

**(1990) 07 BOM CK 0031**

**In the Bombay High Court**

**Case No :** Letters Patent Appeal No. 87 of 1990 In First Appeal No. 108 of 1987  
In First Appeal No. 108 of 1987 In Bombay City Civil Court Suit No.  
6890 of 1983

Youth, for Unity and Voluntary Action (YUVA)

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

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**Date of Decision :** 10-07-1990

**Acts Referred:**

Bombay Revenue Jurisdiction Act, 1876 — Section 11

Constitution of India, 1950 — Article 14, 226, 32

Maharashtra Land Revenue Code, 1966 — Section 50

**Citation :** AIR 1991 Bom 60 : (1990) 3 BomCR 476 : (1990) 92 BOMLR 411 :  
(1991) 1 MhLj 504

**Hon'ble Judges :** C. Mijerhee, C.J;S.P. Bharucha, J

**Bench :** Division Bench

**Advocate :** M.M. Vashi, P.D. Oka, R.D. Dhanuka, for the Appellant; V.A. Gangal,  
N.M. Kachare, Assistanat Govt. Pleaders and L.C. Chogle, for the Respondent

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## Judgement

Bharucha, J.—This Letters Patent Appeal impugns the orders passed by Sharad Manohar J. on 7th March, 1990 and 7th April, 1990 while the First Appeal (F.A. No. 108 of 1987) was pending before him. Thereby he ordered the demolition of hutments in certain areas. This appeal is filed by a social welfare organisation which was an intervener in the First Appeal. The First Appeal had been converted by the learned judge into a public interest litigation.

2. The impugned orders came to be passed in the following circumstances : A suit (being Suit No. 6890 of 1985) was filed by the plaintiff against the State of Maharashtra in the City Civil Court at Bombay for a declaration that notices issued to him by the TehsiS-dar(ENC), Kurla, were not binding upon him and for a permanent injunction restraining the State Government from demolishing his structure at Azad Nagar, Ghatkopar, pursuant to such notices. The Notice of Motion taken out by the plaintiff for interim relief was heard and disposed of by Judge Thube on 2nd December, 1986. In his order the Judge noted the case in

the plaint and the contention raised by the State Government that in view of Section 11 of the Bombay Revenue Jurisdiction Act, 1976, the Court had no jurisdiction to entertain and try the suit because the plaintiff had not exhausted all remedies available to him under the Maharashtra Land Revenue Code. The learned Judge, therefore, framed and tried as a preliminary issue the issue of the Court's jurisdiction. On behalf of the State Government reliance was placed upon a judgment of Pratap J. (in A. O. No. 593 of 1986) delivered on 7th August, 1986 in which also a notice u/s 50 of the Maharashtra Land Revenue Code was under challenge and it was held that the Court had no jurisdiction to entertain the challenge until the plaintiff had exhausted all remedies by way of appeals under the Code. Judge Thube rejected the argument on behalf of the plaintiff that the notices impugned in his suit were not u/s 50 of the Code and held that he was bound by the judgment of Pratap, J. He decided the issue as to jurisdiction against the plaintiff and rejected the plaint. There against the plaintiff preferred the First Appeal.

3. On 22nd March, 1988 the First Appeal reached hearing before Sharad Manohar, J. Counsel on behalf of the plaintiff told the Court that the plaintiff had "no title as such to the land in question....." The learned Judge granted an adjournment to the plaintiff and directed the Assistant Government Pleader "to satisfy the Court as to whether the Policy of the Government, as referred to by Mr. Holmagi, to regularise the unauthorised character of the encroachers and trespassers in fact does or does not exist and, if it exists, the legality and constitutionality of that Policy. If necessary, the Government will be at liberty to file an appropriate affidavit in this behalf." The learned Judge appointed the Court Receiver of the land in question and the plaintiff as the Receiver's agent.

4. On 29th June, 1988 the First Appeal reached hearing again before the learned Judge. He observed that he looked "upon such policy, if there exists any, with grave acceptance.... It would appear, at least prima facie that the public lands and Government lands are not the properties to be gifted away by the Government to grabbers and en-croachers. Under the Land Revenue Code, by and large subject to certain exceptions the entire land in the State of Maharashtra vests in the State Government; but that does not mean that the State Government can go about gifting away the pieces of land to trespassers and encroachers; and if a particular act is wrong till a particular date, the same cannot be, prima facie, converted into a rightful thing by its retrospective "regularisation". It would appear, at least prima facie, that it would be open for the Government to earmark certain land for rehabilitation of certain classes of people; but, in the first place, that has got to be done according to a particular settled policy and, in the second place, such act cannot be done in violation of the provisions of the relevant Town Planning statutes. I make it clear that I do not wish to express my final opinion on this point; but the question is of great public importance having bearing upon the State Government's powers to pass orders flying in the face of the literal legis and sententio legis of the relevant Town Planning statutes and allied statutes."

5. Being dissatisfied with the response of the State Government the learned Judge on 27th July, 1988 issued a summons to the Secretary, Law Department, as well as the Secretary, Housing Department.

