

## MOVING FROM 'BREAKING UP OR CLEARING OF FOREST LAND' TO 'OCCUPATION': UNDERSTANDING THE TERM 'ENCROACHMENT' AND BEYOND.

By

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### **Introduction:**

While hearing a writ petition in the matter of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Forest Rights Act 2006, in short); the Hon. Supreme Court has ordered on 13-2-2019: "Let Forest Survey of India (FSI) make a satellite survey and place on record the encroachment positions and also state the positions after the eviction as far as possible." The issue of making a satellite survey and placing on record the encroachment positions has been reiterated in the order dated 28-2-2019 also by which a stay has been granted by the Hon. Supreme Court on the eviction of claimants whose claims of Forest Rights were rejected. The term 'encroachment' has been used by the Apex Court which needs to be viewed and understood in its entirety since, as the following paras would reveal, neither the Indian Forest Act 1927, nor the Forest Rights Act 2006 contains the term 'encroachment'.

The section 5 of the Indian Forest Act 1927 provides for bar of accrual of forest rights in the Reserve Forests and also mentions that "After the issue of a notification under section 4, ..... *no fresh clearing for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf*"

The Section 26 provides for punishment to any person who as per sub-section (a) makes any fresh clearing prohibited by section 5, and also who as per sub-section (h) clears or breaks up any land for cultivation or any other purpose in a Reserve Forest.

As per section 30 of the Indian Forest Act, the State Government may, by notification in the

Official Gazette, prohibit, from a date fixed by the notification, ..... the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, on any land in any such forest.

As per section 32 of the Indian Forest Act, the State Government may make rules to regulate in the Protected Forests, as mentioned in the sub-section (g), the clearing and breaking up of land for cultivation or other purposes in such forests.

As regards forests and land not being the property of the Government, which includes any land containing trees and shrubs, pasture, lands and any other land whatsoever which the State Government may, by notification in the Official Gazette, declare to be a forest, the State Government is empowered under section 35 of the Indian Forest Act to protect such forests for special purposes and regulate or prohibit in such forests the breaking up or clearing of the land for cultivation, and clearing of vegetation.

The Forest Rights Act 2006, however, recognizes forest rights in favour of 'forest dwelling Scheduled Tribes' and 'other traditional forest dwellers'. As per section 3(1) (a), the right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers which secure individual or community tenure or both, is recognized as a forest right on all 'forest lands'. The Forest Rights Act 2006 defines forest land as per section 2(d) as land of any description falling within any forest area and includes

unclassified forests, un-demarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks. Forest Rights can be claimed and recognized only on Forest Lands. Thus, although the Forest Rights Act does not explicitly use the term 'encroachment', it basically recognized and legalises the same as 'forest right' subject to a set of conditions, applicable to claimants as well as to the forest land, duly specified under the Act

**Encroachment:**

It is important to recognize that the term 'encroachment' needs to be understood in its 'true' meaning when it relates to government land or public property. Forest land is not just a piece of 'land'. It is in fact a public property laden with a bundle of rights of people of this country whose dependence on it ranges from supporting their daily needs and economy to that of serving their 'right to life' through provision of ecological services. Further, the 'right to life' is not restricted to the villagers of the area where such resources exist. It may extend to long distances and larger populations existing in areas upto which the services of the 'locally seen' forests reach through various channels of eco-services.

Encroachment on a government land or public property is an 'unlawful gaining upon the right or possession of another'. This has been dealt with by Hon. Supreme Court in its order dated 19 September 2018 in the case Janabai vs. Additional Commissioner and Ors. [S.L.P. (civil) 24212 of 2017]. In view of this, all forest lands and forest resources on which claims of forest rights have been rejected under the Forest Rights Act 2006 (FRA) are encroachments. It is not surprising because the predominant perception about relevance of FRA in our country has revolved around habitation and cultivation on 'forest land'.

