THE BHOPAL GAS LEAK DISASTER LITIGATION: AN OVERVIEW

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The Bhopal gas leak disaster has left a deep scar on the human psyche, in terms of the catastrophic proportions and the callousness of the safety measures shown in a plant controlled by a multinational company in a developing country. The escape of a highly toxic methylisocyanate (MIC) from the Union Carbide Corporation's (UCC) pesticide plant at Bhopal in the early hours of 3 December 1984 brought havoc to the people of Bhopal, resulting in the death of more than 3,000 people and leaving more than 200,000 people injured—many seriously and some permanently. There was confusion about the treatment warranted by exposure to MIC, compounded by the Union Carbide's insistence that the gas was not lethal! However, the immediate consequences of the gas leakage were very clear, and its long-term effect to human beings as well as to the eco-system could prove to be quite serious.

The Bhopal disaster, regarded as the world's worst industrial accident, led to one of the biggest litigations for damages. This litigation faced questions of jurisdiction and passed through many tortuous twists and turns before ending up as a damp squib—in a sad, much maligned out-of-court settlement. This article traces this litigation in and out of India, and is designed as informative rather than analytical or evaluative.

As soon as the news spread about the escape of deadly MIC from the plant of the Indian subsidiary of Union Carbide Corporation of USA, several American personal injury lawyers descended upon Bhopal to take up class

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action for compensation against UCC. Some of these lawyers—dubbed as ambulance-chasers—filed suits for astronomical sums in the United States courts on behalf of some of the gas victims.¹ However, the Union of India, initially shaken by the tragedy, rose to action and tried to take over control of the whole litigation process against Union Carbide. Accordingly, a special statute entitled the Bhopal Gas Leak Disaster (Processing of Claims) Act,² replacing an earlier Ordinance to that effect, was enacted by the Parliament. The Act, which received the assent of the President on 29 March 1985, sought to confer certain powers on the Union of India, as *parens patriae*, to secure that claims arising out of or connected with the Bhopal gas leak disaster were dealt with speedily, effectively, equitably and to the best advantage of the victims. Following this special enactment, the Union of India assumed the exclusive right to represent and act on behalf of every person (whether within or outside India) who made or was entitled to make a claim concerning the gas disaster.³

By virtue of the authority conferred by this Act of Parliament, the Union of India faced a crucial choice as regards filing of a case against the parent company, UCC, or its subsidiary Union Carbide India Ltd (UCIL), from whose plant the gas actually leaked. Moreover, the Union of India also had to make a strategic choice as regards the forum for filing the suit: either in India (Bhopal) or in the United States (in New York) where UCC was registered. In the end the Union of India decided, for tactical reasons, to file the suit against the parent company in the United States.

1. DISTRICT COURT, NEW YORK

The suit was filed by the Union of India as *parens patriae* on behalf of the gas victims for recovery of damages for any and all claims, present and future, before the United States District Court, Southern District of New York. Ironically, the defendant UCC sought to oppose the suit on the grounds of *forum non conveniens* while the plaintiff insisted for the case to be dealt with by the American Court instead of an Indian court. The Union of India considered that courts in India were not an alternative forum for the following reasons:

- “(a) the delays inherent in the Indian Court system would lead to an unconscionable delay in the resolution of the cases in India;
- (b) India’s Court system lacked the procedural and practical capability to handle the litigation;

1 See *The Hindu* (Madras), 9 December 1984. See also *Wisconsin State Journal*, 8 December 1984.

2 Act No.21 of 1985. See *The Gazette of India*, Extraordinary, Part II, Section 1, No.24 (March 1985). (Hereinafter referred to as “the Bhopal Act”).

3 This enactment articulated a new conception of the role of *parens patriae*, on which the capacity of the Union of India to sue the Union Carbide Corporation rested. See s 3 of the Act, which conferred the “exclusive right” on the Central Government for the purpose.

- (c) a judgment rendered by an Indian Court could not be enforced without resort to United States courts;
- (d) UCC's *forum non conveniens* motion was nothing more than forum shopping."⁴

As against the contention of the Union of India, the UCC insisted that Indian courts were the best forum for the litigation. In support of its plea on the adequacy of the Indian legal system, UCC submitted affidavits of two senior advocates of the Supreme Court of India, NANI PALKHIVALA and J.B. DADACHANDJI. Thus the main battle was fought at the preliminary stage itself on the issue of the best forum to deal with the Bhopal litigation.

