

# **UNSETTLING TRUTHS, UNTOLD TALES**

## **THE BHOPAL GAS DISASTER VICTIMS 'TWENTY YEARS' OF COURTROOM STRUGGLES FOR JUSTICE**

### **[BHOPAL GAS LEAK DISASTER – LEGAL ISSUES]**

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Shiny Chacko did the entire typing of this manuscript notwithstanding many hurdles.

It is quite possible that some others may have been left out from this list. The omission is not deliberate. Bhopal has deeply affected a large number of right thinking persons. That is what gives hope for the future.

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S. Muralidhar

### Abbreviations

ATCA	-	Alien Torts Claims Act (US)
BGIA	-	Bhopal Group for Information and Action
BGPMUS	-	Bhopal Gas Peedit Mahila Udyog Sangh
BGPSSS	-	Bhopal Gas Peedit Sangarsh Sahyog Samiti
BHMRT	-	Bhopal Hospital Memorial Research Trust
BHT	-	Bhopal Hospital Trust
CPC	-	Code Civil Procedure, 1908
Cr.PC	-	Code of Criminal Procedure, 1973
EPA	-	Environment (Protection) Act, 1986
FERA	-	Foreign Exchange Revision Act,
IPC	-	Indian Penal Code, 1860
PIL	-	Public Interest Litigation
SCALE	-	Supreme Court Almanac
SCC	-	Supreme Court Cases
UCC	-	Union Carbide Corporation
UCIL	-	Union Carbide India Limited
UOI	-	Union of India

## Executive Summary

The Bhopal gas leak disaster symbolises the failure of the legal system in general and the failure of the system to respond to the disaster in particular. The twenty years of engagement with the law and the justice system holds many lessons for the future. It is time for introspection and assessment. Law may not have all the answers to the problems that Bhopals generate, but it has the potential to do harm. Also, law is used by the State and the corporation/industry in a variety of ways that actually result in negation of justice to those within their control.

### **The cases concerning award of compensation**

The Supreme Court which approved on February 14/ 15, 1989 the settlement by which Union Carbide Corporation (UCC) was to pay 470 million US dollars as full and final settlement of all civil and criminal claims by the victims, justified it saying: “this court, considered it a compelling duty, both judicial and humane, to secure **immediate relief** to the victims.” Twenty years after the settlement, neither has the relief to the victim been adequate nor immediate. The assumptions on which the settlement is approved was that the number of deaths was 3,000 and the number injured in the range of 1,00,000. In March 2003, the official figures of the awarded death claims stood at 15,180 and awarded injury claims at 5,53,015. The underestimation was slightly above 5 times. The range of compensation which was assumed in the settlement order would be payable was Rs.1 to 3 lakhs for a death claim, Rs.25,000/- to Rs.1 lakh for temporary disablement and Rs.50,000/- to Rs.2 lakhs for permanent disablement. Each death claim has been awarded not more than Rs.1 lakh and on an average an injury claim has been settled for as little as Rs.25,000/-.

There have been failures in acknowledging the victims of the disaster by the devices of exclusion, arbitrary categorization and arbitrary re-categorisation. Further, the costs and losses arising out of the Bhopal gas leak disaster have had to be borne by the victim. The failure to develop a jurisprudence to deal with the legal issues arising out of a mass disaster is clearly inexcusable particularly when the status of risk and safety in Indian industry is no better than it was in 1984. Developing a law is only part of the solution, implementing it effectively would be an even greater challenge.

- The lack of awareness of the legal processes and the absence of legal aid led many of the persons to claim compensation of amounts less than a lakh of rupees and over 90% of them received only Rs.25,000/-. Therefore, the high degree of dissatisfaction with the compensation awarded.
- Nothing of the compensation money was saved since most of it was utilised in health care and repayment of loans. Lack of awareness again resulted in a very small percentage actually filing appeals against the awards.
- The results of the appeal were hardly beneficial to the claimant. A sizeable number of the appellants (26.5%) faced the ironic result of the compensation awarded to them in the first court reduced by the appellate court. The appeal process was also clearly unsatisfactory.
- No claim was settled earlier than a waiting period of 7 years. The adjudicatory process involved over 5 visits of two hours each for the claimant. Ultimately, the Judge was able to spend not more than 10 minutes on a case.

- Of those who paid bribes, who constituted not even 10% of the total number surveyed, many paid it to the court official for getting their claim settled quicker.

#### *The other cases*

The criminal case is far from concluded. The trial of the Indian accused in the Court of the CJM, Bhopal for the offence under s.304A IPC is likely to go on for at least 2 more years. It is anybody's guess whether the ultimate result of the trial would satisfy either the prosecution or the accused. It is likely that further rounds of litigation by way of appeal will ensue. As regards the absconding accused, Warren Anderson, UCC and UCC (E), the belated attempt by the Union of India to seek explanation of Warren Anderson has already met a roadblock. It remains to be seen whether the Union of India will pursue its case any further.

The medical and health issues facing the Bhopal gas victims have finally received an acknowledgment in the proceedings in the Supreme Court. The Advisory Committee and the Monitoring Committee constituted by the court in August 2004 would have to become operational. The effectiveness of these overview mechanisms needs to be assessed.

The litigation concerning environmental pollution and the consequential demand for clean up of the toxic plant site at Bhopal has also entered a critical stage. Whether the victims will be able to show continuing damage to their person and property will to a large extent determine the outcome of this round of litigation in the US.

#### *Action Plan for the future*

- Constructing an administrative and legal regime that is victim friendly and does not erect barriers to private initiatives.
- Evolving a comprehensive disaster management plan which examines the needs of those affected from the point of view of several disciplines.
- Reviewing thoroughly the statutory legal framework from the perspective of mass disasters that are man-made. This would involve weeding out of those provisions of statutes that provide impunity to corporate offenders.
- Putting in place an effective system of legal services and legal aid for those in the neighbourhood of factories and potential risk bearers. Spreading awareness about the risk of hazardous industrial activity among the affected populations should be a mandatory legal obligation of any enterprise undertaking such activity. This would also ensure the enforcement of the victim's right to information.
- The role of the State in avoiding its constitutional and statutory obligations requires severe interrogation. How do we ensure that the crisis management mechanisms, that are now required to be put in place by the State, are actually operational and effective?
- The role of the Indian legal system in general and the Indian judicial system in particular calls for systemic changes that place the victim of a mass disaster at the centre and not merely incidental to the functioning of the system. A reorientation of both the judiciary as well as the legal profession in their response to mass disasters is imperative. It is possible to involve the disciplinary bodies of lawyers and the judicial academies both at the centre and the states in this exercise.
- Corporate accountability mechanisms required to be built into the law, both civil and criminal.

It is indeed a disturbing thought that if another Bhopal would be happen today, we may not be responding differently despite the knowledge of earlier failures. The reluctance to act cannot be explained except on the anvil of the dichotomy of 'us' and 'them'. If indeed, the wind on the intervening night of December 2/ 3 1984 had blown in a different direction, it is possible that attitudes and systems may have changed by now.



## CHAPTER 1

### **1.1 INTRODUCING THE FFM REPORT ON THE LEGAL ISSUES ARISING OUT OF THE BHOPAL GAS LEAK DISASTER**

1.1.1 The Bhopal gas leak triggered many a litigation disaster. Almost every strand of litigation concerning the event has been a disaster for the victim. Bhopal could well symbolise the failure of the legal system in general and the failure of the system to respond to the disaster in particular. The twenty years of engagement with the law and the justice system holds many lessons for the future. It is time for introspection and assessment. Law may not have all the answers to the problems that Bhopals generate, but it has the potential to do harm. Also, law is used by the State and the corporation/industry in a variety of ways that actually result in negation of justice to those within their control.

1.1.2 In undertaking the present exercise of chronicling what has happened in the courts and in the law in the past two decades, it was felt that the inception, continuance and conclusion of every strand of Bhopal litigation, both criminal and civil, required to be documented in order to facilitate analysis by several disciplines not limited to law.

1.1.3 The narration that follows should hopefully contain answers to some of the questions thrown up by the litigation concerning the Bhopal gas leak disaster. For instance,

- What was the role of law makers, lawyers, judges and middle men?
- What were the incidental and allied activities in relation to pursuing claims before the welfare commissioners?
- What were the direct and indirect, apparent and latent areas/instances of corruption?
- Who was involved and to what extent? Were there any accountability mechanisms?
- How has Bhopal affected law making? What have been the changes to the statutes/ rules/ regulations? To whom has these changes made a difference and how?

1.1.4 Another set of questions would be:

- What has been the impact of Bhopal on the working and liability of multi-national corporations?
- Has there been any change in the law to recognize and punish corporate criminality

1.1.5 Then there are questions that arise in relation to obligations/ liabilities under international law. This involves examining law concerning extradition of foreign accused persons. Bhopal also is a compelling testimony to the continuing direct and indirect violations of human rights of the disaster victims. The questions that need to be asked in this context are:

1.1.6 In relation to the gas victim how has law impinged upon

- the right to information
- the right to health (treatment and care)
- the right to shelter
- the right to livelihood
- the right to protest
- the right to a fair trial
- the right to dignity
- the right to access to justice, in particular legal aid

## **1.2 READING THIS REPORT**

1.2.1 The first document is a brief list of important dates and events which helps to read the subsequent chapters in the background of the factual events. The chapters immediately following contain a detailed narrative of the litigation in the context of compensation, criminal proceedings, medical and health issues and environmental issues. In each of these chapters:

- There is a further narration of background facts, which have to be read along with the broad statement of facts contained in the list of dates;
- A description of the litigation;
- Legislative changes, if any; and
- Significant aspects, outstanding issues arising out of the litigation.

1.2.2 The Report ends with a brief summary of each of the chapters and suggests a possible Action Plan to set the agenda for the future.

1.2.3 As a caveat, what this Report does not contain needs to be mentioned. While the attempt is to narrate the detailed facts concerning each stand of litigation, the documentary support cannot possibly be accommodated within this Report. Therefore, there are no appendices containing the detailed documentation. This runs into thousands of pages and it is hoped that these will be separately published in the near future. Such publication would be in continuation of the three books brought out by the Indian Law Institute which contains the litigation documentation up to the stage of the review petition in the Supreme Court, i.e. till the beginning of 1990. Also absent is any detailed analysis of the various strands of litigation. This Report serves to place the facts that can facilitate such analysis not only by the discipline of law but other disciplines as well.

## CHAPTER 2: THE BHOPAL DATE LINE

- 1969** Union Carbide India Limited's (UCIL) plant at Bhopal designed by its holding company Union Carbide Corporation (UCC), U.S.A (which held 50.9% of UCIL's equity) was built in 1969 as a formulation factory for UCC's SEVIN brand of pesticides, produced by reacting Methyl Isocyanate (MIC) and alpha naphthol. Sevin kills pests by paralysing their nervous systems. At this time MIC was imported from the US in steel containers. Plant set up on land taken on long-term lease from State of Madhya Pradesh.
- 1975** UCC decided to 'integrate backwards' and manufacture ingredients of Sevin at the Bhopal of UCIL. Although the then zonal regulations prohibited locating polluting activity in the vicinity of 2 kms from the railway station, UCC was able to persuade the authorities to grant it the necessary clearances.
- 1978** The alpha naphthol manufacturing unit was set up and a year later the MIC unit was set up at UCIL's plant in Bhopal
- December 25, 1981** Leak of Phosgene gas at the UCIL plant killed one worker.
- January 9, 1982** 25 workers were hospitalised as a result of another leak at the UCIL plant. Workers' protests went unheeded.
- 1982** Bhopal journalist Rajkumar Keswani wrote a series of articles in local press about the dangers posed by the UCIL plant
- March 1982** Leak from one of the solar evaporation ponds took place in March 1982. In April 1982 a UCIL document addressed to UCC noted that the continued leakage was causing great concern.
- May 1982** UCC sent its US experts to UCIL plant to conduct audit. The team noticed leaking valves and a total of 61 hazards, 30 of which were major and 11 of which were in the MIC/Phosgene units
- September 1982** UCIL de-linked the alarm from the siren warning system so that only their employees would be alerted over minor leaks without "unnecessarily" causing "undue panic" among neighbourhood residents.
- October 5, 1982** Another leak from the plant resulted in hospitalisation of hundreds of nearby residents.
- March 4, 1983** Bhopal lawyer Shahnawaz Khan served a legal notice on UCIL stating that the plant posed a serious risk to health and safety of workers and residents nearby.
- April 29, 1983** In a written reply, UCIL's Works Manager denied the allegations as baseless.

Between 1983&  
**1984**

The safety manuals were re-written to permit switching off the refrigeration unit and shutting down the vent gas scrubber when the plant was not in operation.

The staffing at the MIC unit was reduced from 12 to 6

Thus at the time of the disaster on the night of December 2/3, 1984

- The refrigeration unit installed to cool MIC and prevent chemical reactions had been shut for 3 months
- The vent gas scrubber had been shut off for maintenance
- The flare tower had been shut off
- There were no effective alarm systems in place
- The water sprayers were incapable of reaching the flare towers
- The temperature and pressure gauges were malfunctioning
- Tank number 610 for storing MIC was filled above recommended capacity
- The stand by tank for use in case of excess was already having MIC

**November 29, 1984** UCC had by this time decided to dismantle the plant and ship it to Indonesia or Brazil. The feasibility report for this was completed on November 29, three days before the Disaster

**December 2, 1984** At 8.30 p.m. the workers under instructions from their supervisors began a water-washing exercise to clear the pipes choked with solid wastes. The water entered the MIC tank past leaking valves and set off an exothermic `runaway reaction' causing the concrete casing of tank 610 to split and the contents leaking into the air.

**December 3, 1984** Because of no warning given to residents or about precautions they should take, many of them ran on to the streets to meet a certain death. A suo-motu FIR was recorded by the SHO at P.S. Hanumanganj on 3.12.84 against UCC, UCIL and its executives and employees under s.304 A IPC. The record indicates the grim statistics]

- 3828 died on the day of the disaster (the unofficial toll is feared to be much higher – by 2003 over 15,000 death claims have been processed)
- Over 30,000 injured on the fateful day (a figure that now stands at 5.5 lakhs)
- 2544 animals killed

- December 3, 1984** 5 junior employees of UCIL were arrested
- December 6, 1984** Case was handed over to the CBI. The Government of Madhya Pradesh on December 6, 1984 set up a Commission of Inquiry called the Bhopal Poisonous Gas Leakage Inquiry Commission, presided over by N.K.Singh a sitting judge of the Madhya Pradesh High Court.
- December 7, 1984** Warren Anderson (A1), Keshub Mahindra (A2) and V.P.Gokhale (A3) were arrested and released on bail on the same day. A1 was escorted out to Delhi on Chief Minister's special plane.
- Nearly 145 claims were filed on behalf of victims in various US courts. These were consolidated and placed before the Southern District Court, New York presided over by Judge John Keenan.
- March 29, 1985** Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 whereby Union of India would be the sole plaintiff in a suit against the UCC and other defendants for compensation arising out of the disaster.
- April 8, 1985** Union of India filed a complaint on behalf of all victims in Keenan's court.
- October 29, 1985** UCIL which was still in control of the plant (except the MIC unit which was sealed by CBI) wrote to UCC that clean up was going on but 'some material remains in the tank bottom'.
- December 15, 1985** The N.K.Singh Commission of Inquiry wound up on December 15, 1985 with the Government of Madhya Pradesh not extending its term of one year. A week thereafter, the Council for Scientific and Industrial Research (CSIR) submitted a detailed report squarely implicating the UCC for faulty design of the plant as well as its reckless disregard of operational safety.
- May 12, 1986** Accepting the *forum non conveniens* defence, Judge Keenan dismissed the claim conditional upon UCC submitting to the jurisdiction of Indian courts.
- Meanwhile, in 1986, two writ petitions were filed in Supreme Court of India challenging the validity of the Claims Act.
- September 5, 1986** Union of India filed a suit against UCC in the Bhopal District Court.
- January 4, 1987** Against the order dated May 12, 1986 of Judge Keenan, appeals were filed by the 145 individual plaintiffs and the UCC. By order dated January 4, 1987, the Court of Appeals for the Second Circuit disposed of the appeals by modifying the conditions subject to which the suit by Union of India had been dismissed.
- October 5, 1987** Union of India's further petition for a writ of certiorari against the order of the Court of Appeals was declined by the U.S. Supreme Court on October 5, 1987.

