Illegality and the Urban Poor

"Cleaning up" the city usually employs demolition as an effective tool to clear the lands and disperse the poor. But for decades, the violence of demolition was tempered by a policy of resettlement which, even when partially and imperfectly implemented, gave demolition a veneer of legitimacy. But the notion of housing for the urban poor has acquired an "illegality" in the last five years. The judiciary has been a significant contributor to this evolving jurisprudence on shelter, housing and the urban poor. The constitutionality that ensured every citizen the fundamental rights of livelihood, housing and shelter has now been revised, reinvented and supplanted by a legality that sees the urban poor as encroachers and a threat to civic existence.

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The position of the urban poor has always been precarious. "Slums",[1] jhuggis and squatter settlements, where the urban poor find shelter and housing, are not invested with legality. As "encroachments" on "public land", they remain at the sufferance of the state and its agencies. When patience runs out, or when a programme of cleaning the city is being pushed, demolition is used as the means to clear the lands and disperse the poor. The violence of demolition was, for decades, tempered by a policy of resettlement which, even when partially and imperfectly implemented, gave demolition a veneer of legitimacy. The past five years have witnessed the casting aside of this fig leaf of resettlement, consequent upon a unidimensional understanding of the illegality of the housing of the urban poor. In this, the obligation of the state to ensure that "economically weaker sections" (EWS) have housing; the link between land acquisition for planned development and housing for the urban poor; and what constitutes the "public interest" has got rewritten. The judiciary has been a significant contributor to this evolving jurisprudence on shelter and housing and the urban poor.

The Pavement Dwellers' case (1985)[2] marks the first serious contest, in the Supreme Court, between pavement and slumdwellers and the power of agencies of state to destroy their dwellings and forcibly evict them. It was heard and decided by a constitution bench comprising five senior judges of the court, in acknowledgement of the serious constitutional questions that were being considered. The judgment reflects the struggle of the court in installing the right to shelter within the fundamental rights framework, while yet allowing the state the power to clear the streets and spaces in the interests of urban order. A conflict of interest was found to exist between the pedestrian who would need to use pavements and the pavement dweller, and the "existence of dwellings on the pavements (was) unquestionably a source of nuisance to the public" (p 579), which the municipal corporation was obliged to remove. It was also held that "no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or earmarked for a public purpose like, for e g, a garden or a playground" (p 589). So, forcible eviction of pavement and slumdwellers was not ruled out, although it was to be preceded by a notice informing them of the impending eviction and giving them an opportunity of being heard. In the case before the court, it was directed that, "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…" (p 589). This was only one visage of the order.

Lending another face, where the right to constitutional existence of the urban poor was asserted, reams were written to explain,

– that the right to livelihood is an important facet of the right to life;

– that the eviction of a person from a pavement or slum which will inevitably lead to deprivation of the means of livelihood is a position that needs to be established in each individual case; that is an inference which can be drawn from acceptable data;

– that empirically it could be concluded that people who live in slums and on pavements do so because they have "small jobs to nurse in the city and there is nowhere else to live" (p 575);

– they choose a pavement or a slum in the vicinity of their work to cope with the costs of money and time;

– that "to lose the pavement or the slum is to lose the job" (p 575).

And: "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" (p 575). Yet, since "the Constitution does not put an absolute embargo on the deprivation of life or personal liberty", the court could only direct that the "procedure established by law" to effect forced eviction be followed.

In justifying the existence of such drastic powers, the state set out the scheme it had for easing the pain of the urban poor, and the court demanded the humanising of the power by holding the state to its word. So,

– although providing "alternate pitches" would not be a "condition precedent" to eviction, the state government was mandated to provide an alternative to those who had been there from before 1976 "at Malvani or at some other convenient place as the government considers reasonable but not further away in terms of distance";

– slums, which had been "in existence for a long time, say for 20 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 alternative sites or accommodation will be provided to them";

– the "Low Income Shelter Programme" would be pursued earnestly;

– the "`Slum Upgradation Programme' by which basic amenities are to be given to

slumdwellers will be implemented without delay".