The presiding judge, J.F. KEENAN, accepted the plea of UCC and dismissed the case on the ground of *forum non conveniens*.⁵ The judge noted that the Indian legal system was in a far better position than the American courts to determine the cause of the tragic events and fix liability. The judge, in fact, took recourse to the private interest factors described in the *Gilbert*⁶ as well as *Piper Aircraft*⁷ cases. Moreover, he felt that no American interest in the outcome of the litigation outweighed the interest of India in applying Indian law and Indian values to the task of resolving the case.

Rejecting the argument of the plaintiff that the Indian judiciary was yet to reach full maturity, Judge KEENAN held that to retain the litigation before [the New York Court] would be yet another example of imperialism which would deprive the Indian judiciary of this opportunity to stand tall before the world. Hence Judge KEENAN dismissed the consolidated case on the grounds of *forum non conveniens* subject to the following conditions:

- "1. Union Carbide shall consent to submit to the jurisdiction of the courts of India and shall continue to waive defences based upon the statute of limitation;
2. Union Carbide shall agree to satisfy any judgment, rendered by an Indian court, and if applicable, upheld by an appellate Court in that country, where such judgment and affirmance comport with minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after an appropriate demand by plaintiffs."⁸

⁴ See "Memorandum of Law in Opposition to Union Carbide Corporation's Motion to Dismiss These Actions on the Grounds of *Forum Non-Conveniens*", in *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India, December 1984, MDL No.626, Misc. No.21-38 (JFK) 85. Civ.2696 (JFK), 6 December 1985.

⁵ In *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India in December 1984, MDL No.626, Misc.21-38 (JFK). All Cases, Opinion and Order of Judge JOHN F. KEENAN, New York, dated 12 May 1986.

⁶ *Gulf Oil Corporation v Gilbert*, 330 US 501 (1947).

⁷ *Piper Aircraft Co. v Reyno*, 454 US 235 (1981).

⁸ *Supra* n.5 at p.69.

2. US COURT OF APPEAL

Against the order of Judge KEENAN, appeals and counter-appeals were made before the United States Court of Appeals for the Second Circuit. While the Union of India continued to oppose the dismissal of the suit on the ground of *forum non conveniens*, UCC opposed, *inter alia*, the conditions imposed upon it concerning discovery. The Court of Appeals quoted the rationale given by the US Supreme Court in the *Piper Aircraft* case in endorsing the District Court's dismissal of the suit:

"The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the Court has considered all relevant public and private interest factors and where its balancing of these factors is reasonable, its decision deserves substantial deference.⁹

The Court of Appeals took the view that there was no abuse of discretion in granting dismissal of the action, as all relevant factors demonstrated the transfer of the case to India for trial and adjudication as fair and just to the parties. As for the UCC challenge to the conditions imposed by Judge KEENAN, the Court of Appeals endorsed the first condition on limitation. It rejected the contention of UCC to monitor Indian Court proceedings, considering the proposed remedy both as impracticable and an abysmal ignorance of basic jurisdictional principles.¹⁰ The Court considered the concept of shared jurisdiction as illusory and unrealistic, and viewed that a judgment of a foreign country that is final, conclusive and enforceable must be recognized and enforced in the United States under Article 53 of the Civil Practice Rules on Recognition of Foreign Country Money Judgments.¹¹ Furthermore, the Court took the view that the District Court erred in requiring UCC to consent (which UCC did under protest and subject to its right of appeal) to broad discovery of it by the plaintiffs under the Federal Rules of Civil Procedure when UCC was confined to the more limited discovery authorized under Indian Law. The Court of Appeals held in this regard:

"We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is

9 In *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India, December 1984 in the United States Court of Appeals for the Second Circuit, dated 14 January 1987, p.16.

10 *Ibid*, p.22.

11 New York's Article 53 is based upon the Uniform Foreign Money-Judgments Recognition Act. See 13 U.L.A. 263 (1962). It has been adopted by 15 States in addition to New York. In states that have not adopted the Uniform Foreign Money-Judgments Recognition Act, foreign judgments may be recognized according to principles of comity. See *Hilton v Guyot*, 159 US 113 (1895).

believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a *forum non conveniens* dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff.¹²

The Court ruled that both sides need to be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Thus, subject to these modifications, the Appellate Court upheld the order of dismissal by Judge KEENAN on the ground of *forum non conveniens*.

The Union of India still not satisfied with the Court of Appeals' ruling, filed a writ of *certiorari* before the US Supreme Court. However, the Supreme Court denied this in its order of 5 October 1987, without assigning any reasons.¹³

After these legal moves and counter-moves before the American courts, the scene of the Bhopal gas leak disaster litigation moved back to India. The Union of India filed a fresh case in the Court of the District Judge, Bhopal against UCC.