- December 1, 1987** CBI filed a charge sheet in the court of the Chief Judicial Magistrate, Bhopal charging accused for offences under s. 304 Part II IPC and other offences.
- December 17, 1987** An interim compensation of Rs. 350 crores was ordered by Judge Deo, District Judge, Bhopal .
- April 4, 1988** This was challenged before the High Court at Jabalpur. By judgment dated April 4, 1988 the High Court reduced the interim compensation to Rs.250 crores. UCC challenged this further before the Supreme Court.
- February 14/  
**15, 1989** Supreme Court approved a Settlement arrived at in the appeal by UCC whereby 470 million \$ was to be paid by it and UCIL to the Union of India in full and final settlement of all claims and criminal proceedings would stand quashed.
- May 4, 1989** Following widespread protests over the manner of arriving at the settlement and quashing criminal proceedings, Supreme Court agreed to review the settlement.
- June 1989 Meanwhile UCC in June 1989 finalised a `Site Rehabilitation Project – Bhopal Plant” for decontamination of the plant site which contained huge quantities of Sevin and Napthol tarry residues and solid wastes dumped in the solar evaporation ponds. Since no Indian organisation had the expertise, it was decided to get NEERI to undertake the task under the supervision of Arthur D little &Co. appointed by UCC.
- December 22, 1989 Supreme Court upheld the validity of the Claims Act applying the doctrine of *parens patriae* [*Charan Lal Sahu v. Union of India* (1990) 1 SCC 613].
- 1990 NEERI submitted its first report in 1990 stating that there was no contamination of the groundwater in and around the plant site. Subsequent documentation reveals that UCC itself doubted NEERI’s conclusions since their internal notes revealed that majority of liquid samples collected from the area “contained napthol or sevin in quantities far more than permitted by ISI for inland disposal”
- October 3, 1991 Supreme Court declined to reopen the settlement justifying it under Article 142 of the Constitution. However, the criminal proceedings were directed to be revived. The court expressed a hope that UCC will contribute Rs.50 crore to setting up of a hospital at Bhopal for the victims.
- February 1, 1992 The CJM Bhopal declared A1 Warren Anderson A10 UCC and A11 UCC (Eastern, Hongkong) as proclaimed offenders. The CJM directed that if parties do not appear on March 27, 1992 he will order attachment of UCC’s shares in UCIL under s.82 Cr.PC.
- March 27, 1992 A1, A10 and A11 fail to appear before the CJM but attachment of shares was put off at UCIL’s request.

April 15, 1992	UCC announced creation of the Bhopal Hospital Trust in London with Sir Ian Percival as Sole Trustee and endowed its entire shareholding in UCIL to the Trust clearly to defeat the attachment.
April 30, 1992	CJM Bhopal refused to recognise the creation of the Trust and endowment of UCIL shares and proceeded to attach those shares.
June 22, 1992	Trial of the Indian accused was separated and committed to Sessions Court.
August 19, 1992	The Central Government announced a scheme of interim relief to the gas victims at Rs.200/- per month subject to a maximum of 5 lakh victims for a period of three years beginning April 1, 1990. The Supreme Court, in a writ petition by the Bhopal Gas Peedith Mahila Udyog Sangathan, directed by its orders dated August 19 and November 4, 1992 interim relief to be paid to all victims, including those left out from the scheme as announced.
October 16, 1992	By an order dated February 24, 1989 the Settlement Fund of 420 million US \$ had been directed to be kept in a separate dollar account with the Reserve Bank of India (RBI) in the name of the Registrar of the Supreme Court. On an application by the Union of India, the court on October 16, 1992 permitted the account to be now held in the name of the Welfare Commissioner, subject to the condition that RBI would not release any part of the amount except on a certificate by the Welfare Commissioner that the amount withdrawn was for payment of compensation to the claimants.
April 8, 1993	Charges framed by the Sessions Court, Bhopal against Indian accused for offences under s.304 Part II IPC
May 28, 1993	The Supreme Court directed continuation of interim relief to the victims from June 1, 1993 and permitted Union of India to withdraw Rs.120 crores from the Settlement Fund for this purpose.
December 10, 1993	Ian Percival approached the Union of India with an 'offer' to sell the attached shares of UCIL to raise money for the Bhopal Hospital to be built by UCC. Union of India filed an application in the Supreme Court for enforcement of UCC's obligation to build the expert medical facility. At the first hearing of the application, Ian Percival was present and heard. The Supreme Court asked Union of India to consider the Sole Trustee's suggestion which was "eminently reasonable, worthy of consideration."
February 14, 1994	Supreme Court modified the CJM's attachment order and permitted the attached shares to be sold.
September 1994	UCC's shares in UCIL sold to McLeod Russel Ltd. for Rs.170 crores. UCIL renamed as Eveready Industries India Limited (EIIL). After release of around Rs. 125 crores (inclusive of dividends) to the BHT, the balance sale proceeds to the tune of about Rs.183 crores remained under attachment.
September 19, 1995	Krishna Mohan Shukla, a lawyer practising in the Supreme Court filed a PIL drawing its attention to numerous illegalities in the matter of categorisation, processing and adjudication of claims by the Deputy

Welfare Commissioners under the Scheme. It was stated that at lok adalats held under the Scheme, many claimants were being compelled to accept a low compensation of Rs.25,000/- in full and final settlement of the claim and further such order could not be appealed. A three-member Committee was appointed by the Supreme Court by its order dated September 19, 1985 to examine the factual position. In its report dated November 14, 1995, the Committee confirmed many of the petitioner's contentions and concluded "all is not well in the matter of disbursement of claims."

- April 3, 1996 Supreme Court directed a sum of Rs.187 crores from the attached monies to be further released to BHT for the construction of the hospital.
- May 1, 1996 In the petition by Krishna Mohan Shukla, the Supreme Court by order dated May 1, 1996 struck down certain circulars issued by the Welfare Commissioner under which a Deputy Welfare commissioner could not revise the category under which the claimant was classified unless the Welfare Commissioner approved it. It called for details of the cases settled in lok adalats.
- September 13, 1996 Meanwhile Indian accused failed in their challenge to the order framing charges before the High Court at Jabalpur. They then approached the Supreme Court by way of Special Leave Petitions. By judgment dated September 13, 1996, the Supreme Court diluted the charges against the Indian accused from s.304 Part II IPC to s.304A IPC. The trial still pending before the CJM, Bhopal.
- October 1997 EIIL retained NEERI and Arthur D Little to conduct further decontamination studies. NEERI submitted its second report again maintaining that there was no contamination of groundwater and soil around plant site. But Arthur D little did not rule them out.
- November 7, 1997 In the Krishna Mohan Shukla petition, the Supreme Court made an order permitting a claimant who was aggrieved by an order made in the lok adalat to challenge it by way of an appeal.
- September 1998 State of M.P took control of the land. Put up notices in nearby residential areas warning against drinking water.
- November 1999 Greenpeace, an international environmental NGO, came out with an independent report of test of soil and water samples collected in areas around the plant site and confirms extensive contamination. Sevin was seen to have leaked from the ruptured tank and water supplies were found contaminated with 'heavy metals and persistent organic contaminants'.
- November 15, 1999 Fresh class action litigation filed in the court of the Southern District New York by Sajida Bano, Haseena Bi and five other victims directly affected by the contamination and five Bhopal victims groups claiming damages under 15 counts. Counts 9 to 15 related to common law environmental claims.
- August 28, 2000 Judge Keenan dismissed the class action claim on the ground that the 1989 settlement covers all future claims.



February 5, 2001	The US Federal Trade Commission approved the merger of UCC with Dow Chemical Company (Dow).
November 15, 2001	The Second Circuit Court of Appeals affirms in part but remanded claims on counts 9 to 15 to Judge Keenan.
April 2002	In discovery proceedings before Judge Keenan UCC submitted over 4000 documents.
March 2003	Judge Keenan dismissed the suit of Hasina Bi again – this time on grounds of limitation.
March 2004	The Court of Appeal affirmed in part but asks Judge Keenan on remand to consider claims of Bi arising out of damage to property and the issue of decontamination by UCC of the site if the Union of India and State of M.P. had no objection.
June 30, 2004	After victims went on a hunger strike in Delhi, the Union of India submitted a memo before Judge Keenan stating it has no objection to decontamination being undertaken by UCC at UCC's cost.
July 19, 2004	In a representative application by 36 victims, Abdul Samad Khan and others, Supreme Court directed disbursement of balance compensation.
September 17, 2004	In another writ petition by the Bhopal groups for medical relief and rehabilitation, Supreme Court finalised the terms of reference of two committees – an Advisory Committee and a Monitoring Committee - appointed by it.
October 26, 2004	In the Abdul Samad Khan application, the Supreme Court directed the disbursement of balance compensation to commence from November 15, 2004 and conclude by April 1, 2005. The court accepted the Action Plan prepared by the Welfare Commissioner.

## CHAPTER 3: COMPENSATION

### **3.1 BACKGROUND FACTS**

#### *Under-stating the numbers of victims*

3.1.1 The Bhopal gas leak disaster which took place on the intervening night of December 2/3 1984 resulted in a large number of fatalities and injuries to several thousands of people, apart from damage to property, livestock, and the environment. The actual numbers of those dead and injured on the day of the incident itself has remained a matter of dispute. In the plaint filed in the first instance in the Court of the Southern District of New York in 1985, the Union of India simply stated “As a direct and proximate result of the conduct of Defendant Union Carbide, numerous thousands of persons in Bhopal, the adjacent countryside and its environs suffered agonizing, lingering and excruciating deaths...”<sup>1</sup>

3.1.2 When the settlement of all civil and criminal claims for a lump sum of 470 million \$ recorded in the order dated February 14/15, 1989 of the Supreme Court<sup>2</sup> was challenged by

<sup>1</sup> See para 44 of the Union of India's complaint dated April 8, 1985 reproduced in Upendra Baxi and Thomas Paul, **Mass Disasters and Multinational Liability: The Bhopal Case**, N.M. Tripathi (1986) 8.

<sup>2</sup> *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674.

way of review petitions, the Supreme Court passed an order on May 4, 1989<sup>3</sup> admitting the review petitions even while explaining the basis on which the court had approved the settlement. In the opening portion of the order, the court said<sup>4</sup>:

“The tragedy took an immediate toll of 2660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees.”

3.1.3 The court explained that it had made a rough and ready estimate that “the total number of fatal cases was about 3,000 and of grievous and serious personal injuries, as verifiable from the records of the hospitals of cases treated at Bhopal, was in the neighbourhood of 30,000.”<sup>5</sup>

3.1.4 By the time the court on October 3, 1991 gave its judgment in review petitions,<sup>6</sup> it acknowledged that there had been around 4,000 deaths tens of thousands injured.<sup>7</sup> It was clear to the court that as on October 31, 1990, the number of persons suffering temporary injuries was 1,73,282; permanent injuries 18,922; temporary disablement caused by temporary injury 7,172; temporary disablement caused by permanent injury 1,313 and permanent partial disablement 2,680.<sup>8</sup>

### ***The gross under estimation of compensation***

3.1.5 The court further made a rough and ready estimate that each fatal case of death would receive a compensation in the region of Rs.1 to 3 lakhs, each case of permanent disability in the range of Rs.50,000 to 2 lakhs, each case of temporary disablement Rs.25,000 to 1 lakh. As will be seen presently the actual figures of the dead and injured as well as the amounts awarded to them bore no resemblance to these estimates. Thus, it was clear even to the court that the original estimates of dead and injured persons on the basis of which the settlement figure was calculated were far below the actuals as is evident just two years thereafter. In fact, in its order of May 4, 1989, the court was forced to admit that “If the total number of cases of death or of permanent, total or partial, disabilities or of what may be called ‘catastrophic’ injuries is shown to be so large that the basic assumptions underlying the settlement become wholly unrelated to the realities, the element of ‘justness’ of the determination and of ‘truth’ of its factual foundation would seriously be impaired.”<sup>9</sup>

3.1.6 The situation as of March 31, 2003 was as under:

The number of claims for injuries registered with the Office of the Welfare Commissioner was 10,01,723 of which 5,53,015 cases were awarded a total sum of Rs.1,442.11 Crores. The number of claims for deaths registered was 22,149 of which 15,180 were awarded by the Office of the Welfare Commissioner. The arithmetic of how much each victim would have possibly received under both the categories of death claims (04) and injury claims (01) is explained thus:

Total No. of Claims filed: **10,29,515**

No. of Claims decided: **10,29, 342**

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<sup>3</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.

<sup>4</sup> *Id.* at 40.

<sup>5</sup> *Id.* at 46. In addition, the court acknowledged that there would be 20,000 cases of temporary total or partial disability, 2,000 cases of injuries of utmost severity.

<sup>6</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

<sup>7</sup> *Id.* at 612, para 29.

<sup>8</sup> *Id.* at 652-653.

<sup>9</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38 at 48-49.

No. of claims awarded: **5, 68, 971**

No. of claims rejected: **4,60 ,371**

**Of the awarded cases,**

**Death claims (04) 15,180 claims were awarded a total sum of **Rs.86.85 crores.****

However, about 60% of these got converted into injury cases and were awarded on that basis. Around 40%, i.e. 6,328 claims were awarded as death cases and these were awarded Rs. 1 lakh each. Depending on the number of dependants per deceased, the amount would get further divided among each of them.

Thus of the 15, 180 death claims:

**6,328** claimants got **1 lakh** each for a total sum of **Rs. 63.28 crores**

**8,752** cases of death claims converted to injury cases would have got on an average **Rs. 26,930/-** aggregating to **Rs. 23.57 crores**

**Injury cases (01)** **5,53,015** claims were awarded a total sum of **Rs.1442.11 crores**

Thus, on an average each injury claim was awarded **Rs. 26,077/-**

The strange phenomenon of conversion of death claims into injury claims requires some explanation. As a result of a general suspicion that a claim filed could be a fraudulent one, the Welfare Commissioner, exercising suo-moto powers, would take up any case in which an amount of over Rupees One lakh was awarded in a death claim, and proceed to re-determine the compensation to be awarded. Where the death had occurred some years after the date of the disaster. The Welfare Commission would, without any bases, hold that the death was not as a result of the gas disaster and would proceed to halve the compensation awarded by treating the claim one for injuries suffered on account of the Gas Disaster. In one such case, the Supreme Court reversed the order of the Welfare Commissioner and remitted the case for a fresh determination (Madhukar Rao v. Claims Commissioner (1998) 8 SCC 544). However, due to litigation fatigue, many such unjust orders remained unchallenged. This explains the wholesale conversion of death claims to injury claims. What is important is that these are the official figures given by the office of the Welfare Commissioner and it is therefore clear that admittedly the number of persons injured and whose claims have been accepted is over 5.50 lakhs and the number of persons who have died as a result of the gas disaster and for whose deaths claims have been accepted are 15,180. A second fact that emerges is that the assumptions on which the Supreme Court proceeded for approving the settlement were totally erroneous.

Thus there has been an injustice of a greater magnitude than perhaps of the disaster itself.

*The unjust process*

3.1.7 The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 enabled the Union of India to become the sole plaintiff in substitution of all of the victims. The Claims Act brought

forth a Scheme to determine the procedure for categorization of claims, their settlement and the ultimate disbursement of compensation. Claims were to be decided by Deputy Welfare Commissioners (Civil Judges on deputation to the Directorate of the Welfare Commissioner) with one appeal to the Additional Commissioner. On their part, the Additional Commissioner and Welfare Commissioner could suo motu revise any order of the Deputy Welfare Commissioner. The machinery under the Claims Act and the Scheme ushered a bureaucratic monolith which served to deny effective justice to the victim. At each stage, as will be discussed hereafter, the victims faced great hardship. To compound this was the arbitrary fixation of compensation and compelling victims to accept very low compensation at lok adalats. It required petitioning the Supreme Court for orders to correct this injustice.

3.1.8 The endemic delays in the process is all too evident 20 years after the disaster – 12,000 claims are yet to be decided. One way of short-circuiting the process was the enmasse dismissal of claims by the Deputy Welfare Commissioners for default where the claimant did not appear at the date fixed for the case despite the lapse of over fifteen years after it had been lodged. Another litigation in the Supreme Court ensured that these claimants were given another chance after a proper notice.

3.1.9 Victims needed to survive in the meanwhile. The court was petitioned for interim relief which was directed to be paid out of the settlement amount and deducted from each individual claimant at the time of the payment of the final award.

3.1.10 Finally, each claimant was underpaid on an overall suspicion of the genuineness of the claim. As a result, it was found in 2004 that there was a balance of over Rs.1503 crores remaining to be disbursed, after nearly 5.7 lakh claims had been settled. It required another round of litigation in the Supreme Court to ensure that this balance amount reached the victims.

#### *Strands of litigation*

3.1.11 Thus we have had several strands of litigation in relation to the cases for payment of compensation arising out of the civil liability of the tortfeasors, UCC and UCIL. At the end of all these strands of litigation over the past twenty years, the victim has been left with a 'brooding sense of injustice'.

3.1.12 The various strands comprising the civil litigation are:

- (i) The litigation prior to the settlement order of February 14/ 15, 1989;
- (ii) The proceedings concerning review of the settlement and the judgment dated October 3, 1991 of the Supreme Court in the review petitions;
- (iii) The proceedings challenging the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Claims Act) and the judgment of the Supreme Court dated December 22, 1989 upholding the validity;
- (iv) The litigation concerning the grant of interim relief to the Bhopal gas victims;
- (v) The litigation arising out of the categorization and settlement of individual claims for compensation by the Deputy Welfare Commissioners and Welfare Commissioner in terms of the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (Scheme);

(vi) The litigation concerning the premature closure of cases for non-appearance of the claimant; and

(vii) The litigation for disbursement of the balance compensation.

3.1.13 Each of the above strands of litigation is proposed to be examined in this section of the Report. This will be followed by the setting out of the main findings in the survey conducted in Bhopal as part of the Fact Finding Mission. Thereafter, it is proposed to discuss broadly the principles of liability that have been developed by the courts as a result of the Bhopal Gas Leak Disaster and also touch upon the legislative changes that have ensued. It is also proposed to suggest a workable action plan.

## **3.2 LITIGATION PRIOR TO THE SETTLEMENT ORDER OF FEBRUARY 14/15, 1989**

### *Litigation in the US*

3.2.1 In the immediate aftermath of the Bhopal Gas Leak Disaster, on **December 7, 1984**, a first law suit was filed by American lawyers in the United States on behalf of thousands of Indians.<sup>10</sup> This was followed by 145 additional actions which were commenced on behalf of victims against Union Carbide Corporation (UCC) in the Federal Courts in the United States. These 145 actions were joined and assigned by the Judicial Panel on Multi-district Litigation to the Southern District of New York by an order of February 6, 1985.

