Olga Tellis & Ors vs Bombay Municipal Corporation & Ors. Etc on 10 July, 1985

Equivalent citations: 1986 AIR 180, 1985 SCR SUPL. (2) 51, AIR 1986 SUPREME COURT 180, 1986 CRILR(SC&MP) 23, 1985 (3) SCC 545, (1985) 2 BOM CR 434

Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, Syed Murtaza Fazalali, V.D. Tulzapurkar, O. Chinnappa Reddy, A. Varadarajan

PETITIONER:
OLGA TELLIS & ORS.

Vs.

RESPONDENT:
BOMBAY MUNICIPAL CORPORATION & ORS. ETC.

DATE OF JUDGMENT10/07/1985

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
FAZALALI, SYED MURTAZA
TULZAPURKAR, V.D.
REDDY, O. CHINNAPPA (J)
VARADARAJAN, A. (J)

CITATION:
1986 AIR 180 1985 SCR Supl. (2) 51
1985 SCC (3) 545 1985 SCALE (2)5
CITATOR INFO :
F 1986 SC 204 (11)
RF 1986 SC 847 (12)
D 1989 SC 38 (13)
D 1989 SC1988 (8,20,21)
R 1990 SC1480 (41,109)
F 1991 SC 101 (23,32,223,239,258)
RF 1991 SC1117 (5)
RF 1991 SC1902 (24)
E 1992 SC 789 (13)

ACT:
Constitution of India, 1950 :
Article 32 - Fundamental Rights - Estoppel - Principle

behind - No estoppel can be claimed against enforcement of Fundamental Rights.

Article 21, 19(1) (e) & (g) - Pavement and slum dwellers Forcible eviction and removal of their hutments under Bombay Municipal Corporation Act - Whether deprives them of their means of livelihood and consequently right to life - Right to life - Meaning of - Whether includes right to livelihood.

Article 32 & 21 - Writ Petition against procedurally ultra vires Government action - Whether maintainable.

Bombay Municipal Corporation Act, 1888 , s.314 - Power to remove encroachments "without notice , when permissible - Section - Whether ultra vires the Constitution.

Administrative Law - Natural Justice - Audi alteram partem - Notice - Discretion to act with or without notice must be exercised reasonably, fairly and justly - Natural justice - Exclusion - How far permissible.

HEADNOTE:

The petitioners in writ petitions Nos. 4610-12/81 live on pavements and in slums in the city of Bombay. Some of the petitioners in the second batch of writ petitions Nos.5068-79 of 1981, are residents of Kamraj Nagar, a basti or habitation which is alleged to have come into existence in about 1960-61, near the Western Express Highway, Bombay, while others are residing in structures constructed off the Tulsi Pipe Road, Mahim, Bombay. The Peoples Union for Civil Liberties, Committee for the Protection of Democratic Rights and two journalists have also joined in the writ petitions.
52

Some time in 1981, the respondents - State of Maharashtra and Bombay Municipal Corporation took a decision that all pavement dwellers and the slum or busti dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin or removed to places outside the city of Bombay. Pursuant to that decision, the pavement dwellings of some of the petitioners were in fact demolished by the Bombay Municipal Corporation. Some of the petitioners challenged the aforesaid decision of the respondents in the High Court. The petitioners conceded before the High Court that they could not claim any fundamental right to put up huts on pavements or public roads, and also gave an undertaking to vacate the huts on or before October, 15, 1981. On such undertaking being given, the respondents agreed that the huts will not be demolished until October 15, 1981 and the writ petition was disposed of accordingly.

In writ petitions filed under Article 32, the petitioners challenged the decision of the respondents to demolish the pavement dwellings and the slum hutments on the grounds (i) that evicting a pavement dweller from his

habitat amounts to depriving him of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law, (ii) that the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in Article 19(1)(3), 19(1)(g) and 21 of the Constitution, (iii) that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act, 1888 for the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, expressly enables that the Municipal Commissioner may cause the encroachments to be removed without notice , (iv) that it is constitutionally impermissible to characterise the pavement dwellers as 'trespassers', because their occupation of pavements arises from economic compulsions; and (v) that the Court must determine the content of the 'right to life', the function of property in a welfare state, the dimension and true meaning of the constitutional mandate that property must subserve common good, the sweep of the right to reside and settle in any part of the territory of India which is guaranteed by Article 19(1) (a) and the right to carry on any occupation, trade or business which is guaranteed by Article 19(1) (g) , the competing claims of pavement dwellers on the one hand and of the pedestrians on the other and, the larger question of ensuring equality before the law.

53

The respondents contested the writ petitions contending that (1) the petitioners must be estopped from contending in the Supreme Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, since they had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981.; (2) that no person has any legal right to encroach upon or to construct any structure on a foot-path, public street or on any place over which the public has a right of way. The right conferred by Article 19(1) (e) of the Constitution to reside and settle in any part of India cannot be read to confer a licence to encroach and trespass upon public property; (3) that the provisions of sections 312, 313 and 314 of the Bombay Municipal Corporation Act do not violate the Constitution, but are conceived in public interest and great care is taken by the authorities to ensure that no harassment is caused to any pavement dweller by enforcing the provisions; (4) that the huts near the Western Express Highway, Vile Parle, Bombay, were constructed on an accessory road which is a part of the Highway itself, and were never regularised by the Corporation and no registration numbers were assigned to

them; (5) that no deprivation of life, either directly or indirectly is involved in the eviction of the slum and pavement dweller from public places. The Municipal Corporation is under an obligation under section 314 of the B.M.C. Act to remove obstruction on pavements, public streets and other public places. The petitioners have not only violated the provisions of the Bombay Municipal Corporation Act, but they have contravened sections 111 and 115 of the Bombay Police Act also.

Disposing of the writ petitions,

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HELD: 1.1 The petitions are clearly maintainable under Article 32 of the Constitution. Where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move the Supreme Court under Article 32. [79 C-D]

Naresh Shridhar Mirajkar v. State of Maharashtra [1966] 3 S.C.R. 744-770, followed.

Smt. Ujjam Bai v. State of Uttar Pardesh. [1963] 1 S.C.R. 778, referred to.

54

1.2 There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes representation to another, on the faith of which the latter acts to is prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. [77 C-E]

1.3 Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and en forced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamable of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21 , 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceedings, whether under a mis take of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceedings. Such a concession, if enforced, would defeat the purpose of the Constitution. [77

F-H, 78 A-B]

The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to day transactions. [78 D]

In the instant case, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is

55

another matter- But, the argument has to be examined despite the concession. [78 C-D]

Basheshar Nath v. The Commissioner of Income Tax Delhi (1959) Supp. 1 S.C.R. 528, referred to.

2.1 The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes like livable, must be deemed to be an integral component of the right to life. [79 F-H, 80 A-B]

2.2 The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21. [80 G-H, 81 A]

Munn v. Illinois [1877] 94 US 113 and Kharak Singh v. The State of U.P. [1964] 1 S.C.R. 332 referred to.

In Re: Sant Ram (1960) 3 S.C.R. 499, distinguished.