6. On 4th August, 1988 the learned Judge stated that "today when the matter came up for hearing and for receiving information from the Secretary on this point, all that is done by the Secretary is to depute an Under Secretary to flourish before the Court the same policy decision regarding the slum clearance. The question of slum clearance does not arise in the remotest possible manner in this appeal. Nobody has asked the Government about their policy regarding slum clearance. The relevant issue is about the unauthorised hutments and constructions on the Government and Municipal lands and that issue is being dodged and evaded." The State Government was given time to file affidavit on or before 10th August, 1988 failing which, the learned Judge stated, appropriate proceedings, including contempt proceedings, might be taken.

7. On 25th August, 1988 the learned Judge said this: "An issue of momentous importance arises in this Appeal. Some day or the other, this High Court has got to decide this issue. The issue relates to:

(a) whether the Government has formulated any policy which authorises its officers to tolerate certain unauthorised and illegal constructions in the city of Bombay in blatant violation, at least prima facie, of the word and spirit, expression and implication of the Town Planning Legislation;

(b) if any such policy is formulated, the power of the Government to formulate such policy.

In the suit, of which the above Appeal arises, a 3rd question is raised-

(c) whether the plaintiff can claim himself legitimately to be falling within the letter and intent of the policy so as to claim protection from the same.

2. The 1st question (a) and the 3rd question (c) require certain amount of evidence. In the instant suit, out of which the present appeal arises, these questions were not originally raised by the plaintiff and the suit has been dismissed by rejection of the plaint on the ground that the suit is not maintainable in law. The view may or may not be correct. That will be a question calling for a decision of this Court at the time of the final hearing of the appeal with which I am no doubt seized at present. But in my opinion, it will be better if the appeal is heard on all the questions involved therein. The above two questions, viz. the questions (a) and (c) require some kind of leading of evidence and appreciation of the evidence by the trial Court when it is led before it." Counsel for the plaintiff then applied for leave to amend the plaint so that issues could be raised and evidence recorded and the learned Judge permitted the amendment. By that amendment, which was carried out, it was alleged that the State Government had formulated a policy whereby structures existing on Government land prior to 1976 were regularised, pitch holders cards were issued

and rent collected. The plaintiff claimed protection under that policy. The State Government was given time to file a written statement in answer to amended plaint and the City Civil Court was directed to frame the requisite additional issues.

Issues were framed and they read thus :

"(1) Whether the Plaintiff proves that the Defendants have formulated the policy with regard to the unauthorised structures as averred by him in para 4(a) of the Plaint?

(2) If issue No. 1 is answered in the affirmative, whether the plaintiff proves that he falls in the category of the beneficiaries of the policy and is, as such, entitled to the benefit of the said policy?

(3) If the answer to issue No. 1 is in the negative, whether the plaintiff proves that he is entitled to the benefit of the policy formulated by the Defendants in 1980 as set out by them in paragraph (b) of their Additional Written Statement?"

Evidence was recorded by Judge Gupta of the City Civil Court. He then made a report stating that the first and third issues were answered in the negative and that no answer to the second issue was required in view of the answer to the first.

8. When the report of Judge Gupta was placed before Sharad Manohar, J. on 8th August, 1989 a paper book was directed to be prepared containing all relevant papers. On 27th September, 1989, the paper book having been prepared, Mr. Kachare, A.G.P., told Sharad Manohar, J. that the "questions of law and Constitution involved in the appeal" could now be set down for hearing. Mr. Kachare agreed "that the questions involved are of grave public importance and quite some important legal and constitutional questions, the decision on which will have a far reaching effect.

The Court is alive to this situation.

4. In view of the gravity of the questions involved and in view of the fact that they are of grave public importance, involving interpretation of various statutes having bearing upon the law of Town Planning and the power of the Government to make changes in the various Plans which, as per the total view of the findings recorded by the lower Court, is being done in an ad hoc manner, it is necessary that a notice should issue to the Advocate General.

5. The office is directed to issue notice to the Advocate General requesting him to appear and to help the Court at the time of the hearing. The Advocate General should be informed that the Court expects him to appear in his capacity as the Advocate General and not only as a Counsel appointed by the Government to support the Government."

9. On 4th December, 1989 the learned Judge said :

"1. This litigation has taken a peculiar turn. Certain findings were called for from the trial Court. The learned Judge has examined the entire matter from various stand points and has recorded certain serious findings. The major task before the Court will be to decide the dispute now existing between the parties, inter alia, on the basis of those findings. However, it goes without saying that parties will be at liberty to address the Court also on other relevant aspects of the question, if any, in addition to those to which this Court has hitherto addressed.

In short, this litigation now partakes virtually the character of a public interest litigation."

The learned Judge recorded that the Advocate General would take a dispassionate view of the matter. .... However, in spite of the above mentioned position, it is in social interest that others who want to address the Court on the legal and constitutional issuance arising in these proceedings should have a reasonable opportunity to put them before the Court so as to mould the Court's judgment by the principles of real justice."

10. On 14th December, 1989 the office of the Court was directed to send a press note to the Times of India, Indian Express, Maha- rashtra Times, Loksatta and Daily which stated, inter alia, the following:

"A large number of interveners have intervened, most of them supporting the findings recorded by the learned Judge, Shri Gupta, and showing their opposition to the declared Government Policy of regularisation. However, there are also some other interveners, who want to contend that there does exist such Policy and they also want to justify the validity of the Policy. All of them have been allowed to intervene." Proposing interveners were called upon to comply with the directions therein stated.