### *The Claims Act*

3.2.2 The Indian Parliament on **March 29, 1985** enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Claims Act) under which the Government of India had the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. The long title to the Claims Act claimed that it was an Act “to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claims and for matters incidental thereto.”<sup>11</sup>

3.2.3 S.3 (1) of the Claims Act declared that “the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.” Under s.3 (2) the purposes referred to in s.3 (1) included (a) the institution or withdrawal of any suit or proceeding; and (b) entering into a compromise. S.4 of the Claims Act required the Central Government to permit to a claimant a legal practitioner of his choice to be associated in the suit by the Union of India having “due regard to any matters which such person may required to be urged with respect to his claim.” The tribunals for categorization processing an adjudication of claims were completely under the control of the Central Government. S.9 of the Claims Act gave the Central Government power to frame a Scheme in relation to these matters. S.11 gave the Claims Act and the Scheme overriding effect over every other statutory enactment.

3.2.4 Pursuant to the Claims Act, the Union of India on April 8, 1985 filed a complaint in the Court of the Southern District of New York setting forth claims similar to those in the 145 actions already filed. All the individual complaints were superseded by a consolidated

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<sup>10</sup> *Dawni et al. v. Union Carbide Corporation* S.D.W. Va. (84-2479).

<sup>11</sup> Initially, this was an Ordinance which later was replaced by the Claims Act.

complaint filed on June 28, 1985. This involved over 200,000 plaintiffs. On **September 24, 1985**, in terms of the powers conferred by the Claims Act, the Government of India framed the Scheme for registration and processing of claims arising out of the disaster. By the end of 1985 nearly 500,000 claims had been registered under the Scheme.

#### *Keenan's order*

3.2.5 UCC moved a motion to dismiss the consolidated action in the Court of Judge John Keenan of the Southern District of New York on the ground of *forum non conveniens*. UCC led expert evidence by way of the affidavits of Shri J.B. Dadachanji, Advocate, Supreme Court and of Shri N.A. Palkhivala, Senior Advocate in support of its motion to dismiss the complaint.<sup>12</sup> Palkhivala extolled the Indian judiciary and the development of the law of torts in India. He said: "the Indian system is undoubtedly capable of evolving the law to cope with advances in technology in the unfolding future. In the Bhopal litigation represents an opportunity for the further development of tort law in India, that chance should not be denied to India merely because some might say that the American legal system is ahead in development."<sup>13</sup> Further, in an answer to the expert evidence led by the Union of India in the form of the affidavit of Marc S. Galanter, Professor of Law, University of Wisconsin,<sup>14</sup> Palkhivala asserted that "to brand the Indian system as being inadequate because its method of dealing with class actions or meeting the need of discovery is different from the American method, is to betray good chauvinism but bad international perspective."<sup>15</sup> Finally, Palkhivala took a pot shot with thinly veiled sarcasm when he termed the claim by the victims "as a means of virtually getting American aid thinly disguised as damages."<sup>16</sup> Judge Keenan relied on the Palkhivala affidavit and by judgment dated **May 12, 1986** dismissed the class action on the ground of *forum non conveniens*.<sup>17</sup> The dismissal was conditional upon:

- UCC consenting to submit to the jurisdiction of Indian courts and waiving defences based on the statute of limitations;
- UCC agreeing to satisfy any judgment rendered by an Indian court as finally upheld by the appellate court "where such judgment and affirmance comport with the minimal requirements of due process";
- UCC being subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

#### *Proceedings in the District Court in Bhopal*

3.2.6 On **September 5, 1986** the Union of India filed Regular Civil Suit No.1113 of 1986 in the Court of the District Judge, Bhopal against UCC praying for "a decree for damages 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

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<sup>12</sup> The full text of the affidavit dated December 18, 1985 of Shri N.A. Palkhivala is reproduced in Upendra Baxi and Thomas Paul (prepared) **Mass Disasters and Multinational Liability: The Bhopal Case** (N.M. Tripathi, 1986) 222-229.

<sup>13</sup> *Id.* at 227-228.

<sup>14</sup> The full text of the affidavit dated December 5, 1985 of Marc Selig Galanter is extracted in **Mass Disasters** (*supra*) note 2 at 161-221.

<sup>15</sup> *Supra* note 2 at 224.

<sup>16</sup> *Id.* at 229.

<sup>17</sup> The full text of Judge Keenan's order dated May 12, 1986 is reproduced in Upendra Baxi and Thomas Paul (prepared) **Inconvenient Forum and Convenient Catastrophe: The Bhopal Case** (N.M. Tripathi, 1986) 35-69.

have suffered as a result of the Bhopal disaster and having claims against the defendant.”<sup>18</sup> The plaintiff also sought a decree for punitive damages to deter UCC and other multinational corporations from “willful, malicious and wanton disregard of the rights and safety of the citizens of India.”<sup>19</sup>

3.2.7 The plaint importantly asserted that UCC had acted in breach of its “primary, absolute and non-delegable duty” of not causing “danger or damage to the public and the State” by virtue of its “undertaking of an ultra hazardous and inherently dangerous activity causing widespread risks at its plant in Bhopal, and the resultant escape of lethal gas from MIC storage tank at the plant, which it should have foreseen and prevented. Defendant Union Carbide further failed to provide the required standard of safety at its Bhopal plant and failed to inform the Union of India and its people of the dangers therein.”<sup>20</sup> Further, the loss of lives and injuries to several thousands was “as a direct and proximate result of the conduct of UCC.”<sup>21</sup>

#### *Interim Compensation*

3.2.8 The award by the District Court at Bhopal of interim compensation in the sum of Rs.350 crores by an order dated **December 17, 1987**<sup>22</sup> led to a revision petition being filed by the UCC challenging that order before the High Court at Jabalpur. By an order dated **April 4, 1988** Justice N.K. Seth disposed of the revision petition reducing the interim compensation to Rs.250 crores.<sup>23</sup> The main ground of challenge by the UCC to the order of the District Court awarding interim compensation was that the court had no jurisdiction to grant such interim relief and further that s.151 of the CPC was not the source of such power. Further, since evidence had not been led and the exact number of affected persons not known, the order for payment of interim compensation was without any factual foundation. While the High Court agreed that the inherent powers under s.151 CPC could not be invoked, it held that the statutory rules made under the Administration of Justice Act, 1969 in England which permitted payment of interim damages could be adapted with suitable modifications as part of the Indian common law and applied to the Bhopal suit. Further, the High Court discussed extensively the development of the law of torts in India and held that in view of the judgment of the Supreme Court in the *Oleum Gas Leak* case<sup>24</sup> the defendants were “liable to pay damages to the gas victims in accordance with the rule of absolute liability without the exceptions”<sup>25</sup> outlined in the English case of *Rylands v. Fletcher*.<sup>26</sup>

#### *Settlement*

3.2.9 UCC and Union of India thereafter filed appeals in the Supreme Court which were admitted and referred for hearing to a bench of five judges. During the pendency of the appeals, by an order dated February 14, 1989, the Supreme Court noted that a settlement had been arrived at between the UCC and the Union of India whereby UCC would pay a lump sum of 470 million US \$ towards full and final settlement of all claims, arising out of both

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<sup>18</sup> The full text of the plaint is reproduced in Upendra Badi and Amita Dhanda (compiled), **Valiant Victims and Lethal Litigation: The Bhopal Case**, Indian Law Institute, 1990 3-12. The extracted portion is prayer (1) at page 11.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.*, paras 20 and 21 of the plaint.

<sup>21</sup> *Id.* at para 36.

<sup>22</sup> **Valiant Victims**, 283.

<sup>23</sup> **Valiant Victims**, 338.

<sup>24</sup> *M.C. Mehta v. Union of India* (1987) 1 SCC 395.

<sup>25</sup> *Supra* note 23 at 374.

<sup>26</sup> (1861-73) All ER Rep 1.

civil and criminal liability.<sup>27</sup> The settlement covered all future claims as well. Instead of providing for a 're-opener' clause, which was usually incorporated in such settlements to account for contingent claims, the settlement required the Union of India and the State of Madhya Pradesh to take steps to ensure that they would defend any claims filed in future against UCC and UCIL. The exact terms of the settlement were recorded in the subsequent order of February 15, 1989 to which UCIL was also made a party.<sup>28</sup> UCC was to pay a sum of Rs.425 million dollars (less US \$5 million already paid by UCC pursuant to the order dated June 7, 1985 of Judge Keenan in the court proceedings taken in the United States of America.) and UCIL had to pay the rupee equivalent of US \$45 million at the exchange rate prevailing at the date of payment.

3.2.10 In the proceedings of February 24, 1989, the court recorded the tendering of the bank draft in the sum of US\$420 million as well as a separate draft in the sum of Rs.68,99,19,509/-, both in favour of the Registrar of the Supreme Court. It was directed that Registrar General will hand over both the said drafts "for depositing in the Reserve Bank of India in two separate accounts, a dollar account ('B' account) and a rupee account ('A' account) respectively, in the name of the Registrar of this Court. The deposit of US \$420 millions will be held in dollars."<sup>29</sup> Following this, on March 14, 1989 the Manager of the Deposit Accounts Department of the Reserve Bank of India informed the Registrar of the Supreme Court that the monies in the 'B' account being the dollar account, would be invested in Government of India Securities and as and when the court desires to withdraw the amount, the corresponding amount of government securities would be liquidated. It was indicated that "Simultaneously the rupee equivalent will be calculated at the exchange rate on the date of the original credit (i.e. Rs.100/- US \$6.58) debited in the rupee column of the account 'B' and credited to account 'A' the differences between the US \$ amount intended to be withdrawn calculated at the exchange rate on the day of withdrawal and the date of first deposit will be credited to your account 'A' by debit to Government of India account as they have agreed to bear the loss on account of fluctuation in the exchange rate."<sup>30</sup> In effect, this meant that the Settlement Fund, would continue to grow with the rising value of the dollar vis-à-vis the rupee.

#### *Admission of the Review Petitions*

3.2.11 One of the principal criticisms of the settlement order was that it was a sell out considering the magnitude of the disaster and the amount for which the settlement was arrived at. The court was approached with review petitions raising many fundamental questions touching on the jurisdiction and powers of the court, the reasonableness of the settlement and the patent violation of principles of natural justice in that neither were the victims heard or consulted but the very basis on which the settlement was arrived at was not disclosed.

3.2.12 The court was obviously taken aback by the negative fall out and entered into a damage limitation exercise. In its proceedings dated April 5, 1989, the court ordered that "Union Carbide Corporation will continue to be subject to the jurisdiction of the courts in India until further orders."<sup>31</sup> It required both the UCC as well as Union of India to file

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<sup>27</sup> *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674.

<sup>28</sup> *Id.* at 676.

<sup>29</sup> Order dated February 24, 1989 of the Supreme Court reproduced in **Valiant Victims**, page 530.

<sup>30</sup> Annexure-R-3/5 to the affidavit dated March 9, 2004 of the Reserve Bank of India in I.A.No.46-47 in C.A.Nos.3187-88 of 1988.

<sup>31</sup> Order dated April 5, 1989 of the Supreme Court reproduced in **Valiant Victims**, pages 531-532.



affidavits indicate “the precise terms of the proposals made from time to time outside the court in regard to the settlement of the claims.”<sup>32</sup>

The figures of disposal of claims by the Deputy Welfare Commissioners demonstrates the gross underestimations that formed the basis of the unjust settlement order dated February 14/15, 1989 which was explained in the subsequent order dated May 4, 1989 of the Supreme Court. (see table below)

Assumptions of the Supreme Court in the settlement order of February 14/15, 1989	Actual figures based on statement issued by the Office of the Welfare Commissioner regarding disposal of claims as in March 31, 2003.
No. of Deaths: 3,000	15,180
No. of injured victims: 52,000	5,53,015

3.2.13 The court on May 4, 1989<sup>33</sup> passed a detailed order purporting to explain the basis for arriving at the figure of 470 million dollars as a settlement of all civil and criminal and future liabilities of the UCC and UCIL. It was stated that the estimate of the number of deaths was 3,000 with compensation ranging from Rs.1,00,000 to Rs.3,00,000. In about 30,000 cases of permanent total or partial disability compensation ranging from Rs.50,000 to Rs.2,00,000 per individual was envisaged. In another 20,000 cases of temporary total or partial disability compensation in the range of Rs.25,000 to Rs.1,00,000 was envisaged. For cases of utmost severity, estimated at 2,000, a compensation of Rs.4,00,000 per individual was considered. A total sum of Rs.500 crores was thought to be allocable to the fatal cases and 42,000 cases of such serious personal injuries.

3.2.14 The court had approved the settlement out of pragmatic considerations as was evident in its explanation that, although the case may not have dealt with the developing law on compensation, “the compulsions of the need for immediate relief to tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they be, are resolved in the due course of judicial proceedings.”<sup>34</sup> According to the court, “the tremendous suffering of thousands of persons... should not be subordinated to the uncertain promises of the law.”<sup>35</sup>

### **3.3 VALIDITY OF THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) ACT, 1985**

3.3.1 The writ petitions challenging the validity of the Claims Act were filed under Article 32 of the Constitution in 1986 and 1989. The grounds on which the Act was challenged were:

- Ss.3, 4 and 11, which gave exclusive right to the Central Government to represent the claims, took away the right of the victims to pursue their own remedies and to seek

<sup>32</sup> *Id.* at 531.

<sup>33</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.

<sup>34</sup> *Id.* at 51.

<sup>35</sup> *Ibid.*

justice in the courts of law and accordingly these provisions are violative of Articles 14, 19 (1)(g) and 21 of the Constitution.

- The Act in so far as it permitted a settlement to be arrived at without consultation with the victims was bad in law. The right of the victim to have her own lawyer to represent her in the proceedings was taken away by s.4 of the Act and therefore s.4 was unconstitutional and violative of Article 21 of the Constitution.
- The machinery set up under the Act for registration, processing and adjudication of claims was entirely in the hands of the Central Government which was a joint tortfeasor. This also violated the principle of natural justice, since the victim was deprived of an opportunity of being heard because of the Act. Thus, the entire procedure was unjust and unreasonable and therefore unconstitutional.

3.3.2 A Constitution Bench of the Supreme Court by a judgment dated December 22, 1989<sup>36</sup> upheld the validity of the Act. The reasons given by the Supreme Court were:

- While it was necessary that the victims had to be heard before arriving at a settlement, even a post decisional notice would be sufficient, having regard to the order of the Supreme Court dated May 4, 1989 admitting the review petitions. The court had said “Where sufficient opportunity is available when the review application is heard on notice, ... no further opportunity is necessary and it cannot be said that injustice has been done. ‘To do a great right’ after all, it is permissible sometimes ‘to do a little wrong’. In the facts and circumstances of the case, this is one of those rare occasions.”<sup>37</sup>
- Further, even assuming that the Central Government was a joint tortfeasor, the doctrine of necessity would override a possible violation of natural justice consequent upon the Central Government itself controlling the tribunals set up under the Act to process and determine the claims for compensation.
- The substitution of the claimants by the Central Government was explained as being justified “by resort to a principle analogous to, if not precisely the same as that of *parens patriae*.”<sup>38</sup>

### 3.4 THE REVIEW PETITIONS

3.4.1 Another Constitution Bench of the Supreme Court heard the review petitions. After the hearing had continued for 18 days and judgment had been reserved, Chief Justice Sabyasachi Mukherjee passed away necessitating a rehearing of the case for another 19 days. The judgment in the review petitions were delivered on October 3, 1991.<sup>39</sup> The majority judgment delivered by M.N. Venkatachalaiah, J., upheld the settlement recorded in the order dated February 14/ 15, 1989 except to the extent that the criminal proceedings against UCC and UCIL which had been quashed now were directed to be revived.

3.4.2 As regards the challenge to the settlement itself the majority held:

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<sup>36</sup> *Charan Lal Sahu v. Union of India* (1990) 1 SCC 613.

<sup>37</sup> *Id.* at 705.

<sup>38</sup> *Id.* at 718.

<sup>39</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

- The contention that the settlement was illegal since the affected persons were not put on notice had to be rejected in view of the judgment in the *Charan Lal Sahu* case upholding the validity of the Act and in which it was held that the opportunity of being heard in the review petitions was sufficient to overcome the breach of the principles of natural justice.
- The settlement was not bad for the absence of a re-opener clause built into it. The Union of India had the power to enter into a compromise under s.4 of the Act even if no suit had been filed. There was therefore no obligation to compel a procedure like a “fairness hearing” as a condition precedent to such compromise.
- The contention that there had been an exclusion of a large number of claims was brushed aside relying on the affidavit of the Directorate of Claims which assured that “these people will still have an opportunity to file claims when the Commissioner for Welfare of the Gas victims issues a notice in terms of para 4(i) of the Scheme inviting claims.”<sup>40</sup>
- The second contention that the whole exercise of medical documentation and categorization was faulty and consequently a large number of genuine victims had got excluded was also negated by stating that “particular care has gone into the prescription of the medical documentation test and the formulation of the results for the purposes of evaluation and categorization.”<sup>41</sup>
- The principal ground of challenge, viz. the inadequacy of the settlement and the failure to account for future claims, was answered by directing that “in the – perhaps unlikely – event of the Settlement Fund being found inadequate to meet the compensation determined in respect of all the present claimants... the Union of India, as a Welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any.”<sup>42</sup>
- As regards persons who have already been put at risk, but filed no claim for compensation since the symptoms had not yet manifested, the court was of the view that “such contingencies shall be taken care of by obtaining an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims.”<sup>43</sup>

3.4.3 The majority judgment concluded with setting down of guidelines on the manner of disbursement of compensation by placing the amount in long term fixed deposits.<sup>44</sup>

#### *Directions regarding the accounts*

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<sup>40</sup> *Id.* at 674.