56

2.3 In a matter like the one in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on the part of the Court to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Common sense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants. [82 B-C]

In the instant case, it is clear from the various expert studies that one of the main reasons of the emergence and growth of squatter-settlements in big Metropolitan cities like Bombay, is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position. These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life. [82 D, 83 B-D]

3.1 The Constitution does not put an absolute embargo on the deprivation of life or personal liberty. It is far too well settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, must conform to the means of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be

57

within the scope of the authority conferred by law and

secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. [83 E, 85 F-H, 86 A]

3.2 In order to decide whether the procedure prescribed by section 314 is fair and reasonable, the Court must first determine the true meaning of that section because, the meaning of the law determines its legality. Considered in its proper perspective, section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner, shall without notice, cause an encroachment to be removed. Putting it differently, section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. The Court must leen in favour of this interpretation because it helps sustain the validity of the law. Reading section 314 as containing a command not to the issue before the removal of an encroachment will make the law invalid. [88 H, 89 A-D]

3.3 Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts
58
of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be known to exist, when so required, the burden being upon those who affirm their existence. [89 E-G]

3.4 The proposition that notice need not be given of a

pro posed action because, there can possibly be no answer to it, is contrary to the well-recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of the public authorities. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. [90 H, 91 A-D]

E.P. Royappa v. State of Tamil Nadu [1974] 2 S.C.R. 348, Maneka Gandhi v. Union of India [1978] 2 S.C.R. 621, M.O. Hoscot v. State of Maharashtra [1979] 1 S.C.R. 192, Sunil Batra, I v. Delhi Administration [1979] 1 S.C.R. 392, Sita Ram. State of U.P. [1979] 2 S.C.R. 1085, Hussainra Khatoon, I v. Home Secret any State of Bihar, Patna [1979] 3 S.C.R. 532,537. Husinara Khatoon,II v. Home Secretary State of Bihar, Patna [1980] 1 S.C.C. 81 Sunil Batra, II. v. Delhi Administration [1980] 2 S.C.R. 557, Jolly George Verghese v. The Bank of Cochin [1980] 2 S.C.R. 913, 921-922. Kasturi Lal Lakshmi Redy v. State of Jammu & Kashmir [1980] 3 S.C.R. 1338, 1356, Francis Coralie Muliin v. The Administrator Union Territory of Delhi [1981] 2 S.C.R. 516, 523-524, The Influence of Remedies on Rights' (Current Legal Problems [1953] Volume 6), Per Frankfurter, J. in Viterall v. Seton 3 L. Ed (2nd series) 1012, Ramana Dayaram Shetty v. The International Airport Authority of India [1979] 3 S.C.R. 1014, 1032, referred to.

In the instant case, the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the

59

right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question is this procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case.

Francis Corlie Mullin v. The Administrator, Union Territory of Delhi [1981] 2 S.C.R. 516, 523-524, referred to.

3.5 Footpaths or pavements are public properties which

are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. [87 B-C]

3.6 No one has the right to make use of a public property for a private purpose without the requisite authorisation and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and, even the pedestrians have but the limited right of using pavements for the purpose of passing and repassing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not authorised so to use it, he becomes a trespasser. [87 D-F]

Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass. [87 H]

Hickman v. Maisey [1980] 1 Q.B. 752, referred to.

S.L. Kapoor v. Jagmohan [1981] 1 S.C.R. 746, 766, Ridge v. Baldwin [1964] AC 40 at 68, John v. Rees [1970] 1 Chancery 345 at 402, Annamunthodo v. Oil fields Workers' Trade Union [1961] 3 All E.R. 621 (H.L.) at 625, Margarits Fuentes at al v. Tobert L.
60
Shevin 32, L. Ed. 2nd 556 at 574, Chintepalli Agency Taluk Arrack Sales Cooperative Society Ltd. v. Secretary (Food and Agriculture) [1978] 1 S.C.R. 563 at 567, 569-70, relied upon.

4.1 There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate insult or annoy any person", which is the gist of the offence of "Criminal trespass" under section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachment committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort. But, even the law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is

reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him. [93 A-D]

In the instant case, the Court would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted by the Supreme Court in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions the Court is of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. [94 E-F]

4.2 Pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites of accommodation will be provided to
61
them; the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and the 'Slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the hardship involved in any eviction, the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is until October 31, 1985 and, thereafter, only in accordance with this judgment. If any slum is required to be removed before that date, parties may apply to the Supreme Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz. October 31, 1984. [98 D-H]

4.3 In so far as the Kamraj Nagar Basti is concerned, there are over 400 hutments therein. Since the Basti is situated on a part of the road leading to the Express Highway, serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamaraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city. [95 C-D]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition Nos. 4610-4612 & 5068-5079 of 1981.

(Under Article 32 of the Constitution of India.) Miss Indira Jaisingh, Miss Rani Jethmalani, Anand Grover and Sumeet Kachhwaha for the Petitioners in W.P. No. 4610-12 of 1981.

Ram Jethmalani, V.M. Tarkunde, Miss Darshna Bhogilal, Mrs. Indu Sharma and P.H. Parekh for the Petitioners in W.P. Nos. 5068-79 of 1981.

L.N. Sinha Attorney General, P. Shankaranarayanan and M.N. Shroff for Respondent Nos. 2 & 3 in W.P. Nos. 4610-12 of 1981 and for Respondent Nos. 1 and 3 in W.P. No. 5068-79 of 1981.

K.K.Singhvi, F.N.D. Mollo and D.N. Mishra for Respondent No. 1 in W.P. Nos. 4610-12 and for Respondent No. The Judgment of the Court was delivered by :

CHANDRACHUD, CJ. These Writ Petitions portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and Basti or Slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say : "Who doesn't commit crimes in this city ?

It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such- as is prescribed by the Bombay Municipal Corporation Act or the

Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by Article 19(1)(e).

The three petitioners in the group of Writ Petitions 4610 4612 of 1981 are a journalist and two pavement dwellers. One of these two pavement dwellers, P. Angamuthu, migrated from Salem, Tamil Nadu, to Bombay in the year 1961 in search of employment. He was a landless labourer in his home town but he was rendered Jobless because of drought. He found a Job in a Chemical Company at Dahisar, Bombay, on a daily wage of Rs-23 per day. A slum-lord extorted a sum of Rs.2,50 from him in exchange of a shelter of plastic sheets and canvas on a pavement on the Western Express Highway, Bombay. He lives in it with his wife and three daughters who are 16, 13 and 5 years of age.

The second of the two pavement dwellers came to Bombay in 1969 from Sangamner, District Ahmednagar, Maharashtra. He was a cobbler earning 7 to 8 rupees a day, but his so-called house in the village fell down. He got employment in Bombay as a Badli Kamgar for Rs. 350 per month. He was lucky in being able to obtain a "dwelling house" on a pavement at Tulsiwadi by paying Rs. 300 to a goonda of the locality. The bamboos and the plastic sheets cost him Rs. 700.

On July 13, 1981 the then Chief Minister of Maharashtra, Shri A.R. Antulay, made an announcement which was given wide publicity by the newspapers that all pavement dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin or removed to places outside the city of Bombay. The Chief Minister directed the Commissioner of Police to provide the necessary assistance to respondent 1, the Bombay Municipal Corporation, to demolish the pavement dwellings and deport the pavement dwellers. The apparent justification which the Chief Minister gave to his announcement was : "It is a very inhuman existence. These structures are flimsy and open to the elements. During the monsoon there is no way these people can live comfortably."

On July 23, 1981 the pavement dwelling of P. Angamuthu was demolished by the officers of the Bombay Municipal Corporation. He and the members of his family were put in a bus for Salem. His wife and daughters stayed back in Salem but he returned to Bombay in search of a job and got into a pavement house once again. The dwelling of the other petitioner was demolished even earlier, in January 1980 but he rebuilt it. It is like a game of hide and seek. The Corporation removes the ramshackle shelters on the pavements with the aid of police, the pavement dwellers flee to less conspicuous pavements in by-lanes and, when the officials are gone, they return to their old habitats. Their main attachment to those places is the nearness thereof to their place of work.

In the other batch of writ petitions Nos. 5068-79 of 1981, which was heard along with the petitions relating to pavement dwellers, there are 12 petitioners. The first five of

these are residents of Kamraj Nagar, a basti or habitation which is alleged to have come into existence in about 1960-61, near the Western Express Highway, Bombay. The next four petitioners were residing in structures constructed off the Tulsi Pipe Road, Mahim, Bombay. Petitioner No. 10 is the Peoples' Union of Civil Liberties, petitioner No. 11 is the Committee for the Protection of Democratic Rights while petitioner No. 12 is a journalist.

The case of the petitioners in the KamraJ Nagar group of cases is that there are over 500 hutments in this particular basti which was built in about 1960 by persons who were employed by a Construction company engaged in laying water pipes along the Western Express Highway. The residents of Kamraj Nagar are municipal employees, factory or hotel workers, construction supervisors and so on. The residents of the Tulsi Pipe Road hutments claim that they have been living there for 10 to 15 years and that, they are engaged in various small trades. On hearing about the Chief Minister's announcement, they filed a writ petition in the High Court of Bombay for an order of injunction restraining the officers of the State Government and the Bombay Municipal Corporation from implementing the directive of the Chief Minister. The High Court granted an ad-interim injunction to be in force until July 21, 1981. On that date, respondents agreed that the huts will not be demolished until October 15, 1981. However, it is alleged, on July 23, 1981, the petitioners were huddled into State Transport buses for being deported out of Bombay. Two infants were born during the deportation but that was set off by the death of two others.