11. On 20th December, 1989, upon the suggestion of the Advocate General, notices were directed to be given to (i) The Bombay Municipal Corporation (ii) The Pune Municipal Corporation (iii) The Nasik Municipal Corporation (iv) The Nagpur Municipal Corporation (v) The Nagpur Improvement Trust Corporation (vi) The Aurangabad Municipal Corporation (vii) The Panvel Municipal Council (viii) The Maharashtra Housing and Area Development Authority and (ix) The Bhoisar Village Panchayat to appear before the learned Judge to present their view point. On that day the learned Judge recorded the assurance given by the Advocate General that he would make his submission on the following lines:

"(i) The legal provisions having bearing upon the question of "regularisation" of the occupation of Government lands and Corporation lands and lands belonging to the public authorities which occupation is in violation of statutory provisions.

(ii) The power of the Government to issue directions to the Corporation, Municipal Councils and other Statutory Authorities in pursuance of the so called "policies" or in relation to the Town Development and extent to which the directions of the Government can have a binding effect upon the various

statutory Corporations and Authorities. The legal and constitutional meaning and result of their conduct stemming from their belief that the Government directives are binding upon them, if they are, in law and Constitution, not binding.

(iii) The legal and constitutional provisions having bearing upon the above.

(iv) The authorities having bearing upon the various questions involved."

12. On 15th January, 1990 the learned Judge directed the Municipal Corporations and other public institutions who were served with notices to file written arguments on the factual position which they intended to present, their submissions on legal and constitutional aspects "and "the remedies that they would suggest as solution to the problem which is no longer legal and constitutional problem but also a socio economic (not to mention human) problem;"

13. On 19th February, 1990 the learned Judge clarified that the question to be considered fell into three categories, viz., "(a) whether any such policy exists; (b) whether the policy is valid and constitutional; (c) if the policy does not exist and / or what exists is not a valid or constitutional policy, what the Court can and should do about the entire problem." The learned Judge formulated "Points for Initial Decisions" which read thus:

" 1. Whether there exists a Policy laid down by the Government, as alleged by the plaintiff, by virtue of which Policy persons like plaintiff encroaching upon the Government lands or other public lands without any right to it are assured protection by the Government for unimpeded use and occupation of the land for all the times or for any particular time.

2. If such Policy exists, where is it located? (a) C.R.? (b) Notification? (c) Circular? (d) White Paper?

3. If such Policy exists, what is the nature of the Policy? Does it relate to protection of occupation (i) for residence only, or (ii) for business, commerce and industry also? (iii) does it extend and apply only to the genuine poor or also to those who cannot be said to be poor.

4. If the Policy exists, what is the source of the Policy (a) in Constitution? (b) in Statutes? (c) in Rules validly made under any of the Statutes?

5. If the Policy exists (a) Is it constitutional with reference to Article 14 ? (b) Is it in keeping with the basic structure of the Constitution? (c) Does it constitute a fraud upon the various laws of the State's own making such as the Maharashtra Land Revenue Code and the various laws relating Town and Regional Planning and also upon the Constitution as alleged, by some social workers and intellectuals?

6. By and large it is the recognised position that cities like Bombay are on the brink of the precipice, waiting only for the last straw on the camel's back in

various senses intelligible to the Courts and intellectuals. Courts have been taking judicial notice of this phenomenon.

7. If this is correct, and if no such Govt. Policy exists or if it does exist, in whatever form, it is unconstitutional -- can and should anything be done by the High Court in its justice delivery process?

8. What can and should be the nature of the judicial process?"

14. Notices were issued by the order dated 20th February, 1990 to the Nagpur Improvement Trust, the Nagpur Municipal Corporation, the Maharashtra Housing and Area Development Authority and the Bombay Metropolitan Regional Authority. On that day the learned Judge recorded that the Bombay Municipal Corporation and the Nagpur Municipal Corporation had refrained from appearing before him and recorded that the Advocate General had asked him to ensure their presence. He, therefore, passed an order giving them a last opportunity and stated, "In case they choose not to pay heed even to this order, the other coercive order may have to be passed."

15. On 28th February, 1990 we find for the first time appearances recorded of the interveners in C.A. No. 5994 of 1989 and C. A. No. 907 of 1990, viz., the Relief Road Housing Societies Association and the Bandra Reclamation Residents Association respectively. In regard to them the learned Judge directed the Advocate General and Mr. Gan-gal, A.G.P., thus: "(i) Both the learned Advocate General and the Assistant Government Pleader will be looking personally into the position arising in Civil Application No. 5993 of 1989 and inform the Court as to the nature of the problem and the remedies that can be evolved in that behalf, by tomorrow or by day after tomorrow. (ii) Similarly, immediately after examining the above question, both the learned Advocate General as well as the Assistant Government Pleader will look into the question relating to the Bandra Reclamation land which is the subject-matter of Civil Application No. 907 of 1990 and report to the Court the nature of the problem and to what can be done in that behalf immediately." The learned Judge stated that on the very next day the following questions would be examined: "Report on the nature of the problem and the remedies to the same in connection with lands which are the subject-matter of Civil Applications Nos. 907 of 1990 and 5993 of 1989". On the same day the office of the Court was directed to ask the Additional Municipal Commissioner Mr. Venkat Chari to be present in Court and place before it the list of names of all hutment dwellers at the places which were the subject-matter of Civil Applications Nos. 5994 of 1989 and 907 of 1990. The list should make a classification of those whose names appeared in the voters' list of the year 1985 and those whose names did not. It should also mention whether the names of the occupants found a place in the 7/12 register. The learned Judge then stated: "The Government shall place before the Court the G. R. of the year 1989 by virtue of which protection is sought to be given to the illegal and unauthorised hutment dwellers and slum dwellers, whose names find place in the Voters' List of 1985. 2. The Advocate General states that the question of validity of the said