On the same day, the five judge bench pronounced judgment on a similar petition brought to them from Tamil Nadu. Having set out the various schemes that the state government claimed to have in place for housing the urban poor, the court was willing to conclude that "steps are being taken for the purpose of improving the slums and wherever they cannot be improved, alternative accommodation is provided to the slumdwellers, before they are evicted".[3] So, the court closed with an expression of "confidence that the government will continue to evince the same dynamic interest in the welfare of the pavement dwellers and slumdwellers" (p 541).

Olga Tellis and *K Chandru* were taken to court in the early years of public interest litigation (PIL). PIL was a judicial device expressly intended to reach legal and constitutional rights to a "person or determinate class of persons (who) by reason of poverty, helplessness or disability or socially or economically disadvantaged position (is) unable to reach the court for relief".[4] PIL demanded exercises in "juristic activism", as it involved introducing variations into traditional litigation. The (i) dilution of the rule of "standing", where any bona fide person could take an issue to the court, (ii) the idea of "epistolary" jurisdiction where a letter addressed to the court may suffice for the court to take the matter on board, (iii), the non-adversarial expectations of the court when matters of public interest were before it were among the significant departures from the conservatism of judicial procedure. In reaching fundamental rights to those unable to access it on their own strength, the court acquired a certain moral legitimacy. Tracing many problems of the polity to executive apathy, inefficiency and abuse – bonded labour, undertrials forgotten in prisons, custodial violence, for instance – the court increased its clout over the executive. The scandals of the state dragged into public view in PIL caught media imagination, giving the court a populist profile. By the early 1990s, the power of the court had been enhanced considerably because of its PIL portfolio and procedure.

By the 1990s, too, the definition of "public interest" had begun to shift. Corruption, misuse of discretion in the exercise of public power, protecting organisations such as the Central Vigilance Commission and the Central Bureau of Investigation from political interference – all issues of significance in any polity – became the agenda of the court, along with a version of environmentalism. This provoked attacks on "judicial activism", but these attacks did little to dent the legitimacy and the power that the court acquired in this process. As the 1990s drew to a close, what was not clear was the extent to which the original constituency of PIL – the poor and the vulnerable to whom constitutional and legal rights had to be reached – continued to have the court on their side.

The Right to Housing

The Turkman Gate demolitions in 1976 was shielded by the impunity that the Emergency (1975-77) vested in those who then wielded power.[5] This shared the infamy with the mass arrests and detention of the opposition, and the coercive sterilisation programme launched amidst the population, which led to the ignominious defeat of the Indira Gandhi government at the polls in 1977. In 1990, the V P Singh government attempted identification and enumeration of jhuggi dwellers with an intent to improve their condition, and to work at providing security of housing. In the climate created by this pro-poor intervention, the Law Commission produced a report asking for a law that would give a statutory basis to the right of a jhuggi dweller to resettlement preceding destruction of their homes.[6] Such a law was never enacted. That was also the time that earnest attempts were made to bring in an amendment to the Constitution to make the right to housing a fundamental right. The V P Singh government did not last long enough for these efforts to reach anywhere.

In 1993, when the judiciary began to express itself on the space occupied by urban poor in the city, it was an entirely different perspective that emerged. In *Lawyers' Cooperative Group Housing Society vs Union of India*,[7] justice B N Kirpal, who was later to write the Almitra Patel order from the Supreme Court bench, spoke for himself and his brother judge: "It appears that the public exchequer has to be burdened with crores of rupees for providing alternative accommodation to jhuggi dwellers who are trespassers on public land." This comment accompanied a direction that where resettlement was done, the resettled should not be given the land on leasehold, as was the practice, but on licence "with no right in the licensee to transfer or part with possession of the land in question". This was intended to prevent the resettled from treating the resettlement plot as property, but to restrict them to the terms of licence which, if breached, could result in resumption of the land. This was the beginning of the de-legitimising of the urban poor who were cast as "trespassers" and as profiteering on public lands. The draft annual plan of the Slum and J J Department of Delhi inducts this direction, and resettlement plots have since been, governed by licence.

In giving text to the licence, the conditions may include:

– "(4) The licensee shall have no ownership rights. They shall not be allowed to sell/rent the plot. If it is sold/rented, the plot will be taken back.