The decision of the respondents to demolish the huts is challenged by the petitioners on the ground that it is violative of Articles 19 and 21 of the Constitution. The petitioners also ask for a declaration that the provisions of sections 312, 313 and 314 of the Bombay Municipal Corporation Act, 1888 are in valid as violating Articles 14, 19 and 21 of the Constitution. The reliefs asked for in the two groups of writ petitions are that the respondents should be directed to withdraw the decision to demolish the pavement dwellings and the slum hutments and, where they are already demolished, to restore possession of the sites to the former occupants.

On behalf of the Government of Maharashtra, a counter- affidavit has been filed by V.S.Munje, Under Secretary in the Department of Housing. The counter-affidavit meets the case of the petitioners thus. The Government of Maharashtra neither proposed to deport any payment dweller out of the city of Bombay nor did it, in fact, deport anyone. Such of the pavement dwellers, who expressed their desire in writing, that they wanted to return to their home towns and who sought assistance from the Government in that behalf were offered transport facilities up to the nearest rail head and were also paid railway fare or bus fare and incidental expenses for the onward journey. The Government of Maharashtra had issued instructions to its officers to visit specific pavements on July 23, 1981 and to ensure that no harassment was caused to any pavement dweller. Out of 10,000 hutment-dwellers who were likely to be affected by the proposed demolition of hutments constructed on the pavements, only 1024 persons opted to avail of the transport facility and the payment of incidental expenses.

The counter-affidavit says that no person has any legal right to encroach upon or to construct any structure on a footpath, public street or on any place over which the public has a right of way. Numerous hazards of health and safety arise if action is not taken to remove such encroachments. Since, no civic amenities can be provided on the pavements, the pavement dwellers use pavements or adjoining streets for easing themselves. Apart from this, some of the pavement dwellers indulge in anti-social acts like chain-snatching, illicit distillation of liquor and prostitution. The lack of proper environment leads to increased criminal tendencies, resulting in more crime in the cities. It is, therefore, in public interest that public places like pavements and paths are not encroached upon. The Government of Maharashtra provides housing assistance to the weaker sections of the society like landless labourers and persons belonging to low income groups, within the frame work of its planned policy of the economic and social development of the State. Any allocation for housing has to be made after balancing the conflicting demands from various priority sectors. The paucity of resources is a restraining factor on the ability of the State to deal effectively with the question of providing housing to the weaker sections of the society. The Government of Maharashtra has issued policy directives that 75 percent of the housing programme should be allocated to the lower income groups and the weaker sections of the society. One of the objects of the State's planning policy is to ensure that the influx of population from the rural to the urban areas is reduced in the interest of a proper and balanced social and economic development of the State and of the country. This is proposed to be achieved by reversing the rate of growth of metropolitan cities and by increasing the rate of growth of small and medium towns. The State Government has therefore, devised an Employment Guarantee Scheme to enable the rural population, which remains unemployed or underemployed at certain periods of the year, to get employment during such periods. A sum of about Rs. 180 crores was spent on that scheme during the years 1979-80 and 1980-81. On October 2, 1980 the State Government launched two additional schemes for providing employment opportunities for those who cannot get work due to old age or physical infirmities. The State Government has also launched a scheme for providing self-employment opportunities under the 'Sanjay Gandhi Niradhar Anudan Yojana'. A monthly pension of Rs. 60 is paid to those who are too old to work or are physically handicapped. In this scheme, about 1,56,943 persons have been identified and a sum of Rs. 2.25 crores was disbursed. Under another scheme called 'Sanjay Gandhi Swawalamban Yojana', interest-free loans, subject to a maximum of Rs. 2,500, were being given to persons desiring to engage themselves in gainful employment of their own. About 1,75,000 persons had benefited under this scheme, to whom a total sum of Rs. 5.82 crores was disbursed by way of loan. In short, the objective of the State Government was to place greater emphasis on providing infrastructural facilities to small and medium towns and to equip them so that they could act as growth and service centres for the rural hinterland. The phenomenon of poverty which is common to all developing countries has to be tackled on an All-India basis by making the gains of development available to all sections of the society through a policy of equitable distribution of income and wealth. Urbanisation is a major problem facing the entire country, the migration of people from the rural to the urban areas being a reflection of the colossal poverty existing in the rural areas. The rural poverty cannot, however, be eliminated by increasing the pressure of population on metropolitan cities like Bombay. The problem of poverty has to be tackled by changing the structure of the society in which there will be a more equitable distribution of income and greater generation of wealth. The State Government has stepped up the rate of construction of tenements for the weaker sections of the society from 2500 to 9500 per annum.

It is denied in the counter-affidavit that the provisions of sections 312, 313 and 314 of the Bombay Municipal Corporation Act violate the Constitution. Those provisions are conceived in public interest and great care is taken by the authorities to ensure that no harassment is caused to any pavement dweller while enforcing the provisions of those sections. The decision to remove such encroachments was taken by the Government with specific instructions that every reasonable precaution ought to be taken to cause the least possible inconvenience to the pavement dwellers. What is more important, so the counter- affidavit says, the Government of Maharashtra had decided that, on the basis of the census carried out in 1976, pavement dwellers who would be uprooted should be offered alternate developed pitches at Malvani where they could construct their own hutments. According to that census, about 2,500 pavement hutments only were then in existence.

The counter-affidavit of the State Government describes the various steps taken by the Central Government under the Five year Plan of 1978-83, in regard to the housing programmes. The plan shows that the inadequacies of Housing policies in India have both quantitative and qualitative dimensions. The total investment in housing shall have to be of the magnitude of Rs. 2790 crores, if the housing problem has to be tackled even partially.

On behalf of the Bombay Municipal Corporation, a counter-affidavit has been filed by Shri D.M. Sukthankar, Municipal Commissioner of Greater Bombay. That affidavit shows that he had visited the pavements on the Tulsi Pipe Road (Senapati Bapat Marg) and the Western Express High Way, Vile Parle (east), Bombay. On July 23, 1981, certain hutments on these pavements were demolished under section 314 of the Bombay Municipal Corporation Act. No prior notice of demolition was given since the section does not provide for such notice. The affidavit denies that the intense speculation in land prices, as alleged, owes its origin to the High rise buildings which have come up in the city of Bombay. It is also denied that there are vast vacant pieces of land in the city which can be utilised for housing the pavement dwellers. Section 61 of the B.M.C. Act lays down the obligatory duties of the Corporation. Under clauses (c) and (d) of the said section, it is the duty of the Corporation to remove excrementitious matters, refuse and rubbish and to take measures for abatement of every kind of nuisance. Under clause(g) of that section, the Corporation is under an obligation to take measures for preventing and checking the spread of dangerous diseases. Under clause (o), obstructions and projections in or upon public streets and other public places have to be removed. Section 63 (k) empowers the Corporation to take measures to promote public safety, health or convenience, not specifically provided otherwise. The object of Sections 312 to 314 is to keep the pavements and foot-paths free from encroachment so that the pedestrians do not have to make use of the streets on which there is heavy vehicular traffic. The pavement dwellers answer the nature's call, bathe, cook and wash their clothes and utensils on the foot-paths and on parts of public streets adjoining the foot-

paths. Their encroachment creates serious impediments in repairing the roads, foot-paths and drains. The refusal to allow the petitioners and other persons similarly situated to use foot-paths as their abodes is, therefore, not unreasonable, unfair, or unlawful. The basic civic amenities, such as drainage, water and sanitation, cannot possibly be provided to the pavement dwellers. Since the pavements are encroached upon, pedestrians are compelled to walk on the streets, thereby increasing the risk of traffic accidents and impeding the free flow of vehicular movement. The

Municipal Commissioner disputes in his counter-affidavit that any fundamental right of the petitioners is infringed by removal of the encroachment committed by them on public property, especially the pavements. In this behalf, reliance is placed upon an order dated July 27, 1981 of Lentin J. of the Bombay High Court, which records that counsel for the petitioners had stated expressly on July 24, 1981, that no fundamental right could be claimed to put up a dwelling on public foot-paths and public roads.