G. R. may be examined by the Court in these proceedings.

After the list is placed before the Court, the Court will pass appropriate orders in respect of the notices of eviction to be given to some or all of the unauthorised hutment dwellers as per the Rules under the Town Planning Act and/or the Bombay Municipal Corporation Act and/or as per the principles of natural justice."

16. The next order, of 7th March, 1990, is the subject of challenge in this appeal. It said: "Mr. Chogle and Mr. Dhakephalkar apply to the Court that the encroachment made on the lands at Backbay Reclamation, particularly those which are of the recent origin of not more than even 15 days have got to be removed by the Collector as also by the Municipal Corporation summarily and immediately. Submission is that the Collector has got power not only to remove such encroachments on Government lands, but has the power as well as the duty to prevent such encroachments and as a matter of this process of prevention it is necessary that all those persons"who have sought to pitch their ugly tents upon the Government lands or the municipal lands should be directed to be removed by the authorities forthwith or else the rot will never stop.

The learned Advocate General strongly urged that this would be correct step to be taken in order to stop further rot of this city.

The applicants and the learned Advocate General say that so far as the Corporation is concerned, the Corporation's power u/s. 55 and the duty linked up with that power is so wide that urgent action is not only an imperative but also very much possible within the four corners of law. In this connection, the learned Advocate General relied upon the Judgment of the Supreme Court in the Olga Tellis case and pointed out that even the Supreme Court did not contemplate issuance of show cause notices in cases where the possession of the miscreants was not a settled possession. Moreover, he argued that the situation has reached such a pass that emergent steps to be taken "brook no delay", as is the expression employed by the S.C. .... Anyone who cares to have even a glance at the slums Or pavement dwellings will see that they are the very hell on earth and, what is worse, they inevitably convert even the adjacent area inhabited by law abiding citizenry desirous of living a decent life into a veritable hell. It requires no special affidavit for the Court to realise that the position since the date of that Judgment has deteriorated itself immeasurably so much so that not only a firm action has got to be resorted to, but it has got to be realised that firm action "brooks no delay". .... In Olga Tellis case the S. C. was dealing with the right of the people for indulging in pavement dwelling and the entire question was being examined from the stand point of their title to the land over which they were squatting. The S.C. held that even after you come to the prima facie conclusion that those poor persons could not be having any kind of title to the land to make any use of it, it wanted the Corporation to give them some kind of hearing so that they could show some right or interest over the land. Such a consideration, in my opinion, practically has no relevance when the Corporation passes the order not with reference to the pavement dwellers or hutment

dwellers but by reference to cleanliness, decency and health of the city. The Corporation sees that the growth is cancerous and the growth has got to be removed not with a view to cause any harassment to the persons who have no place to live in but to save the city as a whole from being ruined by growth of the cancer. The entire approach is different..... It will be, therefore, possible to distinguish the judgment and hold that the Corporation and the Government should proceed even without giving any show cause notice. .... All the same, the Court would like to play safe and hence, the Collector and the Municipal Corporation are hereby directed to issue notices to all the persons to show cause as to why their hutments should not be removed forthwith. In this connection, the Collector and the Corporation can take advantage, for the present, of the Government Policy declaring that hutment dwellers after 1985 would be protected. The Court makes it clear that it is a far cry from saying that this Court finds any legal justification in that policy. That action will be decided by the Court in due course. But even assuming that this is a valid Policy formulated by the Govt., and is not free from mala fides, even according to the Government all those persons who have committed offences upon the Town Planning legislation after 1985 have got to be removed.

The Corporation shall, therefore, give notices to all of them and fix the date of hearing of the same..... The notices need not be issued personally. The notices can be issued by beat of drums and also by displaying them at conspicuous places on the sites in question. ....

It goes without saying that hearing shall be the real hearing in the eye of law and not a just formality because hearing is meaningless if it is done only as a matter of formality.

The hearing shall be on two questions. By Collector, the hearing will be as to by what right the persons are occupying the Government land or Housing Board Land. By Corporation, hearing will be on the question as to by what right they constructed the huts upon the land in violation and contravention of the Building Rules and Development Rules and in violation of the general provisions of the MRTP Act so far as the Government lands and Housing Board lands are concerned. So far as the Corporation lands are concerned, the hearing to be given by the Corporation will be on three points :

- (a) as to by what right they were occupying the Corporation's land;
- (b) in violation and contravention of the Building Rules and Development Rules;
- (c) in violation of general provisions of the MRTP Act.