<sup>41</sup> *Id.* at 681. For instance a case of permanent total disablement (loss of vision) or a permanent injury (infection of the lungs) could be arbitrarily categorized as “temporary disablement” or ‘temporary injury’. Injuries like post-traumatic stress disorder did not figure as a category at all.

<sup>42</sup> *Id.* at 682.

<sup>43</sup> *Id.* at 684. It was directed that the period of insurance should be a period of 8 years in the future. The premier for the insurance fund was to be paid out of the settlement fund. Till date, this part of the order has not been implemented.

<sup>44</sup> The court adopted the guidelines contained in the judgment of the Gujarat High Court in *Muljibhai v. United India Insurance Company Ltd.* (1982) 1 Guj LR 746.

3.4.4 Pursuant to the Settlement Order the accounts had been held in the name of Registrar of the Supreme Court. The Union of India filed applications in the Supreme Court in October 1992 asking that the accounts now being administered by the Welfare Commissioner. While allowing this prayer, the Supreme Court by an order dated October 16, 1992<sup>45</sup> imposed certain conditions: no part of the fund was to be “withdrawn or utilized to meet any administrative expenses or diverted for any purpose other than payment to or applied in satisfaction of the claims of the victims towards compensation determined according to law.”<sup>46</sup> It was made clear that the Reserve Bank of India would not release any part of the fund “except upon a certificate from the Welfare Commissioner that the amount represents substantially the quantum of compensation determined from time to time against the claims of the victims.”<sup>47</sup>

### 3.5 GRANT OF INTERIM RELIEF TO THE BHOPAL GAS VICTIMS

3.5.1 The proceedings arising out of the order of the District Court Bhopal directing payment of interim compensation were in a state of indecision till October 3, 1991. It was only thereafter that the individual claims again were taken up for adjudication and settlement in terms of the Scheme framed under the Claims Act. The Government of India came up with a scheme for grant of interim relief to the victims of the gas disaster @Rs.200/- per month commencing from April 1, 1990. This interim relief scheme envisaged payment of interim relief to all the residents of the thirty-six severely affected wards and was to the benefit of those who were actually present in the wards on the night of the occurrence. The interim relief scheme was to last for a period of three years ending on March 31, 1993. However, the Government of India intended this would cover only 5 lakh victims.

#### *Writ Petitions by BGPMUS*

3.5.2 Bhopal Gas Peedit Mahila Udyog Sangathan (BGPMUS) filed a writ petition under Article 32 of the Constitution in the Supreme Court praying for a direction to the Government of India stating that the actual number of beneficiaries exceeded 5 lakhs and that the interim relief scheme could not be limited to such number. By its order dated August 19, 1992,<sup>48</sup> the court directed that all Bhopal gas victims would be entitled to interim relief, irrespective of the limitation of 5 lakh persons, at Rs.200/- per month from March 1, 1992. Further the arrears up to August 31, 1992 would be paid within two months. By a further order dated November 4, 1992,<sup>49</sup> the court disposed of the writ petition granting interim relief to those left out of the first scheme of interim relief so that they would be on par with those who had been granted interim relief from March 1, 1990 onwards. Accordingly, the Government of India announced a supplemental scheme for interim relief for grant of interim maintenance commencing March 1, 1992 @Rs.200/- per month for those who had been left out from the list of beneficiaries in the first scheme.

3.5.3 With the first scheme of interim relief ending on March 31, 1993 and with the Government of India not inclined to continue it the BGPMUS filed a writ petition under Article 32 of the Constitution in the Supreme Court praying for a direction to the Government of India to continue the first interim relief scheme at least for a further period of three years within which time it was hoped that the claims would be finally be disposed of. This writ

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<sup>45</sup> *Union Carbide Corporation v. Union of India* (1992) 3 SCALE 248.

<sup>46</sup> *Id.* at 250.

<sup>47</sup> *Id.* at 251.

<sup>48</sup> *Bhopal Gas Peedit Mahila Udyog Sangathan v. Union of India* (1992) 2 SCALE 498.

<sup>49</sup> *Bhopal Gas Peedit Mahila Udyog Sangathan v. Union of India* (1992) 3 SCALE 251.

petition was heard along with I.A.Nos.20-21 of 1993 filed by the Union of India seeking to withdraw a sum of Rs.120 crores out of the accrued interest on the settlement fund for the purposes of meeting the financial obligations for the extended period of first interim relief scheme. By its order dated May 28, 1993, the court accepted both prayers and directed that the second phase of interim relief should commence from June 1, 1993 and further that the Union Government “shall be entitled to be reimbursed of the interim payments made in the cases of those whose claims are ultimately allowed. Sums representing the interim relief shall be deducted from the compensation finally determined and shall be made over to the Union Government.”<sup>50</sup>

3.5.4 BGPMUS approached the Supreme Court again on August 23, 1994 with the prayer that the interim relief of Rs.750/- which was being given to widows till the disposal of their claims should not be stopped even after the claim was disposed of. In this application it was stated that “a flat compensation of Rs.25,000/- is being paid almost all persons except those categorized as permanently or totally disabled.”<sup>51</sup> The petitioner attached a list of 500 families from about 4,000 families in which the claims of children and sponsors had not been registered. The third problem was about medical categorization and that approximately 1,40,000 from the 36 directly affected wards were not medically evaluated at all. Many of them were still suffering from the injuries as a result of the gas disaster. The rate of disposal of the claims was also interminably slow.

3.5.5 A further affidavit was filed by BGPMUS on February 28, 1995 pointing out that the compensation awarded was very meagre and that an attempt has been made to dispose of a large number of cases by holding lok adalats where a flat rate of compensation was being awarded. Further, wherever an appeal was filed against a decision of a Deputy Welfare Commissioner, before the Claims Commissioner, no compensation was being disbursed till the disposal of the appeal. As a result, victims were reluctant to file appeals and accept a meagre compensation of Rs.25,000/-.<sup>52</sup>

3.5.6 By an order dated May 12, 1995 the Supreme Court that the death claims “should be taken up on a priority basis and disposed of enmasse.”<sup>53</sup> Also the court directed that if the basic identification document is available, a compensation in the sum of Rs.25,000/- may be paid in death cases pending the disposal of the claim. The court directed the Registrar of the Claims Commissioner to furnish statistical information in regard to personal injury cases.

3.5.7 On August 2, 1995 the Welfare Commissioner filed a statement showing that of the 15, 310 death claims received, as many as 13,658 had already been disposed of and 1,653 death claims were pending adjudication as on July 1, 1995. Only three death cases could the interim compensation as directed by the Supreme Court be granted and only 8 pending cases were eligible for such grant.<sup>54</sup>

3.5.8 On August 30, 1995, a supplementary affidavit was filed by BGPMUS pointing out that there was a ban on upgradation of the categorization of the victim with effect from June 1994 and that this was unjust and inequitable. 78,000 victims who had been receiving interim relief since March 1, 1992 had stopped receiving interim relief with the expiry of 3 years and the claims of the vast majority of these victims had yet to be settled. Further, in a large

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<sup>50</sup> Order dated May 28, 1993 passed by the Supreme Court of India in W.P.(C) No.258 of 1993.

<sup>51</sup> I.A.No.28-29 of 1994 in C.A.Nos.3187-88 of 1988 dated August 23, 1994.

<sup>52</sup> Affidavit dated February 28, 1995 of Abdul Jabbar Khan in I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988.

<sup>53</sup> Order dated May 12, 1995 passed by the Supreme Court in I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988, p.2.

<sup>54</sup> Statement of V.K. Saxena dated August 2, 1995 in I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988.

number of cases, the interim relief passbooks were retained by the Deputy Commissioner due to which the victims were unable to draw interim relief even till the time they got their final compensation.<sup>55</sup> Another supplementary affidavit was filed on May 2, 1996 pointing out that the medical categorisation of the victims was based on the evaluation done way back in 1987-89 and that the condition of many of the victims had deteriorated considerably since then. It was urged that medical boards again be set up to evaluate each of such victims who were nearly one lakh in number. It was further prayed that the victim should be given an option of either taking the full payment in one instalment or in 10 equal yearly instalments with interest on the reducing balance to be paid along with their compensation instalment.<sup>56</sup> In an affidavit filed in 1996 in response to the affidavit filed by the Registrar of the Office of the Welfare Commissioner, it was pointed out on behalf of the victims that 65% of the claims had either being rejected or treated as injury cases. Over 28% of the death claims had been rejected and over 36% have been treated as injury case. The reasons for conversion of death claims into injury claims was attributed to (a) ignorance of the judicial officials; (b) lack of proper documentation and certificates of death among the affected population; (c) absence of proper medical guidelines; and (d) the claimants inability to pay sufficient bribes.<sup>57</sup> It was pointed out that the amounts being awarded both for death claims and injury claims was much less than the amount on the basis of which the settlement was approved by the Supreme Court.

3.5.8 In response to this affidavit, the Registrar, Office of the Welfare Commissioner on November 28, 1996 filed an affidavit denying that injustice was being done to the victims or that there was any irregularity in the documentation of the claims.

3.5.10 These applications were kept pending even as on November 11, 1997 and later disposed of as having become infructuous.

### **3.6 CATEGORIZATION AND SETTLEMENT OF INDIVIDUAL CLAIMS FOR COMPENSATION**

3.6.1 The Claims Act brought into existence the Scheme under which claims of compensation by the Bhopal gas victims had to be registered and processed. The actual process of registration of claims took place in two phases. In the first phase between 1985-89, about 6.4 lakh persons filed claims.

3.6.2 The total categorization figures provided by the Government of Madhya Pradesh on October 31, 1990 is as follows:

1. Total no. of claims filed	6,39,793
2. Medically examined	3,61,166
3. No. of folders categorized	3,58,712
4. Categories:	
A (no injury)	1,55,203
B (temporary injury)	1,73,382
C (permanent injury)	18,922
B + D (temporary disablement caused by a temporary	7,172

<sup>55</sup> Affidavit dated August 30, 1995 of Satinath Sarangi I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988.

<sup>56</sup> Affidavit dated May 2, 1996 of Abdul Jabbar Khan in I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988.

<sup>57</sup> Affidavit dated Nil 1996 of Deenadayalan in I.A.Nos.28-29 in C.A.Nos.3187-88 of 1988.

	injury)	
C + D	(temporary disablement caused by a permanent injury)	1,313
C + E	(permanent partial disablement)	2,680
C + F	(permanent total disablement)	40

3.6.3 A fresh notification was issued on December 2, 1996 pursuant to which more than 4 lakh persons filed their claims. This notification invited claims not only from the 36 severely affected wards but also from the 20 other wards.<sup>58</sup> Thus, a total of 10,29,515 claims were filed in all.<sup>59</sup>

3.6.4 The cumbersome bureaucratic procedure by which a claim is processed involves passage of a claim file through 21 different stages. Under s.9 of the Claims Act, a Scheme has been framed. The Deputy Commissioners appointed under s.6 of the Act are to receive claims under para 4 of the Scheme. Para 5 (1) the Scheme provides that the Deputy Commissioner shall place the claim in the appropriate category under sub-para (2) of para 5 and thereafter register the claims. Para 5 (3) empowers the Deputy Commissioner to change the categorization of the claimant after giving the claimant an opportunity being heard. Where the Deputy Commissioner is of the opinion that the claim does not fall in any of the categories in para 5 (2), he may, under para 5 (4) refused to register the claim. Under para 5 (5) of the Scheme if the claimant is not satisfied with the order of the Deputy Commissioner, an appeal can be preferred to the Additional Commissioner.

3.6.5 Under para 11 (3), the Deputy Commissioner is given the power to determine the compensation payable to each claimant and has to have regard to a variety of factors enumerated under para 11 (4). An appeal lies to the Additional Commissioner against an order by the Deputy Commissioner where the dispute is regarding the disbursement of amounts received in satisfaction of the claims.

3.6.6 Under para 13 (2), suo motu power is given to the Additional Commissioner to call for the record of any claim and revise the order of the Deputy Commissioner whether it pertains to categorization or to the payment of compensation. Under para 13 (3), the Welfare Commissioner is given suo motu powers to call for record of any claim and revise the orders passed thereon.

3.6.7 The above procedure has proved to be cumbersome for the claimant, particularly given the fact that it is highly legalistic and formal, requiring the help of a lawyer and compounded by the fact that no legal aid is available for pursuing a claim for compensation under the Scheme.

#### *The Krishna Mohan Shukla petition*

3.6.8 Krishna Mohan Shukla, a lawyer practising in the Supreme Court of India filed a public interest litigation under Article 32 of the Constitution praying for a direction to the

<sup>58</sup> Notification GSR-548 dated December 2, 1996 issued by the Office of the Welfare Commissioner, Ministry of Chemicals and Fertilizers, Government of India and published in the Gazette of India dated December 3, 1996. This was consequent upon the recommendations made by a Standing Committee on Petroleum and Chemicals.

<sup>59</sup> Affidavit dated nil July 2003 of Veena Gupta, Director, Department of Chemicals and Petrochemicals, Government of India in W.P.(C) No.167 of 2003 (later renumbered as I.A.No.46-47 in C.A.No.3187-88 of 1988) in the Supreme Court of India, p.5.

Welfare Commissioner to entertain claims filed on behalf of children; to constitute a legal aid cell to assist the victims in the processing of their claims, constitute a committee to examine the working of the claims tribunals; direction to ensure sufficient stocks of drugs and medicines required for the treatment of gas victims and for increase of interim relief from Rs.200/- to Rs.500/- per month.<sup>60</sup> In this petition, it was pointed out that the Additional Commissioners were acting arbitrarily and misusing their suo motu powers to reduce the compensation awarded in individual cases. “As a consequence the claimants are forced to contact middle men to ensure that their case is not taken up in revision by the Additional Commissioner and the Commissioner and the amount of compensation is not reduced.”<sup>61</sup> Among other things, the petitioner also pointed out that in majority of the cases only Rs.25,000/- was being granted and that “all the orders passed by the Deputy Commissioner are on printed forms where only the blanks have to be filled and in those forms the scope of giving reason is absolutely nil. It is all done in a mechanical way.”<sup>62</sup>

3.6.9 By an order dated September 19, 1995, the Supreme Court took note of the grievance of the petitioner that the lok adalats being conducted under the Claims Act, counsel were not permitted to accompany the claimants. The Supreme Court required the Welfare Commissioner to look into this grievance and submit a report to the court.<sup>63</sup> After the receipt of the report, the court decided to appoint the Committee to visit Bhopal, examine the facts and submit a status report to the court.<sup>64</sup> A three-member Committee comprising advocates practising in the Supreme Court visited Bhopal conducted sittings and gave the following findings<sup>65</sup>:

- (i) The government was acting in an adversarial role in the matter of payment of compensation;
- (ii) The change of the categorization was being done without any proper medical evaluation; the conversion of death cases to injury cases was improper;
- (iii) The suo motu powers of revision were being exercised arbitrarily and once a matter is taken by way of appeal or revision, all payment of compensation stopped;
- (iv) Cases had taken out of turn and there was a lot of discontent in this regard;
- (v) The procedure in lok adalats was highly unsatisfactory with token signatures being taken from claimants on consent forms;
- (vi) Claims of children were not being dealt with individually even if they had become orphans.

The Committee concluded that “all is not well in the matter of disbursement of claims.”

3.6.10 In response to the Report of the Committee an affidavit dated January 3, 1996 was filed by the Registrar, the Office of the Welfare Commissioner, stating inter alia that a broad consensus had been arrived at the meeting of the Deputy Commissioners in the Welfare Commissioner on December 16, 1993 with respect to the assessment of compensation. The

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<sup>60</sup> W.P. (C) No.66 of 1995 dated January 24, 1995 filed in the Supreme Court – *Krishna Mohan Shukla v. Union of India and others*.

<sup>61</sup> *Id.* para 10 (c) page 10.

<sup>62</sup> *Id.* para 10 (f) page 18.

<sup>63</sup> Order dated September 19, 1995 passed by the Supreme Court of India in W.P. (C) No.66 of 1995.

<sup>64</sup> *Krishna Mohan Shukla v. Union of India* (1995) 6 SCALE 410.

<sup>65</sup> Report of the three Member Committee dated November 14, 1995 in W.P. (C) No.66 of 1995 in the Supreme Court (*Krishna Mohan Shukla v. Union of India*).



affidavit stated that “the purport of this consensus is that for the assessment of compensation, normally the following basis be adopted<sup>66</sup>:

Medical documentation category	Scheme category	Amount of compensation
a	db	Up to Rs.25,000/-
b	db	Up to Rs.25,000/-
c	d	Rs.25,000/- - 1 lakh
b + d	d	Rs.25,000/- - 1 lakh
c + d	d	Rs.25,000/- - 1 lakh
c + e	c	Rs.50,000/- - 2 lakh
f	b	Rs.50,000/- - 2 lakh
c + f	d (a)	Up to Rs.4,00,000/-

3.6.11 The court next took up the matter on May 1, 1996 and noted in its order two specific grievances. First was that curtailment of the discretion of the Deputy Commissioner in terms of para 5 (3) of the Scheme by the issuance by the Welfare Commissioner of a series of administrative orders requiring the Deputy Commissioner not to alter the categorization “unless the Welfare Commissioner has approved of the same.”<sup>67</sup> The Supreme Court struck down these administrative orders as these were “a fetter placed on the Deputy Commissioner’s which neither the Act nor the Scheme justifies.”<sup>68</sup> Consequently, the court permitted the reopening of such cases so that there was no violation of the rule of natural justice and a compliance with the Act and the Scheme.