3. DISTRICT JUDGE, BHOPAL

In the regular civil suit before the District Judge, Bhopal, the parent company, UCC, was again made the defendant. The plaintiff, Union of India, under her statutorily conferred role as *parens patriae* sought to recover damages for "all persons" in respect of deaths, personal injuries to individuals, loss of property, business loss, damage to environment and other losses—present and future—arising from the Bhopal disaster.¹⁴ Contentions in the plaint sought to show that the defendant UCC was the mind and soul of the Bhopal plant and UCIL only its docile arm, as at all material times the UCC:

- “(a) designed, constructed, owned, operated, managed and controlled a chemical plant in the city of Bhopal in the State of Madhya Pradesh through its subsidiary Union Carbide India Limited.
- (b) manufactured, processed, handled and stored at its Bhopal plant, methyl isocyanate, a chemical used in the manufacture of agricultural pesticide produced and marketed by Union Carbide.
- (c) knew or should have known that MIC is an extraordinarily reactive, toxic, volatile, flammable and ultra-hazardous chemical;

¹² *Supra* n.9, p.23.

¹³ See *Union of India v Union Carbide Corporation et al.*, United States Supreme Court Reports 98 L Ed. & d 150.

¹⁴ See *Plaint, Union of India v Union Carbide Corporation* in the Court of the District Judge, Bhopal, Regular Civil Suit No.1113 of 1986.

- (d) knew or should have known that the long-term effects of human exposure to MIC could lead to genetic and carcinogenic consequences.”¹⁵

The plaintiff emphasized that by virtue of their global purpose, structure, organization, technology, finances and resources, the multinational corporations have within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. Accordingly, the Union of India prayed for:

- “1. A decree for *such amount as may be appropriate* under the facts and the law and as may be determined by this Court so as to fully, fairly and adequately compensate all persons and authorities, who have suffered as a result of the Bhopal disaster and having claims against the defendant;
 (2) A decree for *punitive damages* in an amount sufficient to deter the defendant Union Carbide and other multinational corporations involved in similar business activities from wilful, malicious and wanton disregard of the rights and safety of the citizens of India.” (*emphasis added*)¹⁶

Initially the District Judge made a proposal to parties for substantial reconciliatory interim relief. Though both the Union of India and UCC responded positively to work out an overall settlement, yet they made no headway. Therefore, Judge DEO, guided by the need for paramount justice in the case, made a *suo moto* proposal¹⁷ for grant of interim relief. In the interest of justice and fair play, the judge heard the parties on the matter. The defendant submitted that the Court should not assume the robe of an advocate and should not descend into the arena. The counsel for UCC opposed any role for the Court, as there was:

- (a) lack of jurisdiction to order interim relief;
 (b) lack of provision and power under the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, for grant of interim relief;
 (c) lack of material on record in the nature of quality and quantity to permit the Court to undertake such a venture;
 (d) the assertion of the State of Madhya Pradesh and the Union of India in providing interim relief.

The District Judge, refuting the contention of the UCC counsel that he should not allow his vision to be clouded with the dust of conflict, quoted Lord DENNING that “a Judge is not a mere umpire”.¹⁹ The Judge viewed that the

¹⁵ Ibid, pp.3–4.

¹⁶ Ibid, pp.4–5.

¹⁷ See Order in *Union of India v Union Carbide Corporation*: by District Judge, Bhopal, M.W. DEO, dated 17 December 1987, p.2.

¹⁸ Ibid, pp.3–4.

¹⁹ *John v National Coal Board*, 1957 (Vol.III) All ER 155.

object is to find out the truth and to do justice according to law. The Attorney General of India argued that under the provisions of section 94(e),²⁰ coupled with section 151²¹ of the Civil Procedure Code, the Court had ample powers to make such an order in the interest of justice.

Explaining the inherent powers of the Court to make orders necessary for the ends of justice, the Judge said that these powers have not been conferred upon the Courts, but were inherent in the Court, by virtue of its duty to do justice between the parties, as:

“Inherent powers are born with the creation of the Court, like the pulsating life coming with a child born into this world. Without inherent powers, the Court would be like a still-born child. The powers invested in the Court after its creation are like many other acquisitions of faculties which the child acquires after birth during its life. Thus inherent powers are of primordial nature. They are almost plenary except for the restriction that they shall not be exercised in conflict with any express provision to the contrary.”²²

Judge DEO was at pains to emphasize that section 94 of the Civil Procedure Code provides for making an interlocutory order as may appear to be just and convenient and he did not see any express or implied provision prohibiting such an order in a suit for money. The fact that no such order had been shown to have been made in a suit by a civil Court did not deter him from making one, as the judge felt that law must grow to meet the problems raised by changing circumstances.²³ Therefore, the judge held that in a tort action the Civil Court has jurisdiction to grant interim compensation, which has been statutorily recognized of late as well as judicially upheld and laid down as law by the Supreme Court in *M.C. Mehta*.²⁴

The District judge categorically stated in his Order that he drew upon the *M.C. Mehta* case “for the limited principle that in action for tortious liability a

20 Section 94, Civil Procedure Code (CPC), 1976, provides for making such interlocutory order as may be just and convenient.