It is made clear that though hearing shall be about either point, it shall be summary hearing and a mass hearing as suggested by the Supreme Court in *Olga Tellis* case.

From the very nature of things, it is improbable that any of these such hutment dwellers who started occupying the land as late as after 1985 will have any

answer to any of the questions mentioned above but if Collector or Corporation finds that any particular person or group of persons have any considerable defence within the framework of law, the Municipal Commissioner or Collector shall refer the particular question raised by particular individual or group of individuals to this Court and the same shall be heard by this Court on 24th March, 1990 by holding special proceedings in this Court in that behalf, provided the hutment dwellers in question are agreeable to the question being examined by this Court after giving them a due hearing in this Court. If they do not want any such hearing on that particular day, the Collector, Commissioner or his delegate shall pass orders against them on the basis of provisions of the MRTP Act.

It is made clear that this order refers to the two places of encroachment viz. those which are the subject-matter of Civil Application No. 5993/89 and Civil Application No. 907/ 90. ....

Since this is a public interest litigation" and the interest of the entire city are at stake and, as argued by Mr. Matai rightly, the very justice delivery process in this country quite frequently operates as a spoke in the wheel of the delivery of justice by the random orders of stay granted by the subordinate Courts. It is, therefore, hereby ordered that no Civil Court or Criminal Court in the City, excepting the High Court, shall entertain any application for stay or injunction against any action of the Collector and Corporation taken in pursuance of the above order as also against the other Post-1985 hutments. If a suit is filed or any other proceeding is instituted, an injunction or any preventive relief is sought for against the Corporation or the State Government, the Court concerned shall refer the party to this Court, which shall decide the question on merits, in accordance with the exigency of time and provisions of law."

17. By another order dated 7th March, 1990 letters of request were ordered to be issued to Mr. Afzalpurkar, Secretary in the G.A.D., and to Mr. Agarwal, Secretary to the Department of Housing to remain present in Court with all the documents which had a bearing upon the "policy of the Government of what the Government terms as "regularization" of the unauthorised hutments in the City of Bombay."

It appears that there was some news item in the issue of "Mid-Day" of 7th March, 1990 and the Court's attention was drawn thereto. The learned Judge said: "The Court has taken serious notice of this position and will take appropriate action, if necessary, in due course against such land grabbers; but for the present the Collector of Bombay, Commissioner of Police as also the Municipal Commissioner are hereby directed to take every action against the land grabbers and encroachers and they are hereby directed to remove all such persons who have been trying to take law in their own hands and have been trying to encroach upon the public land at the place and in the manner referred to in the said news item. A xerox copy of the news item shall be sent to three authorities and they are directed to take action as aforesaid immediately and

report compliance to this Court in chamber on Saturday, the 10th March, 1990 at or before 4 p.m."

On 9th March, 1990 the learned Judge examined Mr. Tinaikar, Municipal Commissioner. He answered some questions put by the Court and he made certain submissions to the Court.

18. On 7th April, 1990 were passed the other orders impugned in this appeal. The learned Judge read the Collector's report "showing that he has held the requisite enquiry and given the necessary hearing.

It is hereby ordered that the Collector shall be under obligation to do the following :

(1) After consideration of the entire question, the Court is satisfied that in this matter some rough and ready test has to be applied as regards the question whether the particular unauthorised dweller has been in occupation of a particular unauthorised hut before May, 1985 or not. The Court is going to examine the question as to whether even those who were in occupation of the unauthorised hutments before 1985 are entitled to the particular protection or not. But that question will be decided in a short time. Till that time it is decided that all those unauthorised occupants who have come on the scene after April, 1985 (about whose removal Government has implicitly taken a policy decision or about whose removal the Government can, at least, have no excuse must be summarily removed).

The only test that can be applied, which may perhaps be described as rough and ready test but, which is inevitable in the given circumstances, is the test of the name of the particular person being in the Voters' List of 1985, or not. It is, therefore, ordered that all the said unauthorised occupants whose names do not find place in the 1985 Voters' List shall be summarily removed. Such persons will not be entitled to any alternate accommodation at least for the present.

(2) If in any particular hutment locality, part of the occupants are of pre-1985 period (their names being in the Voters' List) and remaining being of post 1985 period, their names not being in the 1985 Voters' List, all of them shall be removed from the locality and entire locality shall be completely cleared of unauthorised occupants. However, the Collector shall see to it that alternate accommodation shall be offered to those unauthorised occupants whose names find place in 1985 Voters' List.

(3) After the locality is cleared of all the unauthorised hutments, the Government shall ensure and see to it that no repetition of encroachment results on the land which is cleared by this exercise. The Government will take stringent steps to ensure strict compliance with the above order."

The learned Judge was assured that the work of removal of all hutments would start from about 20th April, 1990. The Court stated: "This order particularly relates to Bandra Reclamation Encroachment covered by Civil Application No.

1907 of 1990.

As regards Daulatnagar encroachment, action shall be taken on identical line and compliance shall be reported on 30th April, 1990."

On the same day yet another order, was passed which read thus: "The Assistant Government Pleader and the Additional Collectors have placed before a chart showing eight pockets from which the unauthorised growth and hutments have got to be removed posthaste. The learned Government Pleader explained the urgency.