The Municipal Commissioner has stated in his counter- affidavit in Writ Petitions 5068-79 of 1981 that the huts near the Western Express Highway, Vile Parle, Bombay, were constructed on an accessory road which is a part of the Highway itself. These hutments were never regularised by the Corporation and no registration numbers were assigned to them.

In answer to the Municipal Commissioner's counter- affidavit, petitioner no. 12. Prafulla chandra Bidwai who is a journalist, has filed a rejoinder asserting that Kamraj Nagar is not located on a foot-path or a pavement. According to him, Kamraj Nagar is a basti off the Highway, in which the huts are numbered, the record in relation to which is maintained by the Road Development Department and the Bombay Municipal Corporation. Contending that petitioners 1 to 5 have been residing in the said basti for over 20 years, he reiterates that the public has no right of way in or over the Kamraj Nagar. He also disputes that the huts on the foot-paths cause any obstruction to the pedestrians or to the vehicular traffic or that those huts are a source of nuisance or danger to public health and safety. His case in paragraph 21 of his reply-affidavit seems to be that since, the foot-paths are in the occupation of pavement dwellers for a long time, foot-paths have ceased to be foot-paths. He says that the pavement dwellers and the slum or basti dwellers, who number about 47.7 lakhs, constitute about 50 per cent of the total population of Greater Bombay, that they supply the major work force for Bombay from menial Jobs to the most highly skilled jobs, that they have been living in the hutments for generations, that they have been making a significant contribution to the economic life of the city and that, therefore, it is unfair and unreasonable on the part of the State Government and the Municipal Corporation to destroy their homes and deport them : A home is a home wherever it is. The main theme of the reply-affidavit is that" The slum dwellers are the sine qua non of the city. They are entitled to a quid pro quo. "It is conceded expressly that the petitioners do not claim any fundamental right to live on the pavements. The right claimed by them is the right to live, at least to exist.

Only two more pleadings need be referred to, one of which is an affidavit of Shri Anil V. Gokak, Administrator of Maharashtra Housing and Areas Development Authority, Bombay, who was then holding charge of the post of Secretary, Department of Housing. He filed an affidavit in answer to an application for the modification of an interim order which was passed by this Court on October 19, 1981. He says that the legislature of Maharashtra had passed the Maharashtra Vacant Land (Prohibition of unauthorised Occupation and Summary Eviction) Act, 1975 in pursuance of which the Government had decided to compile a list of slums which were required to be removed in public interest. It was also decided that after a spot inspection, 500 acres of vacant land in and near the Bombay Suburban District should be allocated for re-settlement of the hutment dwellers who were removed from the slums. A Task Force was constituted by the Government for the purpose of carrying out a census of the hutments standing on lands belonging to the Government of the

Maharashtra, the Bombay Municipal Corporation and the Bombay Housing Board. A Census was, accordingly, carried out on January 4, 1976 by deploying about 7,000 persons to enumerate the slum dwellers spread over approximately 850 colonies all over Bombay. About 67 per cent of the hutment dwellers from a total of about 2,60,000 hutments produced photographs of the heads of their families, on the basis of which hutments were numbered and their occupants were given identity cards. It was decided that slums which were in existence for a long time and which were improved and developed would not normally be demolished unless the land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternative accommodation to the slum dwellers who were censused and possessed identity cards. This is borne out by a circular of the Government dated February 4, 1976 (No. SIS 1176/D. 41). Shri Gokak says that the State Government has issued instructions directing, inter alia, that "action to remove the slums excepting those which are on the foot-paths or roads or which are new or casually located should not, therefore, be taken without obtaining approval from the Government to the proposal for the removal of such slums and their rehabilitation." Since, it was never the policy of the Government to encourage construction of hutments on foot- paths, pavements or other places over which the public has a right of way, no census of such hutments was ever intended to be conducted. But, sometime in July 1981, when the Government officers made an effort to ascertain the magnitude of the problem of evicting pavement dwellers, it was discovered that some persons occupying pavements, carried census cards of 1976. The Government then decided to allot pitches to such occupants of pavements.

The only other pleading which deserves to be noticed is the affidavit of the journalist petitioner, Ms. Olga Tellis, in reply to the counter-affidavit of the Government of Maharashtra. According to her, one of the important reasons of the emergence and growth of squatter-settlements in the Metropolitan cities in India is, that the Development and Master Plans of most of the cities have not been adhered to. The density of population in the Bombay Metropolitan Region is not high according to the Town Planning standards. Difficulties are caused by the fact that the population is not evenly distributed over the region, in a planned manner. New constructions of commercial premises, small-scale industries and entertainment houses in the heart of the city, have been permitted by the Government of Maharashtra contrary to law and even residential premises have been allowed to be converted into commercial premises. This, coupled with the fact that the State Government has not shifted its main offices to the northern region of the city, has led to the concentration of the population in the southern region due to the availability of Job opportunities in that region. Unless economic and leisure activity is decentralised, it would be impossible to find a solution to the problems arising out of the growth of squatter colonies. Even if squatters are evicted, they come back to the city because, it is there that Job opportunities are available. The alternate pitches provided to the displaced pavement- dwellers on the basis of the so-called 1976 census, are not an effective means to their resettlement because, those sites are situated far away from the Malad Railway Station involving cost and time which are beyond their means. There are no facilities available at Malavant like schools and hospitals, which drives them back to the stranglehold of the city. The permission granted to the 'National Centre of Performing Arts' to construct an auditorium at the Nariman Point, Backbay Reclamation, is cited as a 'gross' instance of the short-sighted, suicidal and discriminatory policy of the Government of Maharashtra. It is as if the sea is reclaimed for the construction of business and entertainment houses in the centre of the city, which creates job

opportunities to which the homeless flock. They work therein and live on pavements. The grievance is that, as a result of this imbalance, there are not enough jobs available in the northern tip of the city. The improvement of living conditions in the slums and the regional distribution of job opportunities are the only viable remedies for relieving congestion of the population in the centre of the city. The increase allowed by the State Government in the Floor Space Index over and above 1.33, has led to a further concentration of population in the centre of the city.

In the matter of housing, according to Ms. Tellis' affidavit, Government has not put to the best use the finances and resources available to it. There is a wide gap between the demand and supply in the area of housing which was in the neighbourhood of forty five thousand units in the decade 1971-81. A huge amount of hundreds of crores of rupees shall have to be found by the State Government every year during the period of the Sixth Plan if adequate provision for housing is at all to be made. The Urban Land Ceiling Act has not achieved its desired objective nor has it been properly implemented. The employment schemes of the State Government are like a drop in the ocean and no steps are taken for increasing Job opportunities in the rural sector. The neglect of health, education transport and communication in that sector drives the rural folk to the cities, not only in search of a living but in search of the basic amenities of life. The allegation of the State Government regarding the criminal propensities of the pavement dwellers is stoutly denied in the reply-affidavit and it is said to be contrary to the studies of many experts. Finally, it is stated that it is no longer the objective of the Sixth Plan to reverse the rate of growth of metropolitan cities. The objective of the earlier plan (1978-83) has undergone a significant change and the target now is to ensure the growth of large metropolitan cities in a planned manner. The affidavit claims that there is adequate land in the Bombay metropolitan region to absorb a population of 20 million people, which is expected to be reached by the year 2000 A.D. The arguments advanced before us by Ms. Indira Jaisingh, Mr. V.M. Tarkunde and Mr. Ram Jethmalani cover a wide range but the main thrust of the petitioners' case is that evicting a pavement dweller or slum dweller from his habitat amounts to depriving of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law. The question of the guarantee of personal liberty contained in Article 21 does not arise and was not raised before us. Counsel for the petitioners contended that the Court must determine in these petitions the content of the right to life, the function of property in a welfare state, the dimension and true meaning of the constitutional mandate that property must subserve common good, the sweep of the right to reside and settle in any part of the territory of India which is guaranteed by Article 19(1)(e) and the right to carry on any occupation, trade or business which is guaranteed by Article 19 (1)(g), the competing claims of pavement dwellers on the one hand and of the pedestrians on the other and, the larger question of ensuring equality before the law. It is contended that it is the responsibility of the courts to reduce inequalities and social imbalances by striking down statutes which perpetuate them. One of the grievances of the petitioners against the Bombay Municipal Corporation Act, 1888 is that it is a century old antiquated piece of legislation passed in an era when pavement dwellers and slum dwellers did not exist and the consciousness of the modern notion of a welfare state was not present to the mind of the colonial legislature. According to the petitioners, connected with these issues and yet independent of them, is the question of the role of the Court in setting the tone of values in a democratic society.