21 Section 151, CPC, provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make orders necessary for the ends of justice.

22 *Supra* n.17 at p.7.

23 In support of his view, Judge DEO has quoted in his *Order, supra* n.17 at p.15, Lord DENNING's following observation in *Packer v Packer*:

“What is the argument on the other side? Only this, that no case has been found in which it has been done before. This argument does not appeal to me in the least. *If we never do anything which has not been done before, we shall never get anywhere. The law will stand still, whilst the rest of the world goes on and that will be bad for both.*” (emphasis in Judge DEO's Order).

Also see, Lord DENNING, *The Discipline of Law* (1979), on the opening page.

24 *M.C. Mehta v Union of India*, A.I.R. 1987 Supreme Court (SC) 965, as modified by order dated 10 March 1986 (A.I.R. 1987 SC 982) and reviewed in unanimous judgment of the five-judge Constitution Bench dated 20 December 1986 (A.I.R. 1987 SC 1086).

grant of interim compensation is permissible". He regarded *M.C. Mehta* as not only binding on all courts but also a source of law, innovative in nature to meet an unprecedented new situation.

Recognizing the paramount need for immediate relief to the gas victims, Judge DEO observed:

"Can the gas victims survive till the time all the tangible data with meticulous exactitude is collected and proved and adjudicated in fine forensic style for working out final amounts of compensation with precision of quality and quantity? Will it not be prudent to order payment of a relative sum bearing in mind all the progress in the case so far, the facts and figures (though not undisputed) which have come on record and the material furnished during settlement efforts made by Judge Keenan? After all, interim relief is never and can never be exact like final adjudication in its very nature."²⁵

Though conceding that such an attempt was not made in the past, the judge said the law will not stand still. Accordingly, the District Judge ordered that the defendant UCC would deposit in the Court a sum of 350,000,000 million rupees (about US\$270 million) for payment of substantial interim compensation and welfare measures for the gas victims.²⁶

4. MADHYA PRADESH HIGH COURT

Aggrieved by the order for interim compensation of the District Judge, the defendant UCC filed a civil revision petition before the Madhya Pradesh High Court.²⁷ In his detailed order, Justice SETH partly allowed the revision and reduced the amount of interim compensation decided by the District Judge, Bhopal. Significantly, however, the High Court fixed the liability of the defendant to pay interim compensation, holding that more than a *prima facie* case had been made out for the purpose.²⁸ Justice SETH, while listing the course the litigation had taken in the US before being dismissed on the ground of *forum non conveniens*, expressed shock over the manner in which the plaintiff Union of India underrated its own judiciary and made it a subject matter of ridicule so publicly before a foreign court.

²⁵ *Supra* n.17 at p.15.

²⁶ *Ibid*, p.16.

²⁷ *Union Carbide Corporation v Union of India* in the Madhya Pradesh High Court, Jabalpur; Civil Revision No.26 of 1988.

²⁸ *Ibid*, see Order by Justice S.K. SETH dated 4 April 1988, p.15.

The High Court took into account certain facts²⁹ stated by the sole defendant UCC in its written statement and as such were not disputed by it in the suit. In addition to 50.9 per cent shares of the Indian company (UCIL) held by UCC, Justice SETH also examined the Design Transfer Agreement and the Technical Service Agreement, which revealed a close relationship of the defendant UCC with the Indian company.