It is, therefore, ordered that the above mentioned order relating to the summary removal of unauthorised occupants and hutment dwellers shall apply with same force and in the same manner to the said eight sites mentioned in the chart.

Since expeditious action is the essence of the matter authorities concerned are directed to swing into action and compliance report shall be submitted before 30th April, 1990. The chart is taken on record."

It is not necessary to go into details about subsequent hearings, which have continued.

19. In April, 1990 three writ petitions were filed on the Original Side of this Court being Writ Petitions Nos. 1371 of 1990, 1451 of 1990 and 1660 of 1990, impugning notices given and actions taken pursuant to the orders of Sharad Manohar, J. dated 7th March, 1990 and 7th April, 1990 and a stay was granted. On the next day this Letters Patent Appeal was admitted.

By the time the stay order became effective some six hundred hutments had been demolished in pursuance of the impugned orders.

20. We have heard, in support of the appeal, Mr. M. M. Vashi, learned counsel for the appellants, Ms. Indira Jaisingh, learned counsel for the petitioners in COCJ Writ Petition No. 1451 of 1990, Olga Tellis v. State of Maharashtra and Mr. Colin Consalves, learned counsel for the petitioners in COCJ Writ Petition No. 1660 of 1990, Nivara Hakk Suraksha Samiti v. State of Maharashtra. We have heard Mr. V. A. Gangal, Assistant Government Pleader, Mr. L. C. Chogle, learned counsel for the Relief Road Housing Societies Association, the intervener in C.A. No. 5993 of 1989, Mr. R. D. Dhanuka, learned counsel for the Bandra Reclamation Residents Association, the intervener in C.A. No. 907 of 1990, and Mr. P.O. Oka, Advocate, an intervener in person. We have heard the Advocate General who appeared to assist Sharad Manohar, J. at his request.

21. It was contended on behalf of the appellants that Sharad Manohar, J. had no jurisdiction to pass the impugned orders of 7th March and 7th April, 1990. On the other side it was contended that the learned. Judge had converted the First Appeal into a public interest litigation and had, therefore, the jurisdiction to pass the impugned orders.

22. It is necessary to go back to the commencement of the hearing of the First

Appeal before Sharad Manohar, J. to decide the issue of his jurisdiction to pass the impugned orders.

23. It will be remembered that Judge Thube of the Bombay City Civil Court had held that the notice to the plaintiff was issued under S. 50 of the Maharashtra Land Revenue Code; that the plaintiff had not exhausted the remedies there against under the said Code; that, therefore, following a judgment of Pratap, J., a Civil Court had no jurisdiction to entertain the plaintiff's suit. Accordingly, Judge Thube had rejected the plaint. The First Appeal was preferred against Judge Thube's order. The question in the First Appeal, therefore, was : was the notice issued to the plaintiff under S. 50 of the said Code. If it was not, the appeal had to be allowed and the plaint restored to the file of the City Civil Court. If, on the other hand, the notice was found to have been issued under S. 50 of the said Code, the judgment of Pratap, J. was binding and the First Appeal had to be dismissed; unless, of course, the Judge hearing it disagreed with the judgment of Pratap, J., in which case he would refer to a larger bench the question involved.

24. But Sharad Manohar, J. at the initial stage of the First Appeal made it clear that he wanted to be satisfied that the State Government's policy under which the plaintiff sought protection existed and that it was valid in law. That order, dated 22nd March, 1988, and later orders left no doubt that he looked "upon such policy, if there exists any, with grave scepticism".

25. It appears that the affidavit of the Tahsildar before the City Civil Court was rather loosely worded and it may have given the impression that no policy as contended by the plaintiff existed. The issue that was raised in that behalf might have been justified at the hearing of the suit, had the plaint been restored to the file. But the question of the legality of the State Government's policy did not and could not arise either in the suit or in the First Appeal because the plaintiff claimed the benefit thereof and could not assert that it was illegal and the State Government could not be heard to urge that the policy formulated by it was illegal.

26. Judge Gupta found in his report that the plaintiff had not proved that the State Government had formulated a policy with regard to unauthorised structures as averred by him and that he had also not proved that he was entitled to the benefit of the policy formulated by the State Government in 1980, as set out in the additional written-statement filed before him under the direction of Sharad Manohar, J.

At the stage of consideration and acceptance of the report made by Judge Gupta, the First Appeal ought to have been dismissed because the plaintiff had failed to prove that there was a policy that protected him. But, apparently with the approval of Assistant Government Pleader who then appeared before him, Sharad Manohar, J. found that "the questions involved were of "grave public importance" and "quite some important legal and constitutional questions" arose,

the decision on which would have a far-reaching effect. The learned Judge asked the Advocate General to assist him. He directed notices to be issued to the Municipal Corporation of Bombay and various other cities and other public authorities to appear before him and, when some failed to do so, threatened coercive orders. He ordered public notices to be given in the newspapers inviting members of the public to intervene and address him on the "Points Formulated for Initial Decisions", which have been quoted above.