– (5) No one other than the licensee and her/his family may stay in the house/ allotted plot…

– (8) If an adequate house is not constructed within six months of allotment, the licence shall be terminated…

– (12) If the licensee has taken a loan from HUDCO (for construction of the house), and has not been able to pay back the loan instalments for a period of six months, the licence will be automatically cancelled, and the licensee will be evicted from the plot.

– (13) Warning: Selling or buying the plot is against the law. In accordance with the directions of the Delhi High Court in CMP No 267 and 464 of 1993, the licensee does not have ownership rights. If anyone other than the licensee or his/her family is staying on the plot, licence will be cancelled and the person will be evicted without notice or without assigning any reason."

In February 2000, in Almitra Patel vs Union of India[8] while dealing with a PIL on solid waste disposal, a three-judge bench of the Supreme Court spoke words that have had a dramatic impact on the lives of the poor in Delhi. Delhi as the capital of the country, the court exclaimed, "should be its showpiece", and yet "no effective initiative of any kind" has been taken for "cleaning up the city" (pp 684-85). "When a large number of inhabitants live in unauthorised colonies, with no proper means of dealing with the domestic effluents, or in slums with no care for hygiene, the problem seems more complex."

Slums were also perceived to be "good business" and "well organised", multiplying "in the last few years by geometrical proportion". To the court, slums represented "large areas of public land... usurped for private use free of cost" (p 685). The "promise of free land, at the taxpayers'

cost, in place of a jhuggi" was depicted as "a proposal which attracts more land grabbers. Rewarding an encroacher on public land with an alternative free site is like giving a reward to a pickpocket." In fact, it was "slum creation" and not "slum clearance" that was occurring in Delhi. This gave "rise to domestic waste being strewn on open land in and around the slums" which needed to be dealt with "most expeditiously and on the basis of priority". Creation of slums, which increased the density of the population beyond the sustainable limit, needed to be prevented.

In 1996, the Industries Relocation case,[9] which was about reconstituting the city by exiling productive and manufacturing activities beyond its limits as being "hazardous", and B L Wadhera vs Union of India,[10] where directions were issued to get municipal authorities to clean the city, had already begun to revise visions of the city, who its denizens should be, and what the government needed to assist in the materialising of those visions.

Almitra Patel marks the judicial moment when, (i) illegality was singled out as the trait of the slumdweller, and (ii) "cleaning up the city" was declared to be the primary task in which governmental agencies needed to be engaged.

In this judgment, where providing "free" land to a slumdweller for resettlement was decried, there is a significance in how the court treated land being made available for landfill sites. The problem, as the court recounted it, was that "land-owning agencies like DDA or the government of NCT of Delhi are demanding market value of the land of more than Rs 40 lakh per acre before the land can be transferred to MCD". But "keeping Delhi clean is a governmental function…Not providing (landfill sites) because MCD is unable to pay an exorbitant amount is ununderstandable", especially as "it is the duty of all concerned to see the landfill sites are provided in the interest of public health". Public interest and state obligation was completely recast in this judgment, where providing housing to the urban poor was castigated even a providing land free for garbage was mandated.

It is instructive to test this depiction of illegality against the performance of governmental agencies under the statute. In 1957, the Delhi Development Act (DD Act) was enacted to facilitate planned development of the city. In 1962, the first Master Plan for Delhi (MPD) was notified. Large-scale land acquisition by the DDA was followed by redistribution of the lands acquired to various "land-owning agencies"(LoA). Integrated development of the city, with housing for all classes of people, commercial sites, spaces for street vending and hawking, industrial establishments and land for other agencies and organisations including the railways was built into the MPD.

Slums and 'Planned Development'

Slums were, needless to say, not envisioned in the MPD. Yet, despite the statutory mandate and powers to effect "planned development", slums have proliferated. Why? The answer lies in what is termed the "implementation backlog". In June 2002, the committee on problems of slums in Delhi, constituted by the Planning Commission, recorded in its report that the DDA is stated to own 25,377.2 ha of land, which is 17 per cent of all the land in the state. A report that the committee relied on has found that "DDA claims that 20 per cent of the residential area is earmarked for EWS/squatter populations under the integrated development project. DDA has not allotted any land to slum and jhuggi jhompri department during 1992-97. In 1997-98, DDA allocated 32 acres of land in Tekhand village…during 1998-99, about 27.4 acres of land was allocated…" This is in a city where, in a population of 14 million people, about three million people were officially estimated as living in six lakh jhuggis in about 1,100 jhuggi jhompri clusters.[11]

In the 10th Plan document, the Planning Commission had said: "Urban housing shortage at the beginning of the 10th Plan has been assessed to be 8.89 million units. As much of 90 per cent of the shortfall pertains to the urban poor, and is attributable (among other reasons) to… (non) provision of housing to slumdwellers".