The High Court examined the impugned order of interim payment made by the District Court: the question was whether under the substantive law, i.e., the general law of torts, it was permissible for the Court to pass an order of interim payment. Justice SETH rejected the argument of UCC that the suit was not properly constituted. It was apparent that the District Judge had relied upon section 151 of the Civil Procedure Code to derive statutory basis for the award of interim compensation in the suit. After an examination of the case law on the point, Justice SETH categorically observed:

“The Supreme Court’s decision in *Padam Sen* and *Manohar Lal* settles the law that howsoever wide the ambit of inherent powers of the Court under section 151, CPC may be, the said powers relate to the procedure to be followed by the Court in deciding the cause before it and they are not powers over the substantive rights which any litigant possesses.”³⁰

Accordingly, Justice SETH inferred as settled that howsoever wide the ambit of inherent powers of the Court under section 151 of the Civil Procedure Code may be, these powers relate to the procedure to be followed by the Court in deciding the cause before it. He felt that they were not powers over the substantive rights which any litigant possessed. And specific powers have to be conferred on the Court for passing such orders which would affect the rights of a party.³¹

Justice SETH answered the question whether under the substantive law of torts it was permissible for the Court to grant relief of interim payment, by reference to the history of the development of the law of torts in India. He held that though the District Judge did not elaborate on the point, he had clearly stated in his order that it would be consistent with the law of torts to contemplate jurisdiction of the civil Court hearing the suit to grant the relief of interim payment. In fact, he has categorically stated that it could not be said

29 The relevant facts stated by the defendant UCC in its written statement were as follows:

“The chemical plant from which the lethal MIC gas escaped on the fateful night resulting in the disaster, belonged to a corporate entity named ‘Union Carbide India Limited’ (Indian company). It is a public company registered under the Indian Companies Act. Till the year 1977–78, 60 per cent of the equity ownership of the defendant UCC was reduced to 50.9 per cent but even then it continued to have more than half of the said ownership.”

30 *Supra* n.27 at p.62.

31 The Supreme Court of India affirmed the *ratio* of its earlier decision in *Padam Sen* and *Manoharlal* recently in *Commissioner of Income Tax, Delhi v Bansidhar and Sons* (A.I.R. 1986 S.C. 421).

that there was no substantive right with the gas victims for such payment. The liability in the tort law was considered as settled with the culmination in the principle of strict and absolute liability without exception laid down by the Supreme Court in the *M.C. Mehta* case.³²

The High Court went into the question of “lifting of the corporate veil”³³ in order to hold the parent company, UCC, liable. The Court took the view that the defendant had real control over the enterprise, which was engaged in carrying on a hazardous and inherently dangerous industry at the Bhopal plant. This was inferred by the Court as “more than *prima facie* established” and hence UCC was held to be absolutely liable (without any exceptions) to the victims.³⁴ One of the objections raised by UCC to the impugned order of interim payment passed by the District Judge, pertained to his *suo moto* proposal. The High Court rejected this argument and observed that in view of the horrendous event, it was immaterial whether the proposal for interim payment came from the Court or from the plaintiff Union of India.

Accordingly, the High Court proceeded to determine the quantum of interim compensation. For this the Court relied upon the figures of affected³⁵ people

32 The five-judge Constitution Bench of the Supreme Court of India unanimously held that:

“Where an enterprise is engaged in an hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-à-vis* the rule in *Rylands v Fletcher* [(1861–1873) 1 All E.R. 146 (HL)] ... [T]he measure of compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise”.

See *M.C. Mehta v Union of India*, A.I.R. 1987 SC 1099.

33 The concept of lifting the veil or piercing the veil was first held in *Saloman v Saloman and Co* (1897 A.C. 22) as an absolute principle that a corporation or company has a legal and separate entity of its own.

In a recent decision, the Supreme Court of India has observed:

“Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented or a taxing statute or a benevolent statute ought to be evaded or where associated companies are inextricably connected as to be in reality part of one concern. It is neither necessary nor desirable to enumerate the class of cases where the lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the objects sought to be achieved, the impugned conduct, the involvement of the element of public interests, the effect on parties who may be affected” *etc.*

See *Life Insurance Corporation of India v Escorts Ltd*, A.I.R. 1986 SC 1370.

34 *Supra* n.27 at p.93.

35 It was stated by the Union of India that a total number of 2,660 persons suffered agonising and excruciating death and between 39,000 and 40,000 sustained serious injuries as a result of the disaster.

furnished by the plaintiff in its amended plaint. The Court took into account categories of claims relating to death and personal injuries under the scheme³⁶ framed under the Bhopal Gas Leak Disaster Act, which formed the basis for its determination of interim relief in respect of each of such categories. In fixing the measure of damages payable by the tortfeasor, the Court specifically bore in mind the criteria of “magnitude and capacity of enterprise” laid down by the Supreme Court in *M.C. Mehta*,³⁷ so that such compensation could have a deterrent effect. Since UCC was a financially sound corporation, the court, taking into account all relevant factors, fixed its liability to pay interim compensation at Rs 2,500 million³⁸ as final and conclusive. Thus the High Court reduced the amount of interim payment from Rs 3,500 million fixed by the District Judge, Bhopal. Nevertheless, instead of making it merely a humanitarian gesture, the Court held UCC legally liable, as it held that a *prima facie* case had been made out in favour of the Union of India.

