehabilitating the people suggested segregation of about 320 acres out of 25,000 acres of the SGNP itself, which area "would be very negligible" . All these things were never considered by the Court, nor any order was passed thereon.

What is important is that on 7th May 1997, the Court passed an "interim order" —if that could ever be considered as an interim order, for, there was nothing left to be done in the petition. It was, a sort of consent order, —consent as between the Petitioners and the conniving Govt. Officials--which sealed the fate of half a million people--"all by the minutes of the order marked "X". No slum dweller was heard,—why should any slum dweller be heard? The petition in effect treated the slum dwellers as dirt, which must be wiped out from SGNP so that trees and wild life be restored and the rich and the powerful could breathe clean air.

Now let us see what the Order says. 1. All bus services should stop at the boundary of the Park only. No bus routes should be allowed to run through the Park. 2. No public transport such as taxis, autos be allowed to enter the park area. 3. MTNL is directed to disconnect all telephone connections, within the park, forthwith. No new connections be given. 4. All sanctions registrations and permissions given by the BMC for commercial and industrial activities within the park be cancelled forthwith. All commercial structures be demolished and the building materials be confiscated. 5. Any person found to be in possession of a hut without a photo-pass must be evicted forthwith and the structure be demolished. 6. Any person refusing to vacate the park be prosecuted under the Forest Laws and Wild Life (Protection) Act. 7. Disconnect all electric and water supply connections. 8. All ration shops be demolished. 9. All schools and other establishments be closed and demolished within one year. 10. All those who are not found in the electoral rolls prepared with reference to 1st Jan., 1995 shall be removed forthwith and structures inhabited by them be demolished forthwith and all materials be confiscated. 11. All those who have been shown as being there prior to 1st Jan., 1995 shall be given six weeks time to satisfy the Govt., and if satisfied the Govt. will within 18 months relocate them outside the boundaries of the park. 12. The Govt. is directed to increase the strength of forest dept. by 50 persons; to make available a helicopter for survey and supervision; to build watch towers every 500 metres; to provide for one or more SRP battalion to help in the demolition work. Much later by an Order dated 13th March, 2000 the Court directed that in addition to two SRP platoons the services of a retired army officer should also be given to the Dy. Conservator of Forest.

Justice V.R. Krishna Iyer (in *The Hindu* Dt. 14th Nov., 2000) had this to say.... "...What jurisprudence empowers the court to confiscate a poor evictee's belongings? What lawless law authorises demolition of ration shops, schools, and dispensaries? Judicial ukase, too harsh to be called social justice! So too, cutting of water supply and electricity? No buses or other transport? Only judicial field marshals, with military flair and militant mood, can conceive of such in *terrorem* commands. The SRP battalions, helicopters and a retired army officer to supervise—these are incongruous with the judicial process with a human face and social justice slant."

As the demolitions began some of the slum dwellers rushed to the court, Some got some temporary relief, but ultimately none could succeed as against a court which had made up its mind to demolish all homes, come what may,-even though "heavens may fall". Till about mid 1999, the Govt. had no scheme to rehabilitate the people whose houses had been demolished and would be demolished thereafter. The Court passed an Order dt. 17th July 1999. In that the court recorded that all eligible encroachers (i.e., those who had their structures built before 1st Jan., 1995) would be allotted pitches

admeasuring 15' x 10' in Kalyan, provided each family pays a sum of Rs.7, 000 by certain instalments. The court constituted a monitoring committee and also a Grievance Redressal Committee under the chairmanship of a Retd. High Court Judge for implementing the Order. Sometime in August 1999 the Govt. indicated that land was available in Ambernath. What sort of rehabilitation was this? Allocated lands have no infra-structure, whatsoever. No roads, no water, no electricity—far away from the Railway Stations and from the roads, above all 40 to 50 kms. away from the existing place of work! What sort of justice is this? How do you justify this kind of order in your conscience? At one point of time the Govt. identified about 33,000 families as eligible encroachers. What has happened to them? Do you think that they have been properly rehabilitated?

Demolitions went on in the most brutal manner. Bull-dozers made no distinction between "eligible encroachers" and others. Things belonging to the people—clothes, utensils, books, documents— whatever they had were destroyed and burnt. Whoever protested, were lathi-charged and beaten; many were arrested, and many suffered injuries, and hospitalised. There were four deaths! Large number of Children lost their schooling—all in the name of environment! Again I quote Justice Krishna Iyer: "This SGNP....scenario is a negation of human rights, the like of which no eye has seen, no heart conceived, no human tongue can adequately tell." "Operation Horror is what it means when whole families, helpless, homeless, jobless, piteously jammed into huts and pits, are flung furiously out of little tenements and petty roofs by the might of the armed state with judicial generals 'drest in a little brief authority' derived on oath by a Constitution which mandates economic justice and right to life! The judicial process and the right to life postulate soul-sensitive compassion and humanism writ into Art.51A spelling out the fundamental duties of every citizen, including the noble 'robed brethren' on the Bench." (*Ibid*, The Hindu)

Demolitions continued whether anyone is rehabilitated or not. I understand that now by an Order Dt. 15th Sept., 2003 the Petition No. 305 of 1995 has been finally disposed of and all the petitions and applications made by the slum dwellers have been dismissed on the basis that they have no right, title, or interest. J. Krishna Iyer had hoped: "When the Court commits a tragic error, the remedy for the malady is a review by the Bench because Judges have no big ego and small minds but rise to reverse themselves once they realise their egregiousness. That is the greatness of judicial office. Alternatively, the legislation with compassion as sanction to stay eviction until just alternative accommodation is realistically made ready is the executive's duty." (*Ibid*. The Hindu).

It is unfortunate that the Court was obsessed with the concept of "encroachment" and that these people were encroachers and they could be just treated as "Unpeople". When a person occupies public

land because he is landless or homeless, he cannot be described as an encroacher. Obviously he cannot be on a private land; per-force he has to be on a public land. But if he is to be thrown out of public land, the only remedy for him would be to drown himself in the Arabian Sea. It is there, he has a basic right, right to shelter—internationally recognised and Constitutionally guaranteed. That is the meaning of Art.21, Right to life, that includes Right to shelter. To say that these people have no right whatsoever is basically wrong and constitutionally incorrect.

Similarly, it is difficult to appreciate the Court's endorsement of a cut-off date of 1st January 1995 for being eligible for an alternate accommodation. It is patently ultra-vires Art.19 and Art.14 of the Constitution. It also means that the rich can always come into the city and acquire any place of his choice, while the poor and the homeless can never enter this city. Moreover all human rights are indivisible and the government cannot say that they will recognise these rights up to a certain date and not beyond that date. Lastly, how many such cut-off dates were there in the past? Would the court guarantee that there would not be another cut-off date? If for any reason cut-off date is extended what will happen to all these persons who have been arbitrarily denied rehabilitation?

In the final Order, the Court finds Support in Art.48-A and Art.51-A (g) of the Constitution. But what about the Preamble where the mandate of social and economic justice writ large? What about Art.38 where the State has to secure and protect "as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life."? What about Art.51(c), which provides respect for international law treaty obligations? Above all what about Art.21 and its very many interpretations?

I understand that as a result of this order, the Tribals who are there will soon be thrown out. There are 53 tribal hamlets in SGNP, 20 of these hamlets fall within Thane District, and the remaining 33 fall within BMC. The total population of these hamlets is about 50,000. The tribals have been residing in this area since time immemorial, i.e. prior to the rule of the Moghals, Marathas, and British. Would that mean any thing for the Judiciary?