Viewing closely, within the perspective of Forest

Rights Act, the term encroachment has been interpreted by most of the people to cover only such cases where the claims of forest rights of habitation and self-cultivation as enunciated in section in 3(1)(a) have been rejected. One must understand, however, that all forest lands as also forest resources in all such cases where recognition of forest rights has been done by the Authorities in violation of FRA provisions are also subjects of state supported continuance of 'encroachments'. Further, all orders of District Level Committees under FRA allowing forest rights in violation of the provisions of FRA leads to allowing encroachments into the rights of others, results in injustice, and severely impacts all citizens as well as ecology of the country in the manner enunciated below.

**Encroachment and the Rights of stakeholders:**

The local people have been breaking or clearing forest land for various purposes in the past and they have been taken cognizance of as forest offence. Different states have regularized such illegal uses from time to time giving signals to one and all that the forest land was available for such process of final allotment of 'pattas' in favour of such encroachers. The FRA came as an intervention from the Government of India in this regard directed in favour of FDSTs and OTFDs. It is a matter of record that the FRA also spurred a massively spread activity all over India directed towards making of new 'encroachments' in the forest land which was further accelerated due to the lack of strictness in the implementation of the Act. While the recognition of forest rights in violation of FRA is a simultaneous violation of provisions of Indian Forest Act 1927, Forest Conservation Act 1980, Wildlife Protection Act 1972, and the orders of Hon. Supreme Court in specific cases, the recognition in favour of ineligible persons/communities results in encroachment into the

rights of and gross injustice towards the genuine Forest Dwelling Scheduled Tribes (FDSTs) and Other Traditional Forest Dwellers (OTFDs) and their communities; akin to what happens when the benefits of reservation meant for Scheduled Tribes is granted to others. The illegal recognition of forest rights in favour of ineligible persons/ communities results in encroachment into the existing rights of other villagers on that forest land; rights that were granted in previous settlements to them. Accordingly it results in injustice to all such people in the village.

The illegal recognition of forest rights results in encroachment into the rights of all villagers through legalization of the ineligible person's use of the concerned piece of forest land to the exclusion of all others in the village who depended on such forest lands for various services essential for their life and livelihood. Thus it results in injustice towards the whole population in the village.

The illegal recognition of forest rights causes encroachment into the 'right to life' of every citizen of this country, which includes the present as also our future generations whom we would not like to gasp for oxygen or perish for want of water and adequate ecological services. Such encroachments' effect on common citizen's right to life has an extended scope to include right to wholesome environment and right to sustainable development.

The illegal recognition of individual forest rights, resulting into encouragement of new encroachments, results in unprecedented pock marking of the forests, excessive degree of fragmentation, and increased ingress of human population into the habitat of wildlife thus resulting in encroachment into the home of as also on the right of life of wildlife which includes, inter alia, their right to survive as a species.

The mass scale illegal recognition of forest right

under 3(1)(i), in effect, leads to the unwarranted transfer of the responsibility of protection and management of ecological frontiers of our country from the Government into the hands of masses geographically as well as politically divided on the basis of village boundaries. Such illegal orders result in a de-facto encroachment into State's authority and its mandate under Article 48(A) of the constitution.

Illegal recognition of forest rights, prima facie, allows encroachment into the right to survival of all living forms (including each one of us) and an injustice to all those who have direct or indirect dependence on forests for supply of oxygen, water, biodiversity elements etc.

**Summary:**

Continuance of encroachments as also those apparently regularized due to illegal orders on forest rights, through justification of illegal activities, undermines the fundamental principle that ecology and environment are not objects of ownership but are nature's gift intended to be preserved in trust for future generations. They also blatantly violate the Doctrine of Public Trust regarding the use of public lands or natural resources. Unfortunately the public as well as the Government looks at 'encroachment' as an illegal occupation of forest land and nothing beyond. It is necessary that all stakeholders including the Government should understand the implication of such activity as also that of its regularization.

The regularization of illegality as also misuse of FRA needs to be stopped immediately lest it results in utter chaos and confusion like the classic case of Hardin's "tragedy of the commons" wherein multiple individuals, acting independently, and solely and rationally consulting their own self-interest, will ultimately deplete a shared limited forest resource even when it is clear that it is not in anyone's long-term interest for this to happen. Author can be contacted on mobile No. 09822601595