5. THE SETTLEMENT

Aggrieved by the order passed by the Madhya Pradesh High Court, UCC preferred an appeal before the Supreme Court of India. Even as the hearing was taking place, the apex Court on 14 February 1989 suddenly made an order for settlement³⁹ between UCC and the Union of India in the case. The Supreme Court regarded its order of settlement as an exercise to fulfil a compelling duty, both judicial and humane, to secure immediate relief to the victims. The Court, taking into consideration the facts and circumstances of the case and the offers and counter-offers made between the parties at different stages during the various proceedings, among other things, viewed the case pre-eminently fit for an overall settlement. Terming it as just, equitable and reasonable, the five-judge Bench of the Court, headed by the then Chief Justice, R.S. PATHAK, made the following order:

- “1. The Union Carbide Corporation shall pay a sum of US Dollars 470 million . . . to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.
2. The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31 March 1989.
3. To enable the effectuation of the settlement, *all civil proceedings related to and*

36 The scheme had divided the categories of claims as: (a) death; (b) total disablement resulting in permanent disability; (c) permanent partial disablement; and (d) temporary partial disablement.

37 *Loc. cit. supra* n.32.

38 *Supra* n.27 at p.98.

39 *Union Carbide Corporation v Union of India and others* in C.A. Nos. 3187 and 3188 of 1988 with S.L.P. (Civil) No.13080 of 1988; A.I.R. 1990 SC 273.

arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.” (emphasis added)⁴⁰

As directed by the Supreme Court in this order, both parties filed on the next day (15 February 1989) a memorandum containing Terms of Settlement. The terms were sweeping in nature, exonerating the UCC completely from the clutches of the law:

“This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever pending) by all Indian citizens and all public and private entities with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever ... all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.” (emphasis added)⁴¹

Both orders passed by the Supreme Court (on 14 and 15 February 1989) for settlement in the case did not assign any reasons. It led to many speculations and an outcry from the gas victims.

Therefore, as suddenly as its earlier order of settlement, the Supreme Court, as if to clear its judicial conscience, decided on 4 May 1989 to give detailed reasons⁴² which had persuaded the Court to make the original order. Significantly, the Court stressed that it was not putting forward reasons “with any sense of finality as to the infallibility of the decisions”.⁴³ It admitted to have an open mind as regards review of the decision on the ground of any tenable and compelling legal or factual infirmities. The Court was, in fact, referring to the review⁴⁴ petitions already pending before it.

The court’s reasoned order explained as to how it arrived at the sum of \$470

40 Ibid, p.275.

41 A.I.R. 1990 SC 276. In a stinging criticism of the Bhopal Award in a centre-page article in *The Times of India* (16 February 1989), Professor UPENDRA BAXI described it as yet “another calamitous event” for the gas victims. He stated that if the escape of the MIC gas from the Union Carbide plant in Bhopal was so lethal, it is no less hurtful than when institutions of justice themselves become instruments of injustice.

42 A.I.R. 1990 SC 277.

43 Ibid.

44 Under Article 137 of the Constitution of India. It provides: “Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.”

million for an overall settlement. Terming the law's delays⁴⁵ as proverbial, the Court stated that considerations of excellence and niceties of legal principles were greatly overshadowed by the compelling need for urgent relief for a large number of gas victims. For arriving at the figure of \$470 million,⁴⁶ the apex Court disclosed the range of 426 million dollars, which UCC was prepared to concede and 500 million dollars, regarded by the Union of India as the minimum amount within which it could strike a settlement. This was also premised upon acceptance of the *parens patriae* role of the Union of India under the Bhopal Act (1985).⁴⁷ As for the reasonableness of the amount of damages, the Court construed it as a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication.⁴⁸ The Court revealed its susceptibility to the criticism received by the settlement order, to the question whether it lost the opportunity to give the law a new direction in laying down principles of liability of monolithic multinational companies operating with inherently dangerous technologies in developing countries. Ironically, instead of explaining that it was not a case of "lost opportunity", the Court skirted the issue by saying, "this was eminently an appropriate case for a careful assessment of the legal and constitutional safeguards".⁴⁹

6. VALIDITY OF THE BHOPAL ACT

In the detailed reasons provided by the Supreme Court, it tried to justify the settlement order. Yet, the Court soon faced another challenge as regards the constitutional validity of the Bhopal Act, on the basis of which the Union of India acted as *parens patriae* in the litigation as well as party to the settlement

45 The Court, as matter of factly, admitted that even after four years of litigations in the Bhopal gas leak disaster, basic questions of the fundamentals of the law as to liability of UCC and the quantum of damages were yet being debated.