3.6.12 The second grievance concerned the mass disposal of cases in lok adalats by payment of Rs.25,000/-. The court asked the Welfare Commissioner to place statistical information before it in this regard. This was furnished in July 1996. At the hearing on August 5, 1996 the petitioner was given an opportunity to file his response. The court took note of the grievance that the claims of children which were invited in the second phase from August 16, 1983 to March 28, 1994 and filed, were not being granted interim relief.<sup>69</sup>

3.6.13 On September 6, 1996 the petitioner pointed out that the Welfare Commissioner had still not furnished the details of the lok adalat cases. In addition, it was pointed out that notwithstanding the decision arrived at the meeting on December 22, 1993 regarding award of compensation, the Deputy Commissioners had themselves form a rough and ready table of proposed amount of compensation under which the compensation for Chronic Conjunctivitis would be Rs.35,000/-, for Asthma Rs.45,000/-, for Pulmonary Oedema Rs.45,000/-, for Gastritis Rs.45,000/- and so on. The petitioner pointed out that most claims had been settled in this rough and ready basis without any application of mind facts of each case. By an order dated November 7, 1997, the Supreme Court directed the Welfare Commissioner to issue a public notice permitting a claimant who felt aggrieved by an award made in the lok adalat to file a review petition. Also, the court disapproved of the practice of not paying any compensation merely because an appeal had been filed. Further, the Commissioner was ask

<sup>66</sup> Affidavit dated January 3, 1996 in W.P.(C) No.66 of 1995 of the Supreme Court (*Krishna Mohan Shukla v. Union of India*).

<sup>67</sup> *Krishna Mohan Shukla v. Union of India* (1996) 4 SCALE (SP) 52 at 54.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Krishna Mohan Shukla v. Union of India* (1997) 2 SCALE (SP) 3.

to examine the guidelines that had been followed by the Deputy Welfare Commissioners for grant of compensation and direct modifications to the said guidelines.

3.6.14 By an affidavit dated December 31, 1997, the Office of the Welfare Commissioner confirmed that the above rough and ready estimate had in fact being arrived at a meeting on July 25, 1995 and that this had been reworked on December 6, 1997. It was indicated that these were guidelines which were not conclusive and that in suitable cases a higher compensation could be awarded after recording reasons.<sup>70</sup> The modified guidelines were as under:

<u>“Name of Disease</u>	<u>Proposed compensation amount</u>
1. Chronic Conjunctivitis	Rs.35,000/-
2. Cornial Opacities	Rs.50,000/- to 55,000/-
<b>B. <u>Respiratory Diseases</u></b>	
1. Abnormal P.F.T.	Rs.40,000/-
1a. U.R.I.	Rs.35,000/-
2. Chronic Bronchitis	Rs.35,000/-
3. Asthma	Rs.45,000/-
4. Pleural effusion	Rs.45,000/-
4a. Pulmonary Oedema	Rs.40,000/-
5. Chronic Obstructive Pulmonary diseases/ Chronic obstructive airways disease.	Rs.50,000/- to Rs.55,000/-
5a. Interstitial Fibrosis of Lungs	
6. Emphysema	Rs.60,000/- to Rs.65,000/-
7. Bronchiactasis	Rs.60,000/- to Rs.65,000/-
8. Alvyolytis	Rs.60,000/- to Rs.65,000/-
9. Corpulmonale	Rs.80,000/- to Rs.85,000/-
10. Pulmonary Tuberculosis	
(i) Unilateral Infiltration	Rs.45,000/- to Rs.55,000/-
(ii) Bilateral Infiltration	Rs.55,000/- to Rs.65,000/-
<b>C. <u>Gastric Intestinal Tract</u></b>	
1. Gastritis	Rs.35,000/-
2. Acid Peptic disease	Rs.40,000/-
3. Hyper acidity or Recurrent Digestive Symptoms (R.D.S)	Rs.35,000/-

<sup>70</sup> Affidavit dated December 31, 1997 of the Registrar of the Welfare Commissioner in W.P.(C) No.66 of 1995 of the Supreme Court (*Krishna Mohan Shukla v. Union of India*).

- D. Musculoisceletical system:
1. Myalgia Rs.35,000/-
- E. Psychosomatic Disease:
1. Anxiety Rs.35,000/-
  2. Depressive Rs.35,000/-
- F. (B+D) (Without any specified disease) Rs.35,000/-“

3.6.15 The *Krishna Mohan Shukla* petition was disposed of by a final order dated January 25, 2000.<sup>71</sup> The court approved the limits of compensation fixed by the Welfare Commissioner in the modified guidelines made on December 6, 1997. If there was any grievance against the order, the claimant had a right of judicial review provided by Articles 226 and 227 of the Constitution rather than approaching the Supreme Court under Article 136 of the Constitution. The court held that once public notice was issued as directed in the earlier order dated November 7, 1997, a person who felt aggrieved by the decision of the lok adalat could not further complain and seek review in the Supreme Court. All pending special leave petitions against orders of the Welfare Commissioner were directed to be transferred to the High Court to be treated as petitions under Articles 226 and 227 of the Constitution.

### **3.7 PREMATURE CLOSURE OF CASES FOR NON-APPEARANCE OF THE CLAIMANT**

3.7.1 A notification dated February 5, 2000 was issued by the Office of the Welfare Commissioner making an amendment to the Scheme to provide that where a claim was dismissed on account of non-appearance, the claimant could file an application for restoration within 30 days from the date of the order, or within March 1<sup>st</sup>, 2000 if the case was dismissed before that date. There was discretion in the Deputy Welfare Commissioner to condone upto 30 days' delay in filing such an application. Thereafter the case would be permanently closed. This notification was challenged by a separate writ petition by the BGP MUS in the Supreme Court as being arbitrary, unreasonable and violative of Articles 14 and 21 of the Constitution.<sup>72</sup>

3.7.2 This petition invoked a very strong response from the Office of the Welfare Commissioner which said “it is silly on the part of the petitioners if they think that the working of the gas tribunals can be prolonged eternal. They cannot be allowed to clamour if the restoration of applications in certain cases are rejected as time barred when no convincing and reasonable explanation is given for the delay.”<sup>73</sup> In rejoinder, the petitioner is pointed out that most victims were inhabitants of jhuggies and huts in the slums. Many were not aware of the notification in the local newspapers. It was pointed out that “in the span of 15 years it is reasonable to expect that many victims would have changed their address.”<sup>74</sup>

<sup>71</sup> *Krishna Mohan Shukla v. Union of India* (2000) 1 SCALE 340.

<sup>72</sup> *BGP MUS v. Union of India* W.P. (C) No.415 of 2000 in the Supreme Court.

<sup>73</sup> Affidavit of Shri R.K. Behar, Registrar, Office of the Welfare Commissioner dated September 9, 2000 in W.P. (C) No.415 of 2000 in the Supreme Court, para 22, page 13.

<sup>74</sup> Affidavit of Abdul Jabbar Khan dated January 14, 2001 in W.P. (C) No.415 of 2000 in the Supreme Court, para 14, pages 7-8.

3.7.3 By its order dated March 2, 2001,<sup>75</sup> the Supreme Court granted a further time of 60 days' from the date of the order for the claimant whose application had been dismissed for non-appearance, to file an application for restoration. As a result of this order, 42,053 claims were restored to the file of the Deputy Welfare Commissioner for adjudication.

### **3.8 DISBURSEMENT OF THE BALANCE COMPENSATION**

3.8.1 By the end of 2002, it was apparent that the exercise of adjudication of the claims was nearing completion. The statistics from the Office of the Welfare Commission revealed that as on March 31, 2002 10,29,254 cases had been decided. For the 5,66,786 claims in which compensation had been awarded, a sum of Rs.1511.51 crores had been disbursed. The balance available for disbursement as on March 31, 2002 was approximately Rs.1360 crores.

3.8.2 At this stage, it was decided by the victim groups to again approach the Supreme Court for disbursement of the balance amount of over Rs.1360 crores remaining out of the compensation amount of 470 million US dollars paid by the UCC. The petition under Article 32 was filed by 36 individual victims whose claims had been settled, one from each of the 36 affected wards. The petition also raised the issue of non-payment of interest on the compensation amount awarded to the victims by the tribunals constituted under the Claims Act. The principal contention of the petitioners was that the retention of the remaining compensation money coupled with the denial of payment of interest on the compensation amounts awarded, which by themselves were meagre, was arbitrary and unconstitutional. Further, this amount legitimately belonged to and was payable to the victims of the Bhopal gas disaster in terms of the settlement and ought to be distributed among them on a pro-rata basis. Accordingly, it was prayed that the balance compensation be "distributed pro rata amongst the Bhopal gas victims whose claims have been processed and settled in terms of the Bhopal Gas Disaster (Processing of Claims) Act, 1985 and that the retention of the said amount of Rs.1360 crores without disbursement amongst the victims constitutes a grave violation of their fundamental rights under Articles 14 and 21 of the Constitution of India."<sup>76</sup> At the first hearing of the writ petition on May 5, 2003, the Supreme Court directed that the petition should be treated as an interlocutory application in C.A.Nos.3187-88 of 1988.<sup>77</sup> The Union of India which appeared at the first hearing itself filed a reply affidavit on October 10, 2003 in which it was stated that "on principle the balance money should be disbursed on pro rata basis among those Bhopal gas victims whose cases have been decided by the Office of the Welfare Commissioner, after all the cases have been decided and the exact quantum of money available is known."<sup>78</sup> However, the Union of India maintained that the balance compensation was a sum of Rs.475.76 crores lying in the dollar component account. In its rejoinder, the applicants pointed out that the Supreme Court should ask the respondents to explain the difference between the sum of Rs.1360 crores and the sum now stated to be the balance by the Union of India. In its order dated January 9, 2004, the court issued notice to Reserve Bank of India and the State of Madhya Pradesh.

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<sup>75</sup> *Bhopal Gas Peedit Mahila Udyog Sangh v. Union of India* (2001) 2 SCALE 495.

<sup>76</sup> W.P.(C) No.167 of 2003 in the Supreme Court of India – *Abdul Samad Khan & Ors v. Union of India*, prayer (a) at page 29-30.

<sup>77</sup> Accordingly, it was registered as I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988.

<sup>78</sup> Affidavit dated nil July, 2003 of Smt. Veena Gupta, Director, Department of Chemicals and Petrochemicals, Government of India in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988, para 2 (b), page 3.

3.8.3 The Reserve Bank of India filed an affidavit dated March 9, 2004 in which it confirmed that as on December 31, 2003 the balance available in various accounts of the Welfare Commissioner was as follows:

Account particulars	Face value of securities (Rs.)	Realisable value of securities (Rs).
1. AGL Account A/C No.DHSL 0048	488,30,20,000/-	578,90,19,086/-
2. C. A/C No.8692256		15,115.42
3. C. A/C No.8692239		434.55
4. C. A/C No.8692243		711.35
Total		578,90,33,347.32

3.8.4 Further, it was explained that “the total amount shown hereinabove does not include the component of exchange difference as the exchange difference can be calculated only at the time of disinvestments in the dollar account and not on an on going basis.”<sup>79</sup>

3.8.5 The applicants consulted a financial expert and on the basis of the correspondence in regard to the ‘A’ account and ‘B’ account placed along with the affidavit of the Reserve Bank of India, it was found that a sum of Rs.1,505.46 crores was available for disbursement. In their rejoinder, the applicants placed before the Supreme Court, the following calculation which explained the basis for arriving at the said figure<sup>80</sup>:

Total liquidation value of securities  
(as on December 31<sup>st</sup> 2003)

	(\$crores)	(Rs.crores)
Realisable value of securities (as on 31-12-2003)		<b>578.90</b>
Dollar account balance (as on 31-12-2003)		475.77
Dollar equivalent (exchange rate of \$6.55 to Rs.100)	31.16	
Current rupee value of dollars (exchange rate of \$1 to Rs.45)		1402.33
Exchange difference for dollars (1402.33 - 475.77)		<b>926.56</b>
Total liquidation value of securities (578.90 + 926.56)		<b>1505.46</b>

<sup>79</sup> Affidavit dated March 9, 2004 of Shri Sitendra Kumar, General Manager (Banking), Reserve Bank of India in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988, paras 24 and 45, page 10.

<sup>80</sup> Affidavit dated March 24, 2004 of Abdul Samad Khan in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988, para 7, page 3.

3.8.6 After hearing the parties, on July 19, 2004, the Court made the following order:

“The Welfare Commissioner shall disburse the amount keeping in view the Order of this Court, particularly paragraph 7 made on I.A. Nos. 16 & 17 of 1992 in Civil Appeal Nos.3187 & 3188 of 1988, dated 16.10.1992 to the persons whose claims have been settled on pro-rata basis having due regard to the number of claims settled, unsettled and pending. As and when the Welfare Commissioner makes request to the Reserve Bank of India, the Reserve Bank of India may place the funds at the disposal of the Welfare Commissioner from time to time. We are informed that the amount of disbursement available with the Reserve Bank of India as on today is approximately Rs.1503.01 crores.”<sup>81</sup>

3.8.7 Further, the court required the Welfare Commissioner to file a Report in the court and directed the case to be listed for hearing after three months.

3.8.8 The Welfare Commissioner, a sitting Judge of the High Court of Madhya Pradesh, prepared a detailed Action Plan and sent it to the court along with his letter dated August 18, 2004. In the said Action Plan, the Welfare Commissioner explained:

- A sum of Rs.1539.03 crores had been awarded in 5,72,029 cases. The funds available as on August 27, 2004 was Rs.1574.29 crores. Even after setting apart Rs.60 crores for the 12,000 pending cases, which included appeals and revisions, the amount available for disbursement would be more or less equal to what had been awarded. Thus, the pro rata compensation amount would be “equivalent to what the claimant has already been awarded.”<sup>82</sup>
- It was proposed that notice would be given as widely as possible to each of the claimants whose claims had already been settled.
- It was proposed that at least 300 cases will be listed before each Deputy Welfare Commissioner. To avoid confusion, pro rata compensation would not be decided simultaneously in the pending cases.
- The guidelines earlier stipulated by the Supreme Court in the review judgment would be adhered to for disbursal of the balance compensation.
- The entire exercise was proposed to be completed in a period of six months.

3.8.9 The court thereafter fixed October 26, 2004 as the date on which the matter would be heard elaborately for examining the Action Plan submitted by the Welfare Commissioner. A flurry of applications were filed in the meanwhile. The two victim groups, BGP MUS and BGPSSS filed applications pointing out that the compensation awarded was inadequate; the latest figures of settled claims proved that the assumptions on which the Supreme Court had approved the settlement was wholly unrelated to the actual figures. Accordingly, these applicants sought an order directing the Union of India to compensate the Settlement Fund to the extent of “five times the initial fund.”<sup>83</sup> Another application was filed by the Bhopal

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<sup>81</sup> *Union Carbide Corporation v. Union of India* (2004) 7 SCALE 259.

<sup>82</sup> Para 1 of the Action Plan prepared by the Welfare Commissioner, Bhopal submitted in I.A.No.46-47 in C.A.Nos.3187-88 of 1988 in the Supreme Court.

<sup>83</sup> I.A.No.48-49 in C.A.Nos.3187-88 of 1988 dated September 17, 2004 in the Supreme Court.

Memorial Hospital Trust seeking release of Rs.37.65 crores still remaining under attachment and for “such additional funds that the Hon’ble Court considered sufficient to meet the additional capital and revenue expenditure that BMHT would require for extending medical facilities... from the funds lying in the State Treasury.”<sup>84</sup> The Union of India filed applications stating that the issue of the period of limitation within which the suo motu revision powers of the Additional Commissioner and Welfare Commissioner under the Scheme could be invoked by a claimant was under consideration of the High Court and that till such time the disbursement of the balance compensation should wait.<sup>85</sup> Kailash Joshi, a BJP leader based in Bhopal filed a writ petition challenging the directives issued by the Welfare Commissioner way back on March 17, 1994 requiring the residents of the 20 unaffected wards to prove actual injury before their claims could be entertained.<sup>86</sup> The Madhya Pradesh Government too saw this is an opportunity to make a claim. In its counter affidavit to the applications of Abdul Samad Khan and others, the Madhya Pradesh Government made a prayer that the Supreme Court should direct the creation of “a corpus fund of Rs.600 crores from the undisbursed amount, the interest from which would be spent for the purpose of various welfare measures to improve the quality of the life of the gas victims.”<sup>87</sup>

3.8.10 At an elaborate hearing on October 26, 2004, the Supreme Court approved the Action Plan prepared by the Welfare Commissioner and directed the disbursement is start from November 15, 2004 and conclude by April 1, 2005.<sup>88</sup> The court rejected the plea of the State Government and the BMHT for release of additional funds. The victim groups were permitted to file replies to the application by BMHT and the latter was asked to explain how it had spent the monies released to it thus far by the Supreme Court. The court rejected the applications by the Union of India as premature. Kailash Joshi’s petition was dismissed and he was asked to approach the High Court first.

### **3.9 FACT FINDING MISSION - FINDINGS**

3.9.1 As part of the exercise undertaken by the Fact Finding Mission (FFM), a common questionnaire was evolved for the purposes of conducting surveys of the affected population. Section E of the questionnaire raised a set of 36 questions pertaining to legal issues. There were a total of 3,881 responses. 94.7% of the persons surveyed had applied for compensation and of these over 64% early on in the first phase, i.e., 1985. 36.85% of the surveyed claimants had sought compensation in the range of Rs.26,000/- to Rs.50,000/- and 30.54% in the range of Rs.76,000/- to Rs.1 lakh. Surprisingly, only around 10% of the respondents had sought compensation in the range of Rs.1 to 5 lakhs. The awareness of the availability of the facility for applying for compensation was essentially through the family member (45.11%) or the neighbour (15.64%).