Pursuant to these notices in the newspapers, the Relief Road Housing Societies Association (representing housing societies in Daulat Nagar, Santacruz, Bombay), by Civil Application No. 5993 of 1989, and the Bandra Reclamation Residents Association, by Civil Application No. 907 of 1990, applied and were permitted to intervene. On 28th February, 1990 the learned Judge recorded that the Assistant Government Pleader and the Advocate-General would look into the position in regard to the areas of these two interveners and would inform the Court as to the nature of the problem and the remedies that could be evolved in that behalf, and that this would be looked into by the Court on the very next day. On the same day, by another order, the learned Judge directed the office to request the Additional Municipal Commissioner to remain present in Court with a list of the names of all the hutment dwellers in the area which were the subject matter of the said two Civil Applications.

27. On 7th March, 1990, the first of the orders impugned in this appeal was passed. Counsel on behalf of the said two interveners tell us that they applied that encroachments made on the lands covered by their Civil Applications should be demolished. The learned Judge observed that "anyone who cared to have even a glance at the slums or pavement dwellings would see that they are the very hell on earth and, what is worse, they inevitably convert even the adjacent area inhabited by law abiding citizenry desirous of living a decent life, into a veritable hell." The position since the Supreme Court delivered the judgment in the Olga Tellis case had deteriorated immeasurably and it had to be realised that firm action brooked no delay. The Supreme Court's requirement of a hearing had no relevance when the Municipal Corporation passed orders not with reference to pavement dwellers or hutment dwellers but with reference to the cleanliness, decency and health of the city. The growth was cancerous and has to be removed. It was, therefore, possible to distinguish the Olga Tellis judgment. All the same the Collector and the Municipal Corporation were directed to give notices to the persons concerned to show cause why their hutments should not be removed forthwith. The hearing had to be a real hearing, but a summary and mass hearing. It was made clear that the order applied to the lands which were the subject matter of the said two Civil Applications. The learned Judge said this was a public interest litigation wherein the interest of the entire city was at stake. He ordered that no Civil or Criminal Court in the city would entertain any application for stay or injunction against any action of the Collector or Corporation taken in pursuance of his order as also against other post-1985 hutments.

28. On 7th April, 1990 Sharad Manohar, J. examined the Collector's report showing that he had held the requisite enquiry and given the necessary hearing. He said that he would examine the question as to whether even those who were in occupation of unauthorised hutments put up before 1985 were entitled to protection. Till the time he decided that, all these unauthorised occupants who had come on the scene after April, 1985, about whose removal Government had implicitly taken a policy decision or about whose removal the State Government could, at least, have no excuse, had to be summarily removed. The only test to be applied was whether the names of the occupants were found in the year 1985 voters' list. All others would be summarily removed and would not immediately be entitled to any alternate accommodation. The removal would start, he ordered, from 20th April, 1990. It would apply to the premises covered by the said two Civil Applications and compliance had to be reported to him on 30th April, 1990.

On the same day, a chart was placed before the learned Judge by the A.G.P. showing eight pockets of land from which, it was said, unauthorised hutments had to be removed post haste. The learned Judge directed that his earlier order of the same they would apply to these eight pockets of land. He directed the concerned authorities to "swing into action" and report compliance on 30th April, 1990.

29. There is no discussion in the impugned orders or in any other order about the learned Judge's jurisdiction to pass the impugned orders. It is, of course, true that there was no one appearing before him to oppose the interveners' applications for demolition. But no Judge of a High Court could have been oblivious to the fact that he was passing orders requiring the demolition of a very large number of hutments in the city which were not even remotely connected with the single hutment that was the subject matter of the plaint that had been rejected by the City Civil Court, against which order the First Appeal before him had been filed, and that some explanation of the assumption of such jurisdiction was necessary. It would appear that the learned Judge was of the view that since he had converted the First Appeal into a public interest litigation, he had such jurisdiction and, indeed, it was so argued before us.

30. It is convenient at this stage to refer to some judgments of the Supreme Court that throw light upon the relevant aspects of public interest litigations.

31. In *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, , a public interest litigation was initiated for the release of bonded labourers. The petition was entertained and relief given. In the course of his judgment, Bhagwati, J. said that, ordinarily, the Court would insist that only a person whose fundamental right was violated should be allowed to activate the Supreme Court under Art. 32 of the Constitution. This reasoning, however, broke down when the Court had before it the case of a person or class of persons whose fundamental right was violated who could not have resort to the Court on account of their poverty or disability or a socially or economically disadvantaged position. In such a case the

Court could and must allow any member of the public, acting bona fide, to espouse the cause of such person or class of persons and move the Court for judicial enforcement of the fundamental right of such person or class of persons.

32. In *Rural Litigation and Entitlement Kendra Vs. State of U. P.*, the Supreme Court noted that the writ petitions before it were not inter parte disputes and had been raised by way of public interest litigation and the controversy before the Court was as to whether, for social safety and for creating a hazardless environment for the people to live in, mining in the area in the Mussoorie-Behradun belt should be permitted or stopped.

33. What is important to note at this point is that a public interest litigation has to be started as such, that it is a proceeding under Art. 32 or Art. 226 of the Constitution and that it is entertained to protect the rights of a person or class of persons who are not in a position to move the Court. We have before us a first Appeal from the rejection of a plaint in the suit of an individual. It was, therefore, not a proceeding initiated as a public interest litigation nor a proceeding under Art. 226. It was not and could not, we think, have properly been converted into a public interest litigation and doing so did not empower the Court to grant relief to any one other than the plaintiff and to adversely affect any one other than the defendant.