46 In arriving at this figure, the Court kept in mind, among others, the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the US for the purpose of execution. It calculated that the amount of \$470 million, which upon immediate payment and with interest over a reasonable period—pending actual distribution amongst the claimants—would aggregate very nearly to \$500 million (about Rs 750 crores), was acceptable to the Union of India.

47 In spite of the fact that petitions challenging the *vires* of the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, were pending, the Supreme Court went ahead on the basis of the assumption of validity of the law. In doing so, the Court undertook considerable risk in the event of the Act subsequently being struck down by it. This step was also laden with the potential of casting shadow even as regards pending petitions for review of the settlement, which actually did happen later.

48 See *supra* n.42 at p.280.

49 *Ibid*, p.283.

reached with the UCC. In a sense it represented a paradox too. The Court heard this matter after providing its reasoned order for the settlement. As such, in the eventuality of the Court striking down the Bhopal Act, it would have torpedoed the settlement, as the Union of India's legal authority in the case flowed from that Act (section 3). The challenge to the Act was made on the ground that the victims had not been given the right to be heard before the settlement by virtue of section 4⁵⁰ of the Act.

The five-judge Constitution Bench, headed by Chief Justice S. MUKHARJI, which upheld the validity of the Act in its judgment of 22 December 1989,⁵¹ emphasized the right of the victims to be heard before the settlement. It observed:

"The Act, as we have construed, requires notice, to be given in what form and in what manner, it need not be spelled out, before entering into any settlement. . . . It further appears that type of notice which is required to be given had not been given. The question, therefore, is what is to be done and what is the consequence? *The Act would be bad if it is not construed in the light that notice before any settlement under section 4 of the Act was required to be given.*" (emphasis added)⁵²

though the apex Court did admit that "entering into a settlement without the required notice is wrong", yet it offered a surprising logic as "to do a great right" after all, it is permissible sometimes "to do a little wrong".⁵³ Therefore, since it affected the vital interest of the victims, they should have had pre-decisional hearing.⁵⁴ However, the Court now felt that granting a post-decisional hearing to the victims would not serve any purpose and consequently the infirmity was allowed to persist. The Court, apparently, insisted that in doing this it was guided by the paramount consideration of urgent relief to the victims rather than to depend upon the uncertain promise of law.

7. REVIEW OF THE SETTLEMENT

The settlement order made by the Supreme Court was followed by public

⁵⁰ Section 4 of the Bhopal Act provides:

"Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

⁵¹ *Charanlal Sahu v Union of India* (1990) 1 Supreme Court Cases 613 in writ petition Nos.268 of 1989, 164 of 1986, 281 of 1989 and 1551 of 1986.

⁵² (1990) 1 SCC 703.

⁵³ *Ibid*, p.705.

outrage and criticism in the media. Therefore, several review petitions were soon filed before the Court under Article 137 of the Constitution of India. In fact, in its order of 4 May 1989 providing reasons⁵⁵ for the settlement, the Court did hint at its open mind on the issue since, as with all other human institutions, the Court was also “human and fallible” and those who trust it “will not have cause for despair”.⁵⁶

The apex Court took up review proceedings as regards challenge to the settlement order. With the change in the government at the centre, the Union of India decided to support review petitions pending before the Court instead of filing a separate one of its own. The Constitution Bench, headed by Chief Justice S. MUKHARJI, heard the matter for 18 days. Justice MUKHARJI’s sudden death necessitated the reconstitution of the Bench, consequently the five-judge Bench headed by the new Chief Justice RANGANATH MISRA gave the judgment on 3 October 1991.⁵⁷ One of the judges, Justice A.M. AHMADI disagreed with the majority which upheld the settlement except the quashing of criminal proceedings, as regards a direction to the Union of India to make good any shortfall in the settlement fund.

Chief Justice MISRA in fact conceded that there has been no final adjudication in a mass tort action anywhere and even an adjudication would only be an attempt at approximation. However, he expressed anguish at the tirade carried on by the media and the mud-slinging against the Court following the settlement order. The Chief Justice, in his separate and concurring opinion, tried to defend the quantum of compensation. While quoting the Court’s judgment in *M.C. Mehta*, which laid down the principle of strict and absolute liability, MISRA, C.J., contended that no compensation was awarded by the Court in that case and what was said was essentially *obiter*.⁵⁸ He expressed apprehension that if the Court was to follow the *ratio* in the *Mehta* case and determined compensation on the basis of strict liability (as compared to *Rylands v. Fletcher*), a foundation different from the accepted basis in the United States, the decree may not be executable. MISRA, C.J. justified the Court not giving the judgment on merit, at the risk of ultimately

54 The Court observed that in entering upon the settlement, in view of s 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these appropriate notices before arriving at any settlement were necessary.