The cause of the "illegal" occupation of public lands is, then, directly attributable to the non-performance of state agencies. This has resulted in the use of the DD Act 1957 to acquire land and handing over the land to LoAs, while neglecting the logic and mandate of the statute in integrated planned development of the city. While turning a Nelson's eye on to the state's breach of statutory duty, a spotlight has been fixed upon the illegality of the housing stock that the poor have created for themselves. Alongside this is the tolerance of violations of the MPD, even complicity, when the state sets itself an agenda and pursues it. In Delhi Science Forum vs DDA,[12] for instance, a scheme to construct an "international heritage centre, competitive housing" and such, was inaugurated in 2001 in the Vasant Kunj area of Delhi. The MPD clearly did not allow construction in the area, which was in a green belt/rural zone, and where severe groundwater problems existed. The court invalidated the project, accepting the contention that the mandatory procedure for prior land use change had not been followed by the DDA; but this did not preclude the resumption of the project once the defect was rectified. Since then, the DDA claims to have gone through the formality of the required procedure and construction has continued.

The privileging of the Delhi Metro Rail Corporation (DMRC) has meant that an endorsement of its plans may be presumed upon, even when they are widely divergent from the MPD. The construction of an "Information Technology Park" at Shastri Park, on the Yamuna river bed, is one instance. This, and other "property development" projects along the metro line, on land handed over to the DMRC for implementing the metro project, run against section 11-A of the DD Act 1957; but while challenge to such "development" in one area is pending, the DMRC continues to deal with the excess property in other areas unrestrained by the MPD.[13] So too the locating of the Akshardham temple complex and the Commonwealth Games village along the banks of the Yamuna, both of which were, cynically, coincidental with mass demolition of the houses of the urban poor, within sighting distance on the banks of the river in the first half of the current decade. The governmental agencies are not prevented from going through the form of legalising the "change of user" which can make the illegal, legal. This is not a route that has been available to the urban poor.

On November 29, 2002, a division bench of the Delhi High Court struck out at "encroachers" and those who had "squatted and trespassed" on public land.[14] It shot down the resettlement policy of the state and, in doing so, absolved the state of its obligation to assist the urban poor in accessing affordable housing. The peremptory direction read:

> 7 No alternative sites are to be provided in future for removal of persons who are squatting on public land.
> 8 Encroachers and squatters on public land should be removed expeditiously without prerequisite requirement of providing them

alternative sites before such encroachment is removed or cleared.

On the way to issuing these directions, the court did acknowledge that "it is undoubtedly the duty of the government authorities to provide shelter to the underprivileged". And the state had "admitted their failure to devise housing schemes for persons in the economically weaker sections of the society". Yet, this "lack of planning and initiative…cannot be replaced by an arbitrary system of providing alternative sites and land to encroachers on public land". This would "encourage dishonesty and violation of law".

Impossibility of performance was held out as another reason for striking down the resettlement policy. About 7,000 acres of land had reportedly been acquired by the DDA between 1990 and 2000, of which 275 acres were utilised for slumdwellers. At this rate, it would take 272 years to resettle those who had been in the site from before 1998, and the acquisition and development cost for six lakh plots would be Rs 4,20,000,00,000, making the proposition unworkable.

Since (i) many of those resettled transacted away their land to return to their original site; (ii) it was taxpayers' monies that were being used twice over, in acquiring the land, and, again, while resettling encroachers; (iii) this placed a premium on illegality; and (iv) it was slumlords who had benefited creating illegal estates, the court decided that the resettlement policy would have to go.

Squashing the policy, the court closed with "the hope and desire that it would help to make Delhi a more liveable place and ease the problems of the residents of this town who undoubtedly suffer and are harassed as a consequence of this encroachment of public land".