The argument which bears on the provisions of Article 21 is elaborated by saying that the eviction of pavement and slum dweller will lead, in a vicious circle, to the deprivation of their employment, their livelihood and, therefore, to the right to life. Our attention is drawn in this behalf to an extract from the judgment of Douglas J in Baksey v. Board of Regents, 347 M.D. 442 (1954) in which the learned Judge said:

> "The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live."

The right to live and the right to work are integrated and interdependent and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy. It is urged that the economic compulsions under which these persons are forced to live in slums or on pavements impart to their occupation the character of a fundamental right.

It is further urged by the petitioners that it is constitutionally impermissible to characterise the pavement dwellers as "trespassers" because, their occupation of pavements arises from economic compulsions. The State is under an obligation to provide to the citizens the necessities of life and, in appropriate cases, the courts have the power to issue order directing the State, by affirmative action, to promote and protect the right to life. The instant situation is one of crisis, which compels the use of public property for the purpose of survival and sustenance. Social commitment is the quintessence of our Constitution which defines the conditions under which liberty has to be enjoyed and justice has to be administered. Therefore, Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the Constitutional provisions. Viewed in this context, it is urged, the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in Articles 19(1)(e), 19(1)(g) and 21 of the Constitution. The paucity of financial resources of the State is no excuse for defeating the fundamental rights of the citizens.

In support of this argument, reliance is placed by the petitioners on what is described as the 'factual context'. A publication dated January 1982 of the Planning Commission, Government of India, namely, 'The Report of the Expert Group of Programmes for the Alleviation of Poverty', is relied on as showing the high incidence of poverty in India. That Report shows that in 1977-78, 48% of the population lived below the poverty line, which means that out of a population of 303 million who lived below the poverty line, 252 million belonged to the rural areas. In 1979-80 another 8 million people from the rural areas were found to live below the poverty line. A Government of Maharashtra Publication "Budget and the new 20 Point Socio-Economic Programme"

> estimates that there are about 45 lakh families in rural areas of Maharashtra who live below the poverty line. Another 40% was in the periphery of that area. One of the major causes of the persistent rural poverty of landless labourers, marginal farmers, shepherds, physically handicapped persons and others is the extremely narrow base of production available to the majority of the rural population. The average agricultural holding of a farmer is 0.4 hectares, which is hardly adequate to enable

him to make both ends meet. Landless labourers have no resource base at all and they constitute the hard-core of poverty. Due to economic pressures and lack of employment opportunities, the rural population is forced to migrate to urban areas in search of employment. 'The Economic Survey of Maharashtra' published by the State Government shows that the bulk of public investment was made in the cities of Bombay, Pune and Thane, which created employment opportunities attracting the starving rural population to those cities. The slum census conducted by the Government of Maharashtra in 1976 shows that 79% of the slum-dwellers belonged to the low income group with a monthly income below Rs.600. The study conducted by P. Ramachandran of the Tata Institute of Social Sciences shows that in 1972,91% of the pavement dwellers had a monthly income of less than Rs.200. The cost of obtaining any kind of shelter in Bombay is beyond the means of a pavement dweller. The principal public housing sectors in Maharashtra, namely, The Maharashtra Housing and Area Development Agency (MHADA) and the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) have been able to construct only 3000 and 1000 units respectively as against the annual need of 60,000 units. In any event, the cost of housing provided even by these public sector agencies is beyond the means of the slum and pavement- dwellers. Under the Urban Land (Ceiling and Regulation) Act 1975, private land owners and holders are given facility to provide housing to the economically weaker sections of the society at a stipulated price of Rs.90 per sq.ft., which also is beyond the means of the slum and pavement-dwellers. The reigning market price of houses in Bombay varies from Rs.150 per sq.ft. outside Bombay to Rs.2000 per sq.ft. in the centre of the city.

The petitioners dispute the contention of the respondents regarding the non-availability of vacant land for allotment to houseless persons. According to them, about 20,000 hectares of unencumbered land is lying vacant in Bombay. The Urban Land (Ceiling and Regulation) Act,1975 has failed to achieve its object as is evident from the fact that in Bombay, 5% of the land-holders own 55% of the land. Even though 2952.83 hectares of Urban land is available for being acquired by the State Government as being in excess of the permissible ceiling area, only 41.51% of this excess land was, so far, acquired. Thus, the reason why there are homeless people in Bombay is not that there is no land on which homes can be built for them but, that the planning policy of the State Government permits high density areas to develop with vast tracts of land lying vacant. The pavement-dwellers and the slum-dwellers who constitute 50% of the population of Bombay, occupy only 25% of the city's residential land. It is in these circumstances that out of sheer necessity for a bare existence, the petitioners are driven to occupy the pavements and slums. They live in Bombay because they are employed in Bombay and they live on pavements because there is no other place where they can live. This is the factual context in which the petitioners claim the right under Articles 19(1)(e) and (g) and Article 21 of the Constitution.

The petitioners challenge the vires of section 314 read with sections 312 and 313 of the Bombay Municipal Corporation Act, which empowers the Municipal Commissioner to remove, without notice, any object or structure or fixture which is set up in or upon any street. It is contended that, in the first place, section 314 does not authorise the demolition of a dwelling even on a pavement and secondly, that a provision which allows the demolition of a dwelling without notice is not just, fair or reasonable. Such a provision vests arbitrary and unguided power in the Commissioner. It also offends against the guarantee of equality because, it makes an unjustified discrimination between pavement dwellers on the one hand and pedestrians on the other. If the pedestrians are entitled to use the pavements for passing and repassing, so are the pavement dwellers entitled to use pavements for dwelling upon them. So the argument goes. Apart from this, it is urged, the restrictions which are sought to be imposed by the respondents on the use of pavements by pavement-dwellers are not reasonable. A State which has failed in its constitutional obligation to usher a socialistic society has no right to evict slum and pavement-dwellers who constitute half of the city's population. Therefore, sections 312,313 and 314 of the B.M.C. Act must either be read down or struck down.

According to the learned Attorney-General, Mr. K.K.Singhvi and Mr. Shankaranarayanan who appear for the respondents, no one has a fundamental right, whatever be the compulsion, to squat on or construct a dwelling on a pavement, public road or any other place to which the public has a right of access. The right conferred by Article 19(1)(e) of the Constitution to reside and settle in any part of India cannot be read to confer a licence to encroach and trespass upon public property. Sections 3(w) and

(x) of the B.M.C. Act define "Street" and "Public Street" to include a highway, a footway or a passage on which the public has the right of passage or access. Under section 289(1) of the Act, all pavements and public streets vest in the Corporation and are under the control of the Commissioner. In so far as Article 21 is concerned, no deprivation of life, either directly or indirectly, is involved in the eviction of the slum and pavement-dwellers from public places. The Municipal Corporation is under an obligation under section 314 of the B.M.C. Act to remove obstructions on pavements, public streets and other public places. The Corporation does not even possess the power to permit any person to occupy a pavement or a public place on a permanent or quasi-permanent basis. The petitioners have not only violated the provisions of the B.M.C. Act, but they have contravened sections 111 and 115 of the Bombay Police Act also. These sections prevent a person from obstructing any other person in the latter's use of a street or public place or from committing a nuisance. Section 117 of the Police Act prescribes punishment for the violation of these sections.