55 See *supra*, n.42.

56 *Ibid*, p.284.

57 *Union Carbide Corporation . . . v Union of India* in C.M.P. Nos.2977-A/88, 7942-43/89, 16039/89, 17965/89; Review Petitions Nos. 229 & 623-24 of 1989 in C.A. Nos.3187-88 of 1988 with W.P. Nos.257, 297, 345, 379, 293, 399, 420/89, 231, 300, 378, 382/89, I.A. Nos.1-3 (In C.A. No.3/87-88/89) & I.A. No.1/90 (In W.P. No.281/89) & W.P. Nos.741/90, 3461/89. See 1991 (2) SCALE 675.

58 As *per* MISRA, CJ, the Court did not award any compensation as it could not reach the conclusion that Shriram (the delinquent company) came within the meaning of “State” in Article 12, so as to be liable to the discipline of Article 21 (Right to Life and Liberty) and to be subjected to a proceeding under Article 32 (Judicial Review) of the Constitution of India.

losing the legal battle! Therefore, he did not find any reason to review the decree obtained on consent terms for compensation.

Among the various contentions placed before it, challenging the settlement order and calling for its review, the Constitution Bench took a rather cautious approach. This may be partly because it was a *fait accompli*. Prior to taking up the review petitions, the Court had already upheld the Bhopal Act (1985).⁵⁹ Moreover, in the *Charanlal Sahu* case the Court did admit that there was a violation of the principles of natural justice, as the victims were not heard for the settlement order, yet it did not vitiate the same.⁶⁰ The Court was also not prepared to go into the question of adequacy of the quantum of settlement and decide the issue on merit applying the strict liability principle. Therefore, what was left was the question of termination of pending criminal proceedings as well as conferment of immunity from future criminal proceedings contained in the settlement order. On both these counts, the Court set aside all relevant portions of the settlement orders (dated 14 and 15 February 1989).

The Court elaborated its power under Article 142⁶¹ of the Constitution to do "complete justice" in any cause or matter. It took the view that it would take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The Court emphatically stated that the proposition did not relate to its powers under Article 142, but only to what was or was not complete justice of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power.

Consequential to this order, the Court set aside the immunity from future criminal proceedings granted in the settlement order.⁶² The Court left untouched the quantum of settlement (US\$470 million). It also directed the Union of India to bear the shortfall, if any, in the settlement fund. Justice AHMADI, however, dissented from the majority on the ground that this would be tantamount to imposing an additional term on the Union of India in the settlement, without its consent as well as without even holding it liable as a tortfeasor.⁶³

⁵⁹ See *supra* n.51, p.681.

⁶⁰ *Ibid*, p.702.

⁶¹ Article 142(1) provides:

"The Supreme Court of India in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament, and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

See *supra*, n.57 at p.698.

⁶³ *Ibid*, p.737.

8. CRIMINAL PROCEEDINGS

Since the judgment of the Supreme Court in the review petitions, the criminal proceedings against the Union Carbide have been revived.⁶⁴

The District Additional Sessions Judge, Bhopal, Mr WAJAHAT ALI SHAH, has now framed charges⁶⁵ against nine persons, including the former chairman of the UCIL, for, among others, culpable homicide not amounting to murder. The judge also declared the former UCC Chairman Mr WARREN ANDERSON, the UCC and the Union Carbide (Eastern) Hong Kong, as absconders. The judge has fixed 12 May 1993 for recording evidence of all the witnesses in the case.

64 A criminal case regarding the leakage of MIC gas from the Bhopal plant of the UCIL was registered with the Hanumanganj police station of Bhopal on 3 December 1984, under s 304-A of the Indian Penal Code. The then UCC Chairman, Mr WARREN ANDERSON, the UCIL Chairman Mr KESHUB MAHINDRA and the UCIL Managing Director, Mr VIJAY GOKHALE, had been arrested in Bhopal on 7 December 1984. The case was handed over to the Central Bureau of Investigation (CBI) on 6 December 1984.

The CBI filed a charge-sheet in the Court of the Chief Judicial Magistrate, Bhopal on 1 December 1987. This proceeding was quashed, following the overall settlement reached between the Union of India and the UCC on 14 February 1989 (A.I.R. 1990 SC 273).

65 *The Times of India* (New Delhi), 9 April 1993.