There is an omission that dictates how illegality is to be perceived: the state's inaction in relation to EWS housing is mentioned, only to be relegated to irrelevance. That land acquired to be used according to the master plan – which includes integrated housing of the EWS – has not been so used due to the failure of governmental agencies has only received passing mention, and the illegality of such failure has been glossed over.

Illegality of Resettlement

Striking down the resettlement policy would mean not merely that resettlement would not be a prerequisite for demolition, but it would actually render resettlement illegal. On appeal, the Supreme Court has partially stayed the order, where it permitted allotments under the resettlement policy to be made "subject to the result of the petitions".[15] This interim stay has not, however, altered the course on which the Delhi High Court has been set. This is in evidence in the high court order in Maloy Krishna Dhar vs GNCTD.[16]

The case was taken to the Delhi High Court by a resident of a set of apartments in the trans-Yamuna area in East Delhi. It concerned three sites housing about 200 jhuggis on DDA land in the vicinity of housing complexes and a local shopping centre. The court had been informed that DDA could only remove the jhuggi clusters when relocation plots become available. So, the court directed DDA to "relocate the jhuggi clusters within a period of two months and provide alternative sites to the jhuggi dwellers in accordance with law and policy". In July 2004, the court chided the DDA for not having acted, and it directed the vice-chairman of DDA to explain the lapse, or be present in court at the next hearing. The vice-chairman, DDA, on July 21, 2004, asked for six

months to do what was required of him; the court, in September 2004, gave him two months. But, well into 2005, he had not acted. On September 21, 2005, the court directed that the vice-chairman should answer charges of contempt of court for his inaction. In the process, the court reiterated the November 29, 2002 logic against resettlement characterising the slum dwellers as "unscrupulous elements" and pitting them against the "honest citizen (who) has to pay for a piece of land or flat". Emphasising that "DDA is a monopolistic organisation dealing with the land in Delhi", the only "statutory obligation" that the court found vesting in the DDA was "to see that nobody should squat upon the land which has been put at their disposal in terms of the DD Act 1957". In consequence, the court directed "the removal of jhuggis…within a period of 15 days forthwith. Any assistance required by the police shall be provided by the commissioner of police."[17]

It is the relocation policy, with the onus on governmental agencies to find an alternative site where the urban poor may be housed, which seems to have been the hurdle to mass demolition. In striking down the relocation policy, demolition could be demanded of governmental authorities, and the power to punish for contempt more effectively used. In Hem Raj vs Commissioner of Police,[18] a court-appointed committee had recommended the demolition of the jhuggis in Nagla Machi. Located at the T-junction from Pragati Maidan going towards NOIDA, the "unauthorised occupants" were reportedly encroaching on valuable land, had opened commercial shops, kept "buffaloes and other animals which not only give way to unhygienic conditions but also create hindrance to the smooth flow of commuters on the Ring Road…" Four years had passed since the court's order to remove and report to the court, and it had not happened yet. "Non-compliance of directions passed by this court for the last four years," the court said, "tantamount to abdication of responsibility of the authorities apart from wilful disobedience of the orders resulting in unauthorised encroachment continuing to remain where they were." The commissioner of police, engineer-in-chief of the PWD, and the special secretary, government of NCT were all hauled up to answer charges of contempt.[19]

In dealing with the impending demolition in Nagla Machi, justices Ruma Pal and Markandey Katju in the Supreme Court are reported to have remarked, irately: "If you are occupying public land, you have no legal right, what to talk of fundamental right, to stay there a minute longer." And: "Nobody forced you to come to Delhi…If encroachments on public land are to be allowed, there will be anarchy."[20] These comments from the bench are symptomatic of legality supplanting constitutionality in current discourse. This has been urged on by a range of threat perceptions, where the urban poor are seen as overrunning cities; their encroachment of public land as bordering on criminality; the occupation of public lands as being synonymous with slumlordism and profiteering; their numbers as placing an intolerable burden on infrastructure; and, the impossibility of their legal existence in cities as providing a prescription for anarchy.