We will first deal with the preliminary objection raised by Mr. K.K.Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are estopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them. It appears that a

writ petition, No. 986 of 1981, was filed on the Original Side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. A learned Single Judge granted an ad-interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981, counsel for the petitioners made a statement in answer to a query from the court, that no fundamental right could be claimed to put up dwellings on foot-paths or public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23,1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners' undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981, no pavement dweller will be removed out of the city against his wish. On the basis of these undertakings, the learned Judge disposed of the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981 they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and substance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15,16,19,21 and 29, and some on citizens and non- citizens alike, like those guaranteed by Articles 14,21,22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any

particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well- founded is another matter. But, the argument has to be examined despite the concession.

The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-today transactions. In Basheshar Nath v. The Commissioner of Income Tax Delhi, [1959] Supp. 1 S.C.R. 528 a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H.Bhagwati and Subba Rao,JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioners' contentions on merits.

The scope of the jurisdiction of this Court to deal with writ petitions under Article 32 of the Constitution was examined by a special Bench of this Court in Smt. Ujjam Bai v. State of Uttar Pradesh. [1963] 1 S.C.R. 778. That decision would show that, in three classes of cases, the question of enforcement of the fundamental rights would arise, namely, (1) where action is taken under a statute which is ultra vires the Constitution ; (2) where the statute is intra vires but the action taken is without jurisdiction; and (3) an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. These categories are, of course, not exhaustive. In Naresh Shridhar Mirajkar v. State of Maharashtra, [1966] 3 S.C.R. 744-770, a Special Bench of nine learned Judges of this Court held that, where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move this Court under Article 32. The contention of the petitioners is that the procedure prescribed by section 314 of the B.M.C. Act being arbitrary and unfair, it is not "procedure established by law" within the meaning of Article 21 and, therefore, they cannot be deprived of their fundamental right to life by resorting to that procedure. The petitions are clearly maintainable under Article 32 of the Constitution.

As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of

argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which people their desertion of their hearths and homes in the village s that struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas J. in Baksey that the right to work is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois, (1877) 94 U.S. 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. The State of U.P., [1964] 1 S.C.R. 332.

Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

Learned counsel for the respondents placed strong reliance on a decision of this Court in In Re: Sant Ram, [1960] 3 S.C.R. 499, in support of their contention that the right to life guaranteed by Article 21 does not include the right to livelihood. Rule 24 of the Supreme Court Rules empowers the Registrar to publish lists of persons who are proved to be habitually acting as touts. The Registrar issued a notice to the appellant and one other person to show cause why their names should not be included in the list of touts. That notice was challenged by the appellant on the ground, inter alia, that it contravenes Article 21 of the Constitution since, by the inclusion of his name in the list of touts, he was deprived of his right to livelihood, which is included in the right to life. It was held by a Constitution Bench of this Court that the language of Article 21 cannot be pressed in aid of the argument that the word `life' in Article 21 includes `livelihood' also. This decision is distinguishable because, under the Constitution, no person can claim the right to livelihood by the pursuit of an opprobrious occupation or a nefarious trade or business, like tourism, gambling or living on the gains of prostitution. The petitioners before us do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honourable.

Turning to the factual situation, how far is it true to say that if the petitioners are evicted from their slum and pavement dwellings, they will be deprived of their means of livelihood? It is impossible, in the very nature of things, together reliable data on this subject in regard to each individual petitioner and, none has been furnished to us in that form. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The writ petitions before us undoubtedly involve a question relating to dwelling houses but, they cannot be equated with a suit for the possession of a house by one private person against another. In a case of the latter kind, evidence has to be led to establish the cause of action and justify the claim. In a matter like the one before us, in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non- official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants.

It is clear from the various expert studies to which we have referred while setting out the substance of the pleadings that, one of the main reasons of the emergence and growth of squatter-settlements in big Metropolitan cities like Bombay, is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position. The Planning Commission's publication, `The Report of the Expert Group of Programmes for the Alleviation of Poverty' (1982) shows that half of the population in India lives below the poverty line, a large part of which lives in villages. A publication of the

Government of Maharashtra, `Budget and the New 20 Point Socio-Economic Programme' shows that about 45 lakhs of families in rural areas live below the poverty line and that, the average agricultrual holding of a farmer, which is 0.4 hectares, is hardly enough to sustain him and his comparatively large family. The landless labourers, who constitute the bulk of the village population, are deeply imbedded in the mire of poverty. It is due to these economic pressures that the rural population is forced to migrate to urban areas in search of employment. The affluent and the not-so-affluent are alike in search of domestic servants. Industrial and Business Houses pay a fair wage to the skilled workman that a villager becomes in course of time. Having found a job, even if it means washing the pots and pans, the migrant sticks to the big city. If driven out, he returns in quest of another job. The cost of public sector housing is beyond his modest means and the less we refer to the deals of private builders the better for all; excluding none. Added to these factors is the stark reality of growing insecurity in villages on account of the tyranny of parochialism and casteism. The announcement made by the Maharashtra Chief Minister regarding the deportation of willing pavement dwellers afford some indication that they are migrants from the interior areas, within and outside Maharashtra. It is estimated that about 200 to 300 people enter Bombay every day in search of employment. These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is no where else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To loss the pavement or the slum is to lose the job. The conclusion, therefore in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life.

Two conclusions emerge from this discussion: one, that the right to life which is conferred by Article 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Article 21, such deprivation has to be according to procedure established by law. In the instant case, the law which allows the deprivation of the right conferred by Article 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in Sections 312(1),313(1)(a) and 314. These sections which occur in Chapter XI entitled `Regulation of Streets' read thus :

> Section 312 - Prohibition of structures or fixtures which cause obstruction in streets.
>
> (1) No person shall, except with the permission of the Commissioner under section 310 or 317 arect or set up any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion or such street, channel, drain, well or tank".
>
> "Section 313 - Prohibition of deposit, etc., of things in streets.
>
> (1) No person shall, except with the written permission of the Commissioner, -

(a) place or deposit upon any street or upon any open channel drain or well in any streets (or in any public place) any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction thereto or encroachment thereon."

"Section 314 - Power to remove without notice anything erected deposited or hawked in contravention of Section 312,313 or 313 A. The Commissioner may, without notice, cause to be removed -

(a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or any street, or upon or over any open channel, drain, well or tank contrary to the provisions of subsection (1) of section 312, after the same comes into force in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after the date of the coming into force of the Bombay Municipal Further Extension of Limits and Schedule BBA (Amendment) Act, 1956;

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached, or suspended in, upon, from or to any place in contravention of sub-section (1) of section 313;

(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of section 313A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale."

By section 3(w), "street" includes a causeway, footway, passage etc., over which the public have a right of passage or access.

These provisions, which are clear and specific, empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. It is undeniable that, in these cases, wherever constructions have been put up on the pavements, the public have a right of passage or access over those pavements. The argument of the petitioners is that the procedure prescribed by section 314 for the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal Commissioner may cause the encroachment to be removed "without notice".

It is far too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. (See E.P.Royappa v. State of Tamil Nadu, [1974] 2 S.C.R. 348; Maneka Gandhi v. Union of India, [1978] 2 S.C.R. 621; M.O.Hoscot v. State of Maharashtra, [1979] 1 S.C.R. 192; Sunil Batra, I v. Delhi Administration, [1979] 1 S.C.R. 392; Sita Ram v. State of U.P., [1979] 2 S.C.R. 1085; Hussainara Khatoon, I v. Home Secretary, State of Bihar, Patna, [1979] 3 S.C.R. 532,537; Hussainara Khatoon, II v. Home Secretary, State of Bihar, Patna, [1980] 1 S.C.C. 81; Sunil Batra, II v. Delhi Administration, [1980] 2 S.C.R. 557;

Jolly George Verghese v. The Bank of Cochin, [1980] 2 S.C.R. 913,921-922; Kasturi Lal Lakshmi Keddy v. State of Jammu & Kashmir, [1980] 3 S.C.R. 1338,1356; and Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, [1981] 2 S.C.R. 516,523-24.) Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must confirm to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribe for, how reasonable the law is, depends upon how fair is the procedure prescribed by it, Sir Raymond Evershad says that, from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work", [`The influence of Remedies on Rights' (Current Legal Problems 1953, Volume

6.)]. Therefore, He that takes the procedural sword shall perish with the sword. "[Per Frankfurter J. in Viteralli v. Seton 3 L.Ed. (2nd Series) 1012] Justice K.K.Mathew points out in his article on `The welfare State, Rule of Law and Natural Justice', which is to be found in his book `Democracy, equality and Freedom', that there is "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power wherever it is found". Adopting that formulation, Bhagwati J., speaking for the Court, observed in Ramana Dayaram, Shetty v. The International Airport Authority of India, [1979] 3 S.C.R. 1014,1032 that it is "unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officers should possess arbitrary power over the interest of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement".

Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "is this procedure reasonables implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case, In Francis Coralie Mullin, [1981] 2 S.C.R. 516, Bhagwati,J., Said :

> "... ... it is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise." (emphasis supplied,

page 524).

In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter. No one has the right to make use of a public property for a private purpose without the requisite authorisation and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavement by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and, even the pedestrians have but the limited right of using pavements for the purpose of passing and repassing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not intended and is not authorised so to use it, he becomes a trespasser. The common example which is cited in some of the English cases (see, for example, Hickman v. Maisey, [1900] 1 Q.B. 752, is that if a person, while using a highway for passage, sits down for a time to rest himself by the side of the road, he does not commit a trespass. But, if a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his user of the pavement would become unauthorised. As stated in Hickman, it is not easy to draw an exact line between the legitimate user of a highway as a highway and the user which goes beyond the right conferred upon the public by its dedication. But, as in many other cases, it is not difficult to put cases well on one side of the line. Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass. Section 61 of the Bombay Municipal Corporation Act lays down the obligatory duties of the Corporation, under clause (d) of which, it is its duty to take measures for abetment of all nuisances. The existence of dwellings on the pavements is unquestionably a source of nuisance to the public, at least for the reason that they are denied the use of pavements for passing and repassing. They are compelled, by reason of the occupation of pavements by dwellers, to use highways and public streets as passages. The affidavit filed on behalf of the Corporation shows that the fall-out of pedestrians in large numbers on highways and streets constitutes a grave traffic hazard. Surely, pedestrians deserve consideration in the matter of their physical safety, which cannot be sacrificed in order to accommodate persons who use public properties for a private purpose, unauthorizedly. Under clause (c) of section 61 of the B.M.C. Act, the Corporation is under an obligation to remove obstructions

upon public streets another public places. The counter-affidavit of the Corporation shows that the existence of hutments on pavements is a serious impediment in repairing the roads, pavements, drains and streets. Section 63(k), which is discretionary, empowers the Corporation to take measures to promote public safety, health or convenience not specifically provided otherwise. Since it is not possible to provide any public conveniences to the pavement dwellers on or near the pavements, they answer the nature's call on the pavements or on the streets adjoining them. These facts provide the background to the provision for removal of encroachments on pavements and footpaths.

The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by section 314 of that Act, which provides by clause (a) that the Commissioner may, without notice, take steps for the removal of encroachments in or upon ay street, channel, drain, etc. By reason of section 3(w), `street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by section 314 is fair and reasonable, we must first determine the true meaning of that section because, the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by

way of exemption and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

It was urged by Shri K.K.Singhvi on behalf of the Municipal Corporation that the Legislature may well have intended that no notice need be given in any case whatsoever because, no useful purpose could be served by issuing a notice as to why an encroachment on a public property should not be removed. We have indicated above that far from so intending, the Legislature has left it to the discretion of the Commissioner whether or not to give notice, a discretion which has to be exercised reasonably. Counsel attempted to demonstrate the practical futility of issuing the show cause notice by pointing out firstly, that the only answer which a pavement dweller, for example, can make to such a notice is that he is compelled to live on the pavement because he has no other place to go to and secondly, that it is hardly likely that in pursuance of such a notice, pavement dwellers or slum dwellers would ask for time to vacate since, on their own showing, they are compelled to occupy some pavement or slum or the other if they are evicted. It may be true to say that, in the generality of cases, persons who have committed encroachments on pavements or on other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities, that no person in his senses would opt to live on a pavement or in a slum, if any other choice were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum dwellings will see that they are the very hell on earth. But, though this is so, the contention of the Corporation that no notice need be given because, there can be no effective answer to it, betrays a misunderstanding of the rule of hearing, which is an important element of the principles of natural justice. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. For example, in the common run of cases, a person may contend in answer to a notice under section 314 that (i) there was, in fact, no encroachment on any public road, footpath or pavement, or (ii) the encroachment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public, or

(iii) time may be granted for removal of the encroachment in view of humane consideration arising out of personal, seasonal or other factors. It would not be right to assume that the Commissioner would reject these or similar other considerations without a careful application of mind. Human compassion must soften the rough edges of justice in all situation. The eviction of the pavement or slum dweller not only

> means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life. Humbler the dwelling, greater the suffering and more intense the sense of loss.

The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. (Kadish, "Methodology and Criteria in Due Process Adjudication - A Survey and Criticism," 66 Yale L.J. 319,340 [1957]. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. (Golberg v. Kelly, 397 U.S. 254, 264-65 [1970] right of the poor to participate in public processes).

> "Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experience at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to inter change express the elementary idea that to be a person, rather than a thing is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "Validity and moral authority of a conclusion largely depend on the mode by which it was reached..... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generation the feeling, so important to a popular government, that justice has been done". Joint Anti-fascist refugee Committee v. Mc Grath, 341, U.S. 123, 171- 172 (1951). At stake here is not Just the much- acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice", (See American Constitutional Law" by Laurence H. Tribe, Professor of Law, Harvard University (Ed. 1978, page 503).
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> The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed. "It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure participation than to use participation to assure accuracy."

Any discussion of this topic would be incomplete without reference to an important decision of this Court in S.L. Kapoor v. Jagmohan, [1981] 1 S.C.R. 746,766. In that case, the suppression of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since, no show cause notice was issued before the order of suppression was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference, the admitted or indisputable facts speaking for themselves. After referring to the decisions in Ridge v. Baldwin, [1964] A.C.40 at 68; John v. Reeas, [1970] 1 Chancery 345 at 402; Annamuthodo v. Oil fields Workers' Trade Union,[1961] 3 All E.R. 621 (H.L.) at 625; Margarita Fuentes at al. v. Tobert L.Shevin, 32 L.Ed. 2d 556 at 574; Chintepalli Agency Taluk Arrack Sales Cooperative Society Ltd. v. Secretary (Food & Agriculture) Government of Anadhra Pradesh, [1978] 1 S.C.R. 563 at 567,569-570, and to an interesting discussion of the subject in Jackson's Natural Justice (1980 Edn.) the Court, speaking through one of us, Chinnappa Reddy, J. Said:

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

These observations sum up the true legal position regarding the purport and implications of the right of hearing.

The jurisprudence requiring hearing to be given to those who have encroached on pavements and other public properties evoked a sharp response from the respondents counsel. "Hearing to be given to trespassers who have encroached on public properties? To persons who commit crimes?" they seemed to ask in wonderment. There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort. But, even the law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him. (See Ramaswamy Iyer's 'Law of Torts' 7th Ed. by Justice and Mrs. S. K. Desai, (page 98, para 41). Besides, under the Law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself. "Here, as elsewhere in the law of torts, a balance has to be struck between competing sets of values ..... " (See Salmond and Heuston, 'Law of Torts', 18th Ed. (Chapter 21, page 463, Article 185-'Necessity').