3.9.2 The survey confirmed, what has been the standard pattern confirmed by other surveys as well. 87% of the respondents received Rs.25,000/- as compensation. In a separate survey

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<sup>84</sup> I.A.Nos.50-51 dated September 20, 2004 in C.A.Nos.3187-88 of 1988.

<sup>85</sup> I.A.Nos.5-6 in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988 dated September 30, 2004 in the Supreme Court.

<sup>86</sup> W.P. (C) No.547 of 2004 dated September 20, 2004 in the Supreme Court of India.

<sup>87</sup> Counter affidavit dated September 25, 2004 of Dr. B.S. Ohri, Chief Medical Officer, Gas Rahat, Bhopal in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988, para 12.

<sup>88</sup> Order dated October 26, 2004 in I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988 of the Supreme Court.

conducted of 601 households in J.P. Nagar, it was found that over 90% of 1481 individual claimants had received only Rs.25,000/-.<sup>89</sup>

3.9.3 The waiting period for the settlement of the claim was in the range of 7 to 12 years from the date of the disaster. 43.9% had their claim settled in 1996 and 33.7% in the years 1991 to 1995. In the separate survey conducted in J.P. Nagar, it was found that 85% of the claimants who lodged the claims in 1985 had their claimants settled only 1994-95.

3.9.4 The dissatisfaction with the settlement of the claims was, unsurprisingly high. 67.68% of the respondents were unhappy with the amount awarded. The disillusionment with the process was apparent from the fact that 84.1% of the respondents did not file any appeal. Sadly, 69.8% did not even know that they could file an appeal.

3.9.5 Only 25.59% of those whose claims were settled could afford to engage a lawyer to file an appeal. 30.26% filed appeals on their own, i.e., without the help of any lawyer. The result of the appeal placed the victim invariably in a worse situation. In 26.15% of the cases, the amount of compensation actually decreased and in 18.97% cases it remained the same. Only in 5.12% cases the amount increased.

3.9.6 The absence of legal aid was confirmed with 82.56% of the respondents saying that they received no legal aid. While 46.86% of the respondents had their cases decided in the courts of the Deputy Welfare Commissioner, 34.6% had the decisions in the lok adalats. As regards the proceedings in court it appears that there were at least 2 to 4 hearings in most of the cases. A Judge would invariably ask around 3 to 4 questions and the entire hearing was over within 10 minutes.<sup>90</sup> It was clear that the Judges simply had no time to pay any individualized attention to the facts of every case.

3.9.7 The actual process of pursuing the claim to its finish was obviously an arduous one for the victim. Although, the Tribunal itself was within a range of 1 to 2 kms from the place of residents for over 62% of the respondents, they had to visit the courts at least 10 times and spent 2 to 3 hours on each visit. 19.89% had spent more than 5 hours on each visit.

3.9.8 Contrary to what might have been expected, only 357 persons constituting 9.2% of the respondents answered yes to the question whether they had to pay bribes. Of these, 40.5% said that the bribe was demanded by the lawyer and 92.15% said it was the court official. The general reasons for giving a bribe was the promise that the case would get decided quickly, the money would be disbursed faster or that files would be located sooner. The exact amount of bribe varied. 47.4% of the 293 persons said that they had paid up to Rs.500/-. Of the 146 persons interviewed in the severely affected wards, 51.4% confirmed that dalals (middleman) sat in the court premises.

3.9.9 61% of the respondents spent the compensation money essentially on health care; and 20.4% on repayment of debts. In the severely affected wards, 94% of those surveyed (145 persons) confirmed that they saved nothing and 55.5% that they had taken loans to survive. These patterns were more or less similar in the mildly and moderately affected wards.

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<sup>89</sup> Annexure-P/9 to I.A.Nos.46-47 in C.A.Nos.3187-88 of 1988 of the Supreme Court.

<sup>90</sup> 31.28% of the respondents had the Judge spending 1 to 5 minutes on their cases and 39.11%, 6 to 10 minutes. Only 12 persons indicated that the Judge had spent over 30 minutes on a case.



3.9.10 While the survey itself could have been more extensive or better designed, it more or less confirms the general truths about the victimization of the Bhopal gas victim. To summarise some of these factors:

- The lack of awareness of the legal processes and the absence of legal aid led many of the persons to claim compensation of amounts less than a lakh of rupees and over 90% of them received only Rs.25,000/-. Therefore, the high degree of dissatisfaction with the compensation awarded.
- Nothing of the compensation money was saved since most of it was utilised in health care and repayment of loans. Lack of awareness again resulted in a very small percentage actually filing appeals against the awards.
- The results of the appeal were hardly beneficial to the claimant. A sizeable number of the appellants (26.5%) faced the ironic result of the compensation awarded to them in the first court reduced by the appellate court. The appeal process was also clearly unsatisfactory.
- No claim was settled earlier than a waiting period of 7 years. The adjudicatory process involved over 5 visits of two hours each for the claimant. Ultimately, the Judge was able to spend not more than 10 minutes on a case.
- Of those who paid bribes, who constituted not even 10% of the total number surveyed, many paid it to the court official for getting their claim settled quicker.

3.9.11 The survey confirms the failure of the legal system to respond to a mass disaster as well as the denial of effective access to justice for the victim of the disaster.

### 3.10 PRINCIPLES OF LIABILITY

3.10.1 The Bhopal case constitutes a lost opportunity for the courts to evolve principles of liability for tortuous acts by multinational corporations. It is ironic that the Bhopal gas disaster which took place on December 2/ 3, 1984 formed the basis for the Supreme Court to attempt evolving some of the principles of liability in other cases that followed while those principles never came to be applied in the Bhopal case itself. In the opinion of a legal scholar “Despite the effort to set out principles of liability, in *Shriram*,<sup>91</sup> which could be applied to Bhopal, the court’s reticence was prompted, and sustained, by the fear of being judged wanting in the US courts.”<sup>92</sup> Indeed, the Supreme Court in the review judgment<sup>93</sup> thought it “necessary to remind ourselves that in bestowing a second thought whether the settlement is just, fair and adequate, we should not proceed on the premise that the liability of the UCC has been firmly established. It is yet to be decided if the matter goes to trial. Indeed, UCC has seriously contested the basis of its alleged liability.”<sup>94</sup>

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<sup>91</sup> *M.C. Mehta v. Union of India* (1987) 1 SCC 395.

<sup>92</sup> Usha Ramanathan, **A Critical Analysis of the Laws Relating to Compensation for Personal Injury**, Thesis submitted for the Degree of Doctor of Philosophy, Delhi University (September 2001), 319.

<sup>93</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

<sup>94</sup> *Id.* at 677.

3.10.2 Within a year of the Bhopal gas leak, Oleum gas leak from the factory of Shriram Foods in the vicinity of the Supreme Court of India. A pending PIL by M.C. Mehta provided the opportunity to the court to pass a series of orders dealing with the after effects of the gas leak. The court went on to expostulate on the principle of strict liability. In an elaborate judgment, the Supreme Court of India said: “An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity undertaken... if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.”<sup>95</sup> This principle has been reiterated and applied in later cases to spell out the liability of polluting units.

3.10.3 In the review judgment, in his concurring judgment, Ranganath Mishra, CJ., tried to dilute the strict liability principle involved in the *Oleum Gas Leak* case by terming it as “essentially obiter.”<sup>96</sup> Later another bench of the Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*<sup>97</sup> explained that the principle of strict enterprise liability laid down in the *Oleum Gas Leak* case was the binding law and not an obiter.<sup>98</sup> The development of the law in this area is owed undoubtedly to the Bhopal gas disaster.

### 3.11 LEGISLATIVE CHANGES

3.11.1 The *Factories Act, 1948* was amended by Act 20 of 1987. The ostensible reason was that “several chemical industries have come up which deal with hazardous and toxic substances. This has brought in its train problems of industrial safety and occupational health hazards.”<sup>99</sup> Chapter IVA dealing with ‘Provisions relating to Hazardous Processes’ introduced ss.41A to 41H in the Act. The constitution of Site Appraisal Committees, the compulsory disclosure of information by the occupier, workers’ participation in safety management and right of workers to warn about imminent danger were all mandated. This was clearly as a result of the Bhopal gas leak disaster. But, there was yet another provision inserted in the Factories Act which would enure to the benefit of the designer of hazardous technology. S.7B was inserted to provide for ‘general duties of manufactures as regards articles and substances for use in factories’. Under s.7B (5), the supplier, designer or manufacturer of an article would be relieved of any liability to vouch for the safety of the use of such article so long as the user of such article gives a written undertaking that “the article will be safe and without risks to the health of the workers when properly used.” Applying it to the Bhopal situation, s.7B (5) would have the effect of completely absolving UCC of any liability as long as UCIL gave a written undertaking that the use of MIC would be safe and without risks to the health of workers. It is surprising that given the horror of the Bhopal gas

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<sup>95</sup> *M.C.Mehta v. Union of India* (1987) 1 SCC 395 at 420-21 (hereafter “Oleum Gas Leak Case”). The court emphasised that “such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330.”

<sup>96</sup> *Supra* note 93 at 608.

<sup>97</sup> (1996) 3 SCC 212 in which villagers in Rajasthan who were denied access to drinking water on account of pollution of the wells by seepage of toxic untreated wastes produced by chemical factories, were held entitled to restitution and compensation.

<sup>98</sup> *Id.* at 242.

<sup>99</sup> Statement of Objects and Reasons to the Factories Amendment Bill, 1987 notified on December 2, 1986, para 2.

disaster, the Union of India and the Parliament thought it fit to insert such a provision in the Factories Act, 1948.

3.11.2 The *Public Liability Insurance Act, 1991 (PLIA)* was enacted with a view to providing for interim compensation in the event of an industrial disaster. Again, the PLIA is premised on the fact that there has been a growth of “hazardous industries, process, and operations” and “growing risks from accidents to workmen and innocent members of the public” alike.<sup>100</sup> The essential feature of PLIA is to provide for compulsory insurance of any unit or factory undertaking a hazardous activity. Based on the no fault principle as contained in s.3 of PLIA, the total outgo for one accident has been limited to Rs.5 crores. What set out to be a compulsory statutory insurance to meet contingencies for payment of interim compensation in the event of accidents in hazardous industries has been reduced to a compromise favouring the industry. There is a cap now on how much liability will be assumed by the insurer. The working of the PLIA depends on the local administration which is empowered to disburse the interim compensation. An Environmental Relief Fund (ERF) has been created under s.7A of the Act into which an amount equal to the premium payable by the owner would be credited by the owner under PLIA. This piece of legislation is yet to be tested for its efficacy.

3.11.3 The third piece of legislation to provide for compensation is the *National Environment Tribunal Act, 1995 (NETA)*, the only feature of which is the payment of final compensation in the event of an accident. However, the NETA has yet to be notified and there appears to be no reasonable prospect of it happening in the future.

### 3.12 CONCLUSION

3.12.1 The litigation for enforcement of civil liability has traversed through a complex maze of petitions and proceedings in courts. There can be little doubt that the victim of the Bhopal gas disaster has been denied justice through this elaborate litigation. As pointed out by Usha Ramanathan in her seminal work on compensation for personal injury, “the quasi-bureaucratic determination and disbursal of compensation, which saw the setting up of a hierarchy of Claims Commissioners, also effected the severing of victims recognition from mainstream judicial process, except for the largely public interest interventions when matters were taken to the Supreme Court.”<sup>101</sup>

3.12.2 At every stage, the victims have had to go back to the Supreme Court for basic survival needs. Thus, the payment of interim relief, the issuance of directions to the Office of the Welfare Commissioner correcting the arbitrary methods of categorization and assessment of claims, the extension of time for filing applications to restore claims dismissed for default and the disbursal of the balance compensation to the victims whose claims have been settled required fresh petitions be filed time and again in the Supreme Court.

3.12.3 The above narration also establishes the central role of the Supreme Court in relation to the needs of the Bhopal gas victims. The role has been negative in the context of the premature but unjust settlement entered into by the UCC and the Union of India. The court also continued to deny a voice to the victim when crucial decisions concerning their fate were taken in the presence of, and sometimes at the instance of, the court. It could be argued that without the constant intervention by the court, very little could have been achieved in terms

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<sup>100</sup> Statement of Objects and Reasons to the PLIA, 1991.

<sup>101</sup> *Supra* note at 92 at 355.

of the interim relief payments to the victims and the disbursement of the residual compensation. Nevertheless, the long wait which the victims have had to endure for recognition and enforcement of their basic rights underscores the overall failure of the legal system to respond to the mass disaster.

In its order dated May 4, 1989 the Supreme Court justified the settlement on the ground that it was a “compelling duty” of the Court “to secure immediately relief to the victims.” The events in the 20 years since the disaster, totally belies this expectation. Far from the relief being immediate it has been both elusive and illusory. The two decade long wait for justice by the Bhopal victims stands irredeemable.

3.12.4 The end to this long drawn litigation has not yet been reached. The actual disbursement of compensation ordered to be effected from November 1, 2004 is likely to give rise to further questions that might require the court’s intervention. Then the issue of additional compensation having been paid to victims who have been completely left out of the claims procedure altogether. Whether the court will be able to persuade the Union of India to undertake this liability and thereafter enforce it remains to be seen.

3.12.5 It is indeed unfortunate that there has been no effective access to justice for the Bhopal gas victims. The continuing lack of legal awareness as well as the complete absence of any form of legal aid appears to be wholly unjustified and inexplicable, considering the magnitude of the disaster. There has been a collective failure on the part of the executive, the judiciary and the lawyers to set right this inexcusable wrong. Future Bhopals may, given the present state of affairs, meet with the same response. The law as it stands devalues human life and suffering and the legal system, as presently ordered, appears incapable of rendering justice to the victim of a mass disaster.

## CHAPTER 4: CRIMINAL PROCEEDINGS

### **4.1 BACKGROUND FACTS**

4.1.1 Enforcing the criminal liability of corporations raises problematic questions. The recent judgment of the Supreme Court in *Assistant Commissioner v. Velliappa Textiles*,<sup>102</sup> reflects this difficulty. The question there was whether a corporation could be convicted of a crime the punishment for which under the law was a combination of both imprisonment and fine. Although, two of the three judges who heard the case agreed that the current trends in the law permitted a company to be prosecuted for the acts done by its officers just as an individual would, they found that the sentence was incapable of being executed since a company could not be imprisoned. The court pointed out that the legislative changes in this regard recommended by the Law Commission in its 41<sup>st</sup> Report, 1969 and 47<sup>th</sup> Report, 1972 remain to be implemented. The case for a stricter regime for corporate criminal liability is best made in the context of the Bhopal gas leak disaster.

4.1.2 The criminal cases arising out of the Bhopal gas leak disaster have been disappointing in their outcome for not just the prosecution but more importantly the victims of the gas leak disaster. To begin with the main executives of the corporations involved managed early release on bail. The foreign accused thereafter absconded. In 1989, an unjust settlement foreclosed not only civil remedies but ended the criminal cases as well. It required a sustained

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<sup>102</sup> (2003) 11 SCC 405.

effort in court to have the settlement revoked even as regards closure of the criminal case. When the criminal proceedings revived in 1991, the foreign accused continued to abscond, the Indian accused were sent up for trial. However, the order framing charges against the Indian accused was challenged by them up to the Supreme Court which in 1996 obliged them by converting the offence from culpable homicide not amounting to murder (s.304 part II IPC)<sup>103</sup> to rash and negligent act (s.304A IPC).<sup>104</sup> As regards the foreign accused, who were declared proclaimed absconders and whose property in India, viz., the 50.9% shares held by Union Carbide Corporation (UCC) in Union Carbide India Limited (UCIL), was attached by the Chief Judicial Magistrate (CJM), Bhopal, the Supreme Court obliged by removing the attachment, and permitting the shares to be sold to raise monies for the construction of the hospital by the Bhopal Hospital Trust (BHT), a body that was created by UCC with the sole purpose of defeating the attachment. The foreign accused continue to abscond. The extradition of Warren Anderson (Accused no.1) has not taken place despite the passage of 20 years aided by an indifferent government and two written opinions of the Attorney General for India recommending that he may not be extradited. Meanwhile, UCC has been taken over by Dow Chemicals (Dow) and it remains to be seen if the criminal liability of UCC can attach to Dow. The trial against the Indian accused in the court of the CJM, Bhopal for the offence under s.304A IPC is nowhere near completion. Over a 100 prosecution witnesses have been examined and cross-examined over a period of 7 years thus far. The trial may, at this rate, not be concluded for the next two years. For an incident, that has resulted in the deaths of nearly 20,000 persons and injuries to over 5,50,000 we do not have yet any conviction. The future of these criminal cases thus indeed seem extremely bleak. Also, there appears to be no move to strengthen the legal regime concerning criminal liability of corporations.

4.1.3 UCIL's plant at Bhopal was designed by its holding company UCC and was built in 1969 as a formulation factory for UCC's Sevin brand of pesticides, produced by reacting Methyl Isocyanate (MIC) and alpha naphthol. Sevin kills pests by paralysing their nervous systems. At this time MIC was imported from the US in steel containers. The plant was set up on a land taken on long-term lease from State of Madhya Pradesh.