This has dictated how the fundamental right to livelihood, to move around and settle anywhere in the country, and to shelter and housing has been revised, and reinvented, and supplanted by one version of legality. The inefficiencies of governmental agencies have acquired axiomatic status, and the statutory power to acquire control over land in the city has been preserved while the statutorily mandated duty to integrate the urban poor into the city and provide them housing and livelihood has been shelved, in the interests of pragmatism.

In cleaning up the city through a strict enforcement of legality, the court has also been ordering the bringing down of unauthorised structures, or parts of structures, on pain of contempt. The relative political clout of those whose buildings and activities are facing demolition is seen in the way the Delhi Laws (Special Provisions) Act 2006, coming into effect in May 2006, has been constructed. There is a moratorium of one year on demolition of unauthorised structures, "whether in pursuance of court orders or otherwise", because it "is causing avoidable hardship and irreparable loss to a large number of people". But, while removal of slums and jhuggi jhompri dwellers and hawkers and street vendors are also covered by the moratorium, the central government may order their removal where "clearance of land is required for specific public projects". And, the "central government may, from time to time, issue such directions to the local authorities as it may deem fit, for giving effect to the provisions of this act and it shall be the duty of the local authorities to comply with such directions". This is despite the acknowledgement that a policy on relocation and rehabilitation of slumdwellers in Delhi is still "under the consideration of the central government". The power to demolish, separated from the obligation to ensure housing for the urban poor, is preserved in this law.

This narrow construction of legality, and the inversion of constitutionalism, has to be urgently challenged.[21] EPW

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Notes

1 For how a slum is defined in law, different from it commonly attributed meaning, see, Usha Ramanathan, 'The Demolition Drive', *EPW*, 2005.
2 Olga Tellis vs Bombay Municipal Corporation (1985), 3 SCC, p 545.
3 K Chandru vs State of Tamil Nadu (1985), 3 SCC, 536 at 541.
4 S P Gupta vs Union of India 1981, Supp SCC, 87 at 210.
5 For extracts from the Interim Report II of the Shah Commission of Inquiry, see, 'Shah Commission's Findings – V: The Wrecking of Delhi' in *Economic and Political Weekly*, June 24, 1978, pp 1019-21.
6 138th Report of the Law Commission on 'Legislative Protection for Slum and Pavement Dwellers', 1990.
7 CW No 267 and CM 464 of 1993, Delhi High Court.
8 (2000) 2 SCC 679.
9 (1996) 4 SCC 750.
10 (1996) 2 SCC 594.
11 Affidavit filed in the Supreme Court by the Deputy Commissioner, Slum and J J Department, Municipal Corporation of Delhi in the matter of Almitra H Patel vs Union of India WP (C) 888 of 1996, August 2, 2000, p 4.
12 2004 (112), *Delhi Law Times (DLT)* in the Delhi High Court.
13 Gita Diwan Verma vs DMRC WP (C) 6,500 of 2005, Delhi High Court.
14 Okhla Factory Owners' Association vs GNCTD 2003 (108) DLT 517, Delhi High Court.
15 Interim order dated March 3, 2003 in SLP (C), 3166-67 of 2003 and SLP (C), 6313-14 of 2003 in the Union of India and NCT's appeal in the Supreme Court against the high court order dated November 29, 2002.
16 WP 6160 of 2003, September 21, 2005, Delhi High Court.
17 Also, Navniti CGHS vs Lt Governor WP (C) 5697 of 2002, August 16, 2004, Delhi High Court.
18 WP (C) 3419 of 1999, December 14, 2005, Delhi High Court.
19 Ram Rattan vs Commissioner of Police CC 3732 of 2006, dated May 9, 2006 (Supreme Court). See also, Sajha Manch vs Union of India CWP 241 of 2006, May 12, 2006.
20 Dhananjay Mahapatra, 'SC: Encroachers Have No Right over Public Land: Court Rules Poverty Cannot be an Excuse for Squatting', *Times of India*, Delhi edition, May 10, 2006.
21 This law has been challenged in the Supreme Court. The Nagla Machi demonstrations have been stayed till the next date of hearing of the challenge to the law: Siddarth Narrain, 'Four Weeks' Stay on Slum Demolitions', *The Hindu*, New Delhi, June 23, 2006, p 3.