The charge made by the State Government in its affidavit that slum and pavement dwellers exhibit especial criminal tendencies is unfounded. According to Dr. P.K.Muttagi, Head of the unit for urban studies of the Tata Institute of Social Sciences, Bombay, the surveys carried out in 1972, 1977,1979 and 1981 show that many families which have chosen the Bombay footpaths just for survival, have been living there for several years and that 53 per cent of the pavement dwellers are self-employed as hawkers in vegetables, flowers, ice-cream, toys, balloons, buttons, needles and so on. Over 38 per cent are in the wage-employed category as casual labourers, construction workers, domestic servants and luggage carriers. Only 1.7 per cent of the total number is generally unemployed. Dr. Muttagi found among the pavement dwellers a graduate of Marathwada University and Muslim Post of some standing. "These people have merged with the landscape, become part of it, like the chameleon", though their contact with their more fortunate neighbours who live in adjoining high-rise buildings is casual. The most important finding of Dr. Muttagi is that the pavement dwellers are a peaceful lot, "for, they stand to lose their shelter on the pavement if they disturb the affluent or indulge in fights with their fellow dwellers". The charge of the State Government, besides being contrary to these scientific findings, is born of prejudice against the poor and the destitute. Affluent people living in sky-scrapers also commit crimes varying from living on the gains of prostitution and defrauding the public treasury to smuggling. But, they get away. The pavement dwellers, when caught, defend themselves by asking, "who does not commit crimes in this city ? As observed by Anand Chakravarti, "The separation between existential realities and the rhetoric of socialism indulged in by the wielders of power in the government cannot be more profound." 'Some aspects of inequality in rural India : A Sociological Perspective published in 'Equality and Inequality, Theory and Practice' edited by Andre Beteille, 1983.

Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the enroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted by us in an ample measure, both sides having mate their contentions elaborately on acts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. As observed in S.L. Kapoor, (Supra) "where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs . Indeed, in that case, the Court did not set aside the order of supersession in view of the factual position stated by it. But, though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which, we believe, he would or should have passed, had he granted a hearing to them and heard what we did. We are of the opinion that the petitioners should not be evicted from the pavements, footpaths or accessory roads until one month after the conclusion of the current monsoon season, that is to say, until October 31, 1985. In the meanwhile, as explained later, steps may be taken to offer alternative pitches to the pavement dwellers who were or who happened to be censused in 1976. The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made, though we do not propose to make it a condition precedent to the removal of the encroachments committed by them.

Insofar as the Kamraj Nagar Basti is concerned, there are over 400 hutments therein. The affidavit of the Municipal Commissioner, Shri D.M.Sukhthankar, shows that the Basti was constructed on an accessory road, leading to the highway. It is also clear from that affidavit that the hutments were never regularised and no registration numbers were assigned to them by the Road Development Department. Since the Basti is situated on a part of the road leading to the Express Highway, serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city.

The affidavit of Shri Arvind V. Gokak, Administrator of the Maharashtra Housing and Areas Development Authority, Bombay, shows that the State Government had taken a decision to compile a list of slums which were required to be removed in public interest and to allocate, after a spot inspection, 500 acres of vacant land in or near the Bombay Suburban District for resettlement of hutment dwellers removed from the slums. A census was accordingly carried out on January 4, 1976 to enumerate the slum dwellers spread over about 850 colonies all over Bombay. About 67% of the hutment dwellers produced photographs of the heads of their families, on the basis of which the hutments were numbered and their occupants were given identity cards. Shri Gokak further says in his affidavit that the Government had also decided that the slums which were in existence for a long time and which were improved and developed, would not normally be demolished unless the land was required for a public purposes. In the event that the land was so required, the policy of the State Government was to provide alternate accommodation to the slum dwellers who were censused and possessed identity cards. The Circular of the State Government dated February 4, 1976 (No. STS/176/D-41) bears out this position. In the enumeration of the hutment dwellers, some persons occupying pavements also happened to be given census cards. The Government decided to allot pitches to such persons at a place near Malavani. These assurance held forth by the Government must be made good. In other words despite the finding recorded by us that the provision contained in section 314 of the B.M.C. Act is valid, pavement dwellers to whom census cards were given in 1976 must be given alternate pitches at Malavani though not as a condition precedent to the removal of encroachments committed by them. Secondly, slum dwellers who were censused and were given identity cards must be provided with alternate accommodation before they are evicted. There is a controversy between the petitioners and the State Government as to the extent of vacant land which is available for resettlement of the inhabitants of pavements and slums. Whatever that may be, the highest priority must be accorded by the State Government to the resettlement of these unfortunate persons by allotting to them such land as the Government finds to be conveniently available. The Maharashtra Employment Guarantee Act, 1977, the Employment Guarantee Scheme, the 'New Twenty Point Socio-Economic Programme, 1982', the 'Affordable Law Income Shelter Programme in Bombay Metropolitan Region' and the Programme of House Building for the economically weaker sections' must not remain a dead letter as such schemes and programmes often do. Not only that, but more and more such programmes must be initiated if the theory of equal protection of laws has to take its rightful place in the struggle for equality. In these matters, the demand is not so much for less governmental interference as for positive governmental action to provide equal treatment to neglected segments of society. The profound rhetoric of socialism must be translated into practice for, the problems which confront the State are problems of human destiny.

During the course of arguments, an affidavit was filed by Shri S.K.Jahagirdar, Under Secretary in the Department of Housing, Government of Maharashtra, setting out the various housing schemes which are under the consideration of the State Government. The affidavit contains useful information on various aspects relating to slum and pavement dwellers. The census of 1976 which is referred to in that affidavit shows that 28.18 lakhs of people were living in 6,27,404 households spread over 1680 slum pockets. The earning of 80 per cent of the slum house holds did not exceed Rs.600 per month. The State Government has a proposal to undertake 'Low Income Scheme Shelter Programme' with the aid of the World Bank. Under the Scheme, 85,000 small plots for construction of houses would become available, out of which 40,000 would be in Greater Bombay, 25,00 in the Thane-Kalyan area and 20,000 in the New Bombay region. The State Government is also proposing to undertake 'Slum Upgradation Programme(SUP)' under which basic civic amenities would be made available to the slum dwellers. We trust that these Schemes, grandiose as they appear, will be pursued faithfully and the aid obtained from the World Bank utilised systematically and effectively for achieving its purpose.

There is no short term or marginal solution to the question of squatter colonies, nor are such colonies unique to the cities of India. Every country, during its historical evolution, has faced the problem of squatter settlements and most countries of the under-developed world face this problem today. Even the highly developed affluent societies face the same problem, though with their larger resources and smaller populations, their task is far less difficult. The forcible eviction of squatters, even if they are resettled in other sites, totally disrupts the economic life of the household. It has been a common experience of the administrators and planners that when resettlement is forcibly done, squatters eventually sell their new plots and return to their original sites near their place of employment. Therefore, what is of crucial importance to the question of thinning out the squatters' colonies in metropolitan cities is to create new opportunities for employment in the rural sector and to spread the existing job opportunities evenly in urban areas. Apart from the further misery and degradation which it involves, eviction of slum and pavement dwellers is an ineffective remedy for decongesting the cities. In a highly readable and moving account of the problems which the poor have to face, Susan George says: ('How the other Half Dies The Real Reasons for World Hunger' (Polican books).

> "So long as thorough going land reform, re- grouping and distribution of resources to the poorest, bottom half of the population does not take place, Third World countries can go on increasing their production until hell freezes and hunger will remain, for the production will go to those who already have plenty to the developed world or to the wealthy in the Third World itself. Poverty and hunger walk hand in hand ."(Page 18). We will close with a quotation from the same book which has a massage:
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> "Malnourished babies, wasted mothers, emaciated corpses in the streets of Asia have definite and definable reasons for existing. Hunger may have been the human race's constant companion, and 'the poor may always be with us', but in the twentieth century, one cannot take this fatalistic view of the destiny of millions of fellow creatures. Their condition is not inevitable but is caused by identifiable forces within the province of rational, human control". (p.15) To summarise, we hold that no

person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear- marked for a public purpose like, for example, a garden or a playground; that the provision contained in section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that, the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purposes, in which case, alternate sites or accommodation will be provided to them, the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and, the Slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31,1985 and, thereafter, only in accordance with this judgment. If any slum is required to be removed before that date, parties may apply to this Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz. October 31, 1985.

The Writ Petitions will stand disposed of accordingly. There will be no order as to costs.

M.L.A. Petitions disposed of.