34. In *State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others*, an appeal was preferred in a public interest litigation. It related to allegations of ragging in the Medical College at Shimla. The Supreme Court disapproved of the direction given by the High Court which, it said, was nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging. This was entirely a matter for the executive branch of the Government to decide and the Court could not mandate the initiation of such legislation, howsoever necessary or desirable the Court may consider it to be. This was not a matter which was within sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive was not carrying out a duty laid upon it by the Constitution or the law, the Court could certainly require the executive to carry it out but the Court could not usurp the functions assigned to the executive and the legislature under the Constitution.

35. The State Government and the Municipal Corporation are given statutory powers to demolish unauthorised structures. It is for these authorities to decide when and where such powers shall be exercised. The exercise of these powers, if not carried out, may be mandated by the Court in a given case in an appropriate proceeding. But to direct the authorities to demolish all post-1985 hutments in the areas covered by the said two Civil Applications, and that within a very short time, is to impinge upon the sphere of the executive. It is for the executive to decide when to demolish hutments in what area having regard to the various problems that might arise by having the occupants thereof roaming the streets, problems which the courts would not have the requisite knowledge of nor the

expertise to resolve.

36. In *State of Himachal Pradesh and Another Vs. Umed Ram Sharma and Others*, the residents of hilly areas are as complained of being affected by the denial of proper roads. The High Court issued certain directions and, despite the State Government's assurance that the directions would be carried out, listed the matter again to be satisfied that the directions had in fact been carried out. The Supreme Court disapproved and said that the High Court should have known its limitations. It quoted the words of Benjamin N. Cardozo in "The Nature of Judicial Process", wise words which we think are very relevant here :

"The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."

37. The learned Judge's orders leave one in no doubt about the great concern he felt for the city of Bombay having regard to the proliferation of unauthorised hutments. The orders also leave one in no doubt that, for that reason, he was very doubtful about the legality of Government policy to regularise unauthorised hutments. These personal concerns would appear to have led the learned Judge to expend the scope of the First Appeal first to pronounce upon the legality of such policy and then to order the demolition of post-1985 hutments in regard to which there was no policy of regularisation.

This personal concern no doubt caused the learned Judge to set out a tight time-bound programme for the demolitions and to direct the report of compliance to him. To use the Supreme Court's words, the learned Judge should have known his limitation.

Even more unnecessary in our view is the learned Judge's direction to the subordinate courts not to entertain the application of any hutment dweller adversely affected by the impugned orders to stay the demolition of his hutment. The learned Judge's comments about the subordinate courts were not called for nor the directions that they occasioned. The High Court should be very, very slow indeed in debarring subordinate courts from entertaining litigations that they are otherwise entitled, nay, bound to do.

38. By declaring the First Appeal before him, which arose out of the grievance of an individual against the State Government to be a public interest litigation, the First Appeal did not become a public interest litigation in the sense in which that phrase is generally understood, so that it did not confer jurisdiction upon the learned Judge to pass the impugned orders. If the question regarding the legal validity of the State Government's policy of regularization had, in fact, arisen in

the appeal, the learned Judge could validly have called upon Municipal Corporations, other public authorities and members of the public to intervene to assist him in arriving at a correct decision. But that is very different from saying that he could have, even in that appeal, ordered the demolition of hutments had he found that no Government policy of regularization existed or that it was illegal.

39. In our view the impugned orders dated 7th March and 7th April, 1990 are without jurisdiction and bad in law. They are, therefore, set aside.

All actions taken pursuant to the impugned orders, that is to say, the notices that state that they are issued pursuant to the impugned orders and the conclusions upon the hearings given thereon, are set aside. No demolitions shall be carried out pursuant to the impugned orders.

Some six hundred hutments were demolished in pursuance of the impugned orders before stay thereof was granted. These adversely affected by such demolitions shall be entitled to take appropriate proceedings on the basis that these demolitions were carried out in pursuance of executive orders, and not pursuant to judicial orders. It will, of course, be open to the State Government to take such defence against such proceedings as it may be advised, always having regard, of course, to this judgment and order.

40. It is, we think, desirable in the context of all that has happened in this First Appeal that it should now be placed before a Division Bench for hearing and final disposal. The Division Bench must consider whether the First Appeal should be limited to its proper sphere or should be allowed to take within its compass the questions raised by Sharad Manohar, J. We should make it clear here that although Judge Gupta decided the first and third issues before him against the plaintiff, it is now conceded by the Assistant Government Pleader that there is a policy of regularization. The question, therefore, will be whether such policy covers the plaintiff. The Division Bench must consider whether it shall decide this question itself or send it to the City Civil Court for trial after deciding whether the plaint should be restored to its file.

41. It is made clear that our judgment and order will in no way affect the exercise of the powers vested in the State Government, Municipal Corporations and other statutory authorities to remove unauthorised hutments.

The Civil Application for transfer of the hearing of the First Appeal to a Division Bench no longer survives and is dismissed.

Order accordingly.

No order as to costs.

42. Order accordingly.