4.1.4 In **1975**, UCC decided to 'integrate backwards' and manufacture ingredients of Sevin at the Bhopal plant. Although the then zonal regulations prohibited locating polluting activity in the vicinity of 2 kms from the railway station, UCC was able to persuade the authorities to grant it the necessary clearances. In **1978**, the alpha naphthol manufacturing unit became operational, and a year later in **1979**, the MIC unit became functional. The documents in the possession of UCC, that have now become available as a result of discovery proceedings in the US in 2002,<sup>105</sup> show that the UCC was fully aware of the dangers posed by the use of untested technology for producing MIC. Further, it deliberately scaled down the safety

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<sup>103</sup> "S.304: Punishment for culpable homicide not amounting to murder. – Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of their description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

<sup>104</sup> "S.304-A: Causing death by negligence. – Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

<sup>105</sup> See Chapter on environmental issues *infra*.

measures for the UCIL plant in Bhopal in comparison to a similar plant of the UCC at Institute, West Virginia, USA.

4.1.5 On **December 25, 1981**, a leak of Phosgene gas took place at the UCIL plant killing one worker. This was followed by another leak on **January 9, 1982**, when 25 workers were hospitalized. The UCIL workers protested but their plea for enhanced safety measures went unheeded. In 1982, a Bhopal journalist Rajkumar Keswani wrote a series of articles in the local press about the dangers posed by the UCIL plant. In **March 1982**, there was a leak from one of the solar evaporation ponds which was brought to the attention of UCC by the UCIL officials. In **April 1982** a UCIL document noted that the continued leakage was causing great concern. In **May 1982**, UCC sent its US experts to UCIL plant to conduct audit. The team noticed leaking valves and a total of 61 hazards, 30 of which were major and 11 of which were in the MIC/ Phosgene units. Instead of strengthening the safety measures, UCIL in **September 1982**, delinked the alarm from the siren warning system so that only their employees would be alerted over minor leaks without “unnecessarily” causing “undue panic” among neighbourhood residents.

4.1.6 On **October 5, 1982**, there was another leak from the plant which resulted in hospitalisation of hundreds of nearby residents. On **March 4, 1983**, Bhopal lawyer Shahnawaz Khan issued a legal notice to UCIL stating that the plant posed a serious risk to health and safety of workers and residents nearby. In a written reply dated **April 29, 1983**,

UCIL’s Works Manager denied the allegations as being baseless. Again, on **August 24, 1984**, the Union Carbide Karamchari Sangh wrote to the works manager of UCIL pointing out to the rising noise and air pollution in different parts of the factory. The letter pointed out that “it is known to you very well that some chemicals in our factory are so dangerous and helpful to develop chronic diseases, if we work in such atmosphere for longer time and few chemicals can kill any person while taking minor exposure.”<sup>106</sup> On the same day, the works manager replied denying that the plant was unsafe and asserting that “it is the policy of this company to provide a safe and healthy working environment for all our employees.”<sup>107</sup>

4.1.7 The criminal conduct of UCC and UCIL which placed an entire population at risk despite full knowledge of the total lack of safety at the UCIL plant was evident from a series of conscious decisions taken by both managements between **1983& 1984**, some of which are listed below:

- The safety manuals were re-written to permit switching off the refrigeration unit and shutting down the vent gas scrubber when the plant was not in operation.
- The staffing at the MIC unit was reduced from 12 to 6
- Thus at the time of the disaster on the night of **December 2/3, 1984**
  - The refrigeration unit installed to cool MIC and prevent chemical reactions had been shut for 3 months
  - The vent gas scrubber had been shut off for maintenance
  - The flare tower had been shut off
  - There were no effective alarm systems in place

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<sup>106</sup> Letter dated August 24, 1984 of Shri R.K. Yadav, General Secretary, Union Carbide Karamchari Sangh to the Works Manager, UCIL.

<sup>107</sup> Reply dated August 24, 1984 from Shri J. Mukund, Works Manager, UCIL to Shri R.K. Yadav.

- The water sprayers were incapable of reaching the flare towers
- The temperature and pressure gauges were malfunctioning
- Tank number 610 for storing MIC was filled above recommended capacity
- The stand by tank for use in case of excess was already having MIC

4.1.8 Further, UCC had by this time decided to dismantle the plant and ship it to Indonesia or Brazil. The feasibility report for this was completed on **November 29, 1984**, three days before the disaster.

4.1.9 On **December 2, 1984**, at 8.30 p.m. the workers under instructions from their supervisors began a water-washing exercise to clear the pipes choked with solid wastes. The water entered the MIC tank past leaking valves and set off an exothermic ‘runaway reaction’ causing the concrete casing of tank 610 to split and the contents leaking into the air.

4.1.10 Because of no warning given to residents or about precautions they should take, many of them ran on to the streets to meet a certain death.

## 4.2 THE COMMENCEMENT OF CRIMINAL PROCEEDINGS

4.2.1 A suo-motu FIR was recorded by the SHO at P.S. Hanumanganj on **December 3, 1984** against UCC, UCIL and its executives and employees under s.304 A IPC. The FIR noted that:

- 3828 died on the day of the disaster (the unofficial toll is feared to be much higher by 2003 over 15,000 death claims have been processed)
- Over 30,000 were injured on the fateful day (a figure that now stands at 5.5 lakhs)
- 2544 animals were killed

4.2.2 On **December 3, 1984**, 5 junior employees of UCIL arrested. On **December 6, 1984**, the case was handed over to the CBI. On **December 7, 1984**, Warren Anderson [(Accused no.1 and Chairman of UCC (Accused no.10)], Keshub Mahindra [Accused no.2 and Chairman of UCIL (Accused No.12)] V.P.Gokhale (Accused no.3 and Vice President of UCIL) were arrested and released on bail on the same day. Warren Anderson was escorted out to Delhi on the Chief Minister’s special plane.

4.2.3 On **March 29, 1985**, Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 whereby Union of India would be the sole plaintiff in a suit against the UCC and other defendants for compensation arising out of the disaster. However, this legislation was meant to deal with only the proceedings to enforce the civil liability of UCC and UCIL.<sup>108</sup>

4.2.4 On completion of the investigation, charge sheet was presented by the CBI in the Court of the CJM, Bhopal on **December 1, 1987**.

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<sup>108</sup> The validity of this statute was upheld by the Supreme Court in *Charan Lal Sahu v. Union of India* (1990) 1 SCC 613. The court categorically ruled that (para 89, page 682-683): “Criminal liability is not the subject matter of the Act... the Act does not deal with either claims or rights arising out of such criminal liability.”

### 4.3 SETTLEMENT ORDER

4.3.1 Although, the enforcement of civil liability occupied the attention of the parties and the courts between the date of the disaster and the date of the settlement, i.e., **February 14, 1989**, there were hardly any significant developments in the criminal proceedings during this period. The settlement recorded in the orders dated **February 14 and 15, 1989** of the Supreme Court resulted in the closure of not only the claims arising out of civil liability of the UCC but also the closure of all the criminal cases. After ordering that UCC shall pay 470 million dollars “in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal gas disaster,”<sup>109</sup> the **February 14, 1989** order directed that “To enable the effectuation of the settlement, all civil proceedings related to and 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.”<sup>110</sup> The consequential order of **February 15, 1989**, joined UCIL as a party to the settlement and enjoined the Union of India and the State of Madhya Pradesh “To take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any corporation, company, or person referred to in this settlement are defended by them and disposed of in terms of this order.”<sup>111</sup> Further, civil and criminal proceedings “filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal or quashing in terms of this order.”<sup>112</sup> The consequential terms of settlement appended to the order specifically mentioned that “all such criminal proceedings including contempt proceedings stand quashed and the accused deemed to be acquitted.”<sup>113</sup>

4.3.2 The Supreme Court’s order recording the settlement was extra-ordinary in many ways. First of all, the proceedings arose from an interim order in a civil suit directing payment of interim compensation and therefore the Supreme Court was exercising its civil appellate jurisdiction. It had no jurisdiction whatsoever to deal with criminal proceedings. Secondly, the offence with which the accused were charged included culpable homicide not amounting to murder (s.304 part II IPC) which was punishable with ten years’ imprisonment and clearly not compoundable under s.320 of the Cr.PC. The Supreme Court could not have quashed or put its stamp of approval on an agreement between parties to quash such criminal proceedings. Thirdly, the Union of India was pursuing the civil remedy for the victims in terms of the Claims Act which, as explained by the Supreme Court, did not cover the criminal liability. Therefore, the Union of India also lacked the authority in the civil proceedings pending in the Supreme Court to agree to an order dealing with the criminal liability of UCC.

### 4.4 THE REVIEW PETITIONS

4.4.1 There was a justified wholesale protest against the Settlement Order. Review petitions were filed and were admitted for hearing by an order dated **May 4, 1989**.<sup>114</sup> The court noted

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<sup>109</sup> *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674 at 675.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Id.* at 676.

<sup>112</sup> *Id.* at 677.

<sup>113</sup> *Id.* at 678.

<sup>114</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.



that one of the grounds on which the review was preferred pertain to the termination of criminal proceedings.

4.4.2 The review petitions were allowed by a judgment dated **October 3, 1991**, only to the extent of revival of criminal proceedings.<sup>115</sup> Four of the contentions of the victim groups for assailing the settlement order pertained to the criminal proceedings. The first was that the criminal proceedings were not relatable to the Act and that the court had no power to withdraw those criminal proceedings and quash them and that therefore the settlement order was without jurisdiction. The court negated this contention as being “hypertechnical”<sup>116</sup> saying that it had very wide powers under Articles 136 and 142 to do justice. The contention that the quashing of the criminal cases was violated s.320 Cr.PC which did not permit the compounding of such an offence was also negated saying that “it will again be wholly incorrect to say that the powers under Article 142 are subject to such express statutory prohibitions.”<sup>117</sup> However, the court agreed that the Union of India had not put forth a justification for withdrawal of prosecution under s.321 Cr.PC. It therefore, reviewed the settlement order and permitted revival of the criminal proceedings. It also directed that “all portions in the orders of this Court which relate to the incompetence of any future prosecutions be deleted.”<sup>118</sup>

4.4.3 An interesting aspect of the review proceedings was that by the time these were heard in the Supreme Court, the Government at the Centre had changed and the Attorney General now representing the Union of India attacked the settlement agreed to by the earlier Attorney General. The court was informed that the correspondence pertaining to a letter rogatory in the criminal investigation “for discovery and inspection of UCC’s plant in the United States for the purposes of comparison of the safety standards” had resulted in permission being granted for inspection to be conducted by the CBI team in the middle of **February 1989**. The Attorney General submitted that the settlement which took place on **February 14, 1989** “was intended to circumvent that inspection.”<sup>119</sup> The court simply said that “the documents relied upon do not support such an allegation. That apart we must confess our inability to appreciate this suggestion coming as it does from the Government of India which was a party to the settlement.”<sup>120</sup>

## **4.5 ATTACHMENT OF UCC’S SHARES IN UCIL**

4.5.1 As a consequence of the order passed in the review petitions, the criminal case registered against Warren Anderson (Accused no.1), UCC (Accused no.10), UCC (E) (Accused no.11), UCIL and their Directors in the Court of the Chief Judicial Magistrate (CJM), Bhopal revived. On **February 1, 1992**, the CJM, Bhopal ordered that if accused no.1, 10 and 11 did not appear at the next hearing on **March 27, 1992**, they would be declared proclaimed absconders and their properties would be attached. The hearing was subsequently adjourned to **April 30, 1992**. In order to defeat this attachment, the UCC announced on **April 15, 1992**, the creation by it of the Bhopal Hospital Trust (BHT) in London with Sir Ian Percival as Sole Trustee. UCC endowed its entire shareholding in UCIL to the BHT. The CJM, Bhopal on **April 30, 1992** refused to recognize the creating of the Trust and viewed it

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<sup>115</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

<sup>116</sup> *Id.* at 627.

<sup>117</sup> *Id.* at 635.

<sup>118</sup> *Id.* at 641.

<sup>119</sup> *Id.* at 638.

<sup>120</sup> *Ibid.*

as being malafide with a view to defeating the order of the court. Consequently, the CJM directed attachment of UCC's properties in India which were at that time comprised of UCC's 50.9% shareholding of the equity shares in UCIL. UCIL filed a revision against this order in the High Court of Jabalpur.

4.5.2 The BHT through Sir Ian Percival, its Sole Trustee approached the Union of India in 1993, with a proposal to construct the expert medical facility in the form of a 500 bed hospital in Bhopal as directed by the Supreme Court in the judgment dated **October 3, 1991** disposing of the review petitions. Although, the UCC was expected to fund this separately, the BHT now sought the help of the Union of India to have the money raised through sale of UCC's shareholding in UCIL which was placed under attachment by a order dated **April 30, 1992** of the CJM, Bhopal. The Union of India obliged by filing applications, I.A.Nos.24 and 25, in the Supreme Court in the disposed off Civil Appeal Nos.3187-88 of 1988 in which the settlement had been recorded. On **February 14, 1994**, the Supreme Court disposed off these applications by modifying the attachment order and allowing the sale of the shares held by the UCC in the UCIL. The victim groups on getting to know of this order, filed review petitions on **April 13, 1994** for recall of the order dated February 14, 1994. These applications were adjourned on five occasions and were ultimately heard on **October 20, 1994** by which time, the sale of the shares had already taken place.<sup>121</sup> The court now clarified that "we have neither expressly nor by implication pronounced on the question whether the purported pledge of the shares by UCC with the Sole Trustee was bonafide and valid or whether the order of attachment was properly made."<sup>122</sup> The court noted that the matter of legality of the creation of BHT would be decided by the Madhya Pradesh High Court where the revision petitions challenging the attachment were still pending. It was further directed that while Rs.60 crores from the sale proceeds would be transferred to the account of BHT towards construction of the hospital, the remaining amount of Rs.230 crores would be kept in a separate account in the name of the UCC and BHT and remain under attachment to be operated only upon orders of the CJM, Bhopal.

4.5.3 In a well orchestrated move, UCIL on **August 24, 1995** withdrew its revision petitions in the Madhya Pradesh High Court challenging the attachment order passed by the CJM, Bhopal on April 30, 1992. Thus, the attachment order attained finality and so did the finding of the CJM, Bhopal in that order that the creation of the Trust was malafide and with a view to defeat the attachment order. This was followed by the Sole Trustee moving a separate application in the Supreme Court seeking the release of Rs.183 crores from the balance amount under attachment on the pretext that he needed additional funds to convert the proposed 260 bedded hospital into a 500 bed one.<sup>123</sup> Meanwhile, the victim groups on **November 29, 1995** filed separate applications urging the court not to permit the BHT to handle any of these funds from the sale of attached shares and further that the order of attachment had already attained finality. These applications specifically asked the Supreme Court to remove Ian Percival from the joint account holding of the accounts in which these monies were deposited.

4.5.4 The Supreme Court never dealt with the objections raised by the victim groups. Instead, on **April 3, 1996**, concluded that "the attachment had thus lost its sting because in any case UCC is not claiming that amount, confiscated or otherwise. There is, therefore, no

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<sup>121</sup> See the orders dated October 20, 1994 passed by the Supreme Court reported in *Union Carbide Corporation v. Union of India* (1994) 4 SCALE 973. This aspect is revisited in the Chapter dealing with medical and health issues.

<sup>122</sup> *Ibid.*

<sup>123</sup> For a detailed discussion on this aspect, see the section on medical issues.

difficulty in directing the release of that amount from attachment. We, therefore, direct that out of the attached amount a sum of Rs.187 crores be released for the construction of the hospital.”<sup>124</sup> Thus, the Supreme Court virtually obliterated the order of the CJM, Bhopal attaching the shares and which order had already attained finality with there being no pending challenge to it in any court. What is ironic is that for a second time in its civil appellate jurisdiction, the Supreme Court interfered with a valid order of the criminal court and virtually set it aside.<sup>125</sup>

#### **4.6 THE COMMENCEMENT OF CRIMINAL TRIAL AGAINST INDIAN ACCUSED**

4.6.1 The trial of the Indian accused was separated and committed to the Court of Sessions since the charge against them was culpable homicide not amounting to murder. Since the absconding accused nos.1, 10 and 11 remained absent, the case against them remained in the Court of the CJM, Bhopal.

4.6.2 The Ninth Additional Sessions Judge, Bhopal, Shri W.A. Shah, on April 8, 1993 made a detailed order framing charges against the Indian accused. He dismissed the application of the accused for discharge and concluded that “it is a fit case for framing of charge:

- (a) against accused nos.5 to 9, u/ss.304 (II) 326,<sup>126</sup> 324<sup>127</sup> and 429<sup>128</sup> IPC; and
- (b) against accused nos.2, 3, 4 and 12 u/ss.304 (II) 326, 324 and 429 r/w s.35 of the IPC.”

4.6.3 The Indian accused thereafter filed revision petitions in the High Court at Jabalpur. The High Court by its order dated **August 1, 1995** dismissed the criminal revision petitions. Thereafter, special leave petitions were filed by the Indian accused in the Supreme Court.

4.6.4 By a judgment dated **September 13, 1996**,<sup>129</sup> the Supreme Court held that “taking the entire material... on its face value... it could not be said that the said material even prima facie called for framing of a charge against the accused concerned under s.304 Part II IPC.”<sup>130</sup> The court concluded that there was no material to show that “any of the accused had a knowledge that by operating the plant on that fateful night whereat such dangerous and highly volatile substance like MIC was stored they had the knowledge that by this very act itself they were likely to cause death of any human being.”<sup>131</sup> The court also concluded that the materials did not support the framing of charge against the accused under any of the other sections i.e., s.324, 326 or 429 IPC. However, the court felt that “the voluminous evidence

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<sup>124</sup> *Union Carbide Corporation v. Union of India* (1996) 3 SCALE (SP) 64.

<sup>125</sup> After the release of this money, a small sum of Rs.37 crores is still lying in the said account which is under attachment. In September 2004, the BHT filed one more application in the Supreme Court seeking release of these monies as well. As of the date of this Report, no orders have yet been made on the said application.

<sup>126</sup> Voluntary causing grievous hurt by dangerous weapons or means punishable with a maximum of ten years or with fine or with both.

<sup>127</sup> Voluntary causing hurt by dangerous weapons or means punishable with a maximum of three years or with fine or with both.

<sup>128</sup> Mischief by killing or maiming cattle of the value of 50 rupees punishable with a maximum imprisonment five years or fine or with both.

<sup>129</sup> *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129.

<sup>130</sup> *Id.* at 157.

<sup>131</sup> *Ibid.*

led by the prosecution at least prima facie shows that the accused concern who operated the plant on that fateful night at Bhopal could be alleged to be at least guilty of rash and negligent act in the way this highly volatile substance MIC was handled by them and which ultimately escaped in vaporous form and extinguished the lives of thousands of human beings and animals apart from causing serious bodily injuries to thousands of others.”<sup>132</sup> In addition to s.304 A IPC, with or without the aid of s.35 IPC,<sup>133</sup> the court required the trial court to examine whether charges should be framed under s.336,<sup>134</sup> 337<sup>135</sup> and 338<sup>136</sup> IPC.

4.6.5 This order again came as a shock to the victim groups. In the first place, what was strange was that neither the order framing charge nor the judgment of the Supreme Court referred to several of the pre-disaster facts which showed that from 1981 onwards there had been accidents involving leakage of gas from the UCIL plant at Bhopal. No reference was made also to the legal notice issued in March 1983 by Shahnawaz Khan, the Bhopal lawyer to UCIL and the reply in April 1983 of UCIL assuring the safety of the plant. This was followed by the further representation of August 24, 1984 by the workers union and the written assurance given to them by UCIL on the same date that the plant was safe. Further, the articles of Raj Kumar Keswani, the Bhopal journalist published in the local press in 1982 were all available locally. The scientific team headed by Dr. Varadarajan which investigated the disaster soon after its occurrence pointed out several design defects and lack of safety systems. The report also pointed out that “neither the UCC nor the UCIL took any steps to apprise the local administration or the local public about the consequences of exposure of MIC... and the medical steps to be taken immediately.”<sup>137</sup> The prosecution had also relied upon the Operational Safety Survey Report dated July 28, 1982 prepared by a team of experts of UCC which showed that there were a number of deficiencies in the maintenance of the MIC unit.<sup>138</sup> All these documents would clearly show that not only UCIL but also UCC had full knowledge of the unsafe nature of the plant. Thus, there appeared to be no justification for the conclusions reached by the Supreme Court and the consequent dilution of the charges.

## 4.7 REVIEW PETITIONS BY THE VICTIMS IN THE SUPREME COURT

4.7.1 The victims groups approached the CBI and urged to file a review petition but the CBI appeared not willing to make any move in this regard. Ultimately, the Bhopal Gas Peedith Sangharsh Sahyog Samiti filed a review petition in the Supreme Court on **November 29, 1996**, placing on record all of the above documents and urging the court to recall its order. An application for permission to file the review petition was also filed.<sup>139</sup> The Supreme

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<sup>132</sup> *Id.* at 162-163.

<sup>133</sup> Act being done with criminal knowledge or intention by several persons.

<sup>134</sup> Act endangering life or personal safety of others punishable with three months imprisonment or maximum fine of Rs.250/- or with both.

<sup>135</sup> Causing hurt by act endangering life or personal safety of others, punishable with six months imprisonment or maximum fine of Rs.500/- or with both.

<sup>136</sup> Causing grievous hurt by act endangering life or personal safety of others punishable with two years imprisonment or maximum fine of Rs.1,000/- or with both.

<sup>137</sup> As quoted in the judgment in *Keshub Mahindra* case (*supra* note \_\_\_ at 148).

<sup>138</sup> The detailed findings of this Expert team of UCC have been set out extensively in the judgment in *Keshub Mahindra* at pages 152-154 SCC.

<sup>139</sup> CrI. M.P.Nos.713-716 of 1997 in Review Petition (CrI.) Nos.D20073/97 in CrI. Appeal Nos.1672-1675 of 1996.

Court dismissed this application at the preliminary hearing on **March 10, 1997** in a single line “Crl. Misc. petitions are dismissed.”<sup>140</sup>

#### **4.8 TRIAL BEFORE THE CJM, BHOPAL**

4.8.1 The three victim groups, Bhopal Gas Peedit Mahila Udyog Sangh (BGPMUS), the Bhopal Group for Information Action (BGIA) and the Bhopal Gas Peedit Sangarsh Sahyog Samiti (BGPSSS) filed an application under s.301(2) Cr.PC to assist the public prosecutor. This application was allowed by the Chief Judicial Magistrate by an order in early 1997. The trial has been a slow and arduous process. Over 150 witnesses for the prosecution have been examined in the past 7 years and the trial has obviously not proceeded on a day to day basis. The accused have never been present in court and their presence also had never been insisted upon by the trial Judge. The High Court had granted all the accused, except Mr. Shetty and Mr. Khureshi, exemption from appearing at the trial. It does not appear that the trial will be concluded in the immediate future with prosecution witness action not having been concluded as yet.

4.8.2 Following the conclusions of the prosecutions evidence, the accused are likely to be their evidence. At the present rate, the trial is not expected to conclude in the next two years. The 260 of the Cr.PC provides that where an offence is punishable with an imprisonment for a term not exceeding two years, it could be tried summarily. In the instant case, the principal offence with which the Indian accused now stand charged is s.304A IPC, cause and death by negligence, the maximum term of imprisonment is two years or with fine or with both. Despite trial having to be of a summary nature, it has dragged on for over 7 years and the end does not appear to be in sight. The failure of the criminal justice process to deal with the problem is writ large on these proceedings.

#### **4.9 EXTRADITION OF THE FOREIGN ACCUSED**

4.9.1 The three foreign accused, Warren Anderson (accused no.1), UCC (accused no.10) and UCC (E) (accused no.11) have remained absconding throughout the trial. After Warren Anderson was granted bail by the order dated **December 7, 1984** of the CJM, Bhopal, he never appeared before the court. With the judgment of the Supreme Court in the review petitions on **October 3, 1991**, the criminal proceedings against the accused, including the foreign accused revived.

4.9.2 By an order dated **February 1, 1992**, the CJM, Bhopal noted that the proclamation about accused no.1, issued under s.82 Cr.PC had been published in the Washington Post, USA on **January 1, 1992** and that despite this proclamation, accused no.1 remained absent. The CJM, Bhopal therefore ordered “that the moveable and immoveable properties of accused no.1 Warren Anderson be attached and the detailed account of his property be presented at the next hearing.”<sup>141</sup> By the same order, the CJM declared accused nos.10 and 11 as absconders and directed that a proclamation to that effect be issued under s.82 Cr.PC. The next date of hearing was fixed for **March 27, 1992**.

4.9.3 At the next hearing on **March 27, 1992**, the prosecution (CBI) moved an application for attachment of the property of the absconding foreign accused but at the request of the

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<sup>140</sup> Order dated March 10, 1997 passed by the Supreme Court in Crl. M.P.Nos.713-716 of 1997 in Review Petition (Crl.) Nos.D20073/97 in Crl. Appeal Nos.1672-1675 of 1996.

<sup>141</sup> Order dated February 1, 1992, CJM, Bhopal in M.J.C. No.91/1992.

counsel for the Indian co-accused the case was adjourned to **April 30, 1992**. The request for issue of non-bailable arrest warrants against Warren Anderson for the purposes of extradition was to be considered on **May 22, 1992**.<sup>142</sup> In this interregnum, UCC managed to create the Bhopal Hospital Trust and endow its entire shareholding in UCIL to the BHT. This was clearly done with a view to defeat the impending orders of attachment. Therefore, another application is moved on **April 23, 1992** to forbid UCC or UCIL from selling the properties in India. A similar application was moved by the three victim groups.<sup>143</sup>

4.9.4 By an order dated **April 30, 1992**, the CJM concluded that it was evident that “the accused wants to evade prosecution by any means. Then there is no option but to attach its properties situated in India.”<sup>144</sup>

4.9.5 On **May 22 1992**, the CJM bifurcated the case against the Indian accused from the one against the foreign accused. The former was committed to trial by the Sessions Court while the latter remained in the Court of the CJM, Bhopal.

4.9.6 With no steps taken with regard to the extradition of Warren Anderson as directed by the CJM, Bhopal, the victim groups on July 4, 1994 filed two applications. One was an application requesting direction to the Government of India “to submit a statement before this Hon’ble Court on progress made, including the reasons for the inordinate delay, in the extradition of Warren Anderson and other accused officials of Union Carbide Corporation from the United States of America.”<sup>145</sup> The other application was for a direction to the CBI to inspect to the UCC’s pesticide plant at Institute, West Virginia and to restrain UCC from alienating its properties before the final decision in the criminal case. By a reply dated **August 26, 1994**, the UCIL opposed the latter application as being “totally misconceived.”<sup>146</sup>

4.9.7 By an order dated **October 7, 1994**, the CJM, Bhopal recognized the locus standi of the victim groups to move the application and intervene in the proceedings but rejected the prayer for inspection on the ground that the matter was pending in the court of the Sessions Judge, Bhopal. As regards the prayer for extradition of Warren Anderson, the Court recorded the undertaking given by CBI that the facts relating to the steps taken by the Government of India in that regard would be placed before the Court of the CJM, Bhopal within a month.

4.9.8 The CBI failed to comply with its undertaking to the Court of the CJM, Bhopal. Accordingly, on **February 20, 1995** the victim groups, BGPSSS and BGIA filed a further application in the Court of CJM, Bhopal seeking contempt proceedings to be issued against the Government of India. The victim groups also placed information pertaining to accused nos.10 and 11, UCC and UCC (E) and sought the extradition of the officials of these two corporations.<sup>147</sup> By a further I.A.No.5 filed on **March 31, 1995**, the two groups furnished further information pertaining to UCC (E) which showed that the said company was still functioning from Hong Kong.

4.9.9 By an order dated **May 5, 1995**, the CJM, Bhopal directed to CBI to investigate the factual information furnished by the victim groups. By order dated **June 9, 1995** the CJM, Bhopal asked the CBI to place on record information pertaining to the extradition of the

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<sup>142</sup> Order dated March 27, 1992 passed by the CJM, Bhopal in M.J.C. No.91 of 1992.

<sup>143</sup> Publication dated April 29, 1992 by the three victim groups in R.T. No.2782 of 1987 in the Court of the CJM, Bhopal.

<sup>144</sup> Order dated April 30, 1992 passed by the CJM, Bhopal in M.J.C. No.91 of 1992.

<sup>145</sup> Application dated July 4, 1994 filed by the BGPSSS and BGIA in the Court of the CJM, Bhopal.

<sup>146</sup> Reply of UCIL dated August 26, 1994 in the Court of the CJM, Bhopal.

<sup>147</sup> I.A.No.4 dated February 20, 1995 filed by BGPSSS and BGIA in the Court of CJM, Bhopal in M.J.C.No.91/1992.

foreign accused. At the next hearing on **August 4, 1995**, the CJM was informed that “the extradition proceedings against Warren Anderson are in the final stages.”<sup>148</sup>

4.9.10 On **July 10, 1996**, the victim groups BGPSSS and BGIA filed yet another application in the Court of the CJM, Bhopal stating that CBI was not taking any steps for extraditing arrest or extradition of accused nos.1, 10 and 11 and sought further directions in this regard. By an order dated **August 14, 1996** the CJM, Bhopal directed the CBI to furnish the current status of the steps taken to extradite Warren Anderson.<sup>149</sup> The CBI filed its reply on **October 8, 1996** asking for extradition of the foreign accused and asking that the application of the victim group be dismissed. On **November 19, 1996** the CBI furnished details regarding the steps taken by it for extradition of the foreign accused. This showed that between **April 11, 1992** and the first week of **September 1993** the “documents were prepared to be sent to the Ministry to initiate extradition proceedings.”<sup>150</sup> Between **September 8, 1993** to **December 22, 1994**, several reminders were sent by the CBI to the Ministry of External Affairs to expedite the proceedings. On **January 4, 1995** the Secretary, MEA requested the CBI “to convene a meeting of the Committee of Secretaries soon to discuss the extradition matter.”<sup>151</sup> Thereafter, till **August 21, 1996**, further reminders were sent by the CBI to the MEA. On **September 2, 1996** at the meeting of the Secretaries and the CBI “it was decided the MEA would send a matter to advocate general for opinion.”<sup>152</sup> Thereafter again nothing happened till the judgment of the Supreme Court in the *Keshub Mahindra* case on **September 13, 1996** thereafter it is decided to examine the matter again.

4.9.11 On **December 20, 1996** the victim groups placed their written submissions on record in the proceedings before the CJM, Bhopal pointing out that the CBI had willfully disobeyed its order for extradition of the foreign accused against whom the charges under s.304 part II still remained since their case had been separated from the case of the Indian accused. They also placed on record a new item dated August 21 1995 published in the Business Times which quoted a US Ambassador Frank G Wisner as stating that “The US had an outstanding extradition treaty with India, but as yet, India had not sought the extradition of Mr. Anderson.”<sup>153</sup> The matter was heard on **May 13, 1997**, **June 26, 1997**, and **July 26, 1997**. At each hearing the CBI avoided giving any concrete information regarding the steps taken by it for extradition note before the foreign accused. Further written submissions were filed by the victim groups on **January 20, 1998** before the CJM, Bhopal explaining why the case against the foreign accused for their extradition remained unaffected by the judgment of the Supreme Court in relation to the Indian accused.

4.9.12 On **July 31, 1998** the then Attorney General for India, Soli J. Sorabjee gave a written opinion to the Legal and Treaties Division, Ministry of External Affairs on “whether a request by the Government of India to the Government of the United States of America for the extradition of Mr. Warren Anderson, would be consistent with the requirement of the Extradition Treaty between India and the United States”.<sup>154</sup> Sorabjee advised, wrongly, that the reasoning of the Supreme Court in the *Keshub Mahindra* case<sup>155</sup> “would apply to Mr.

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<sup>148</sup> Order dated August 4, 1995 passed by the CJM, Bhopal in M.J.C. No.91 of 1992.

<sup>149</sup> Order dated August 14, 1996 passed by the CJM, Bhopal in M.J.C. No.91 of 1992.

<sup>150</sup> CBI document titled ‘Steps taken in the matter of extradition of Mr. Warren Anderson in RC.3/84-ACU(I) (Bhopal Gas Leak case)’ submitted to the CJM, Bhopal.

<sup>151</sup> *Id.* at page 2.

<sup>152</sup> *Id.* at page 3.

<sup>153</sup> Annexure-C to written submissions dated December 20, 1996 filed by BGPSSS and BGIA in Court of the CJM, Bhopal.

<sup>154</sup> Opinion dated July 31, 1998 of Soli J. Sorabjee, Attorney General for India.

<sup>155</sup> (1996) 6 SCC 129.

Anderson also. In these circumstances, it is clear that any extradition request for Mr. Anderson will have to be limited to s.304A of the IPC.”<sup>156</sup> Further, in his view “prima facie, the offence of causing death by rash or negligent act is covered by the offence of manslaughter referred to in Article 3 of the Extradition Treaty.”<sup>157</sup> As regards the real question whether “there is sufficient evidence to show that Mr. Anderson actually committed an offence under s.304A”, Mr. Sorabjee stated “prima facie, in my view, the evidence so far collected does not appear to be sufficient at this time.”<sup>158</sup> However, on the fulfillment of the actual ingredients of s.304A vis-à-vis the foreign accused Mr. Sorabjee opined that “the advice of a competent US attorney should be obtained.”<sup>159</sup>

4.9.13 The Government of India then sought opinion from a US solicitors firm, M/s Verner, Lipfert, Bernhard, McPherson and Hand, Chartered. After a delay of three years, the US firm took the view that there were missing evidentiary links regarding the knowledge of Mr. Anderson about the cause of the gas leak and without these links the Indian Government would not be able to convince a US Court about its case for extradition. Mr. Sorabjee in his subsequent written opinion of **August 6, 2001** accepted this opinion and said “I am not sanguine that at the end of the day the requisite evidentiary material would be forthcoming.”<sup>160</sup> He also considered the reasons furnished by the US Attorneys about Mr. Anderson’s age of 81 years and the lapse of 17 years since the occurrence as “weighty and relevant considerations for the state of department for refusing our request for extradition.”<sup>161</sup> Thus, Sorabjee concluded his written opinion with his view that “proceedings in the USA for extradition of Mr. Warren Anderson are not likely to succeed and, therefore, the same may not be pursued.”<sup>162</sup>

4.9.14 Meanwhile, on **February 6, 2001** UCC became a wholly owned subsidiary of another multinational corporation, Dow Chemical Company (Dow). This was based on a merger plan approved on **December 1, 1999** by UCC’s shareholders. The US Federal Trade Commission had also approved the merger on **February 5, 2001**. This information was furnished by the lawyer for the victim groups in the US, Shri H. Rajan Sharma to the CBI. He further informed the CBI that both UCC and Dow had falsely represented to the Securities and Exchange Commission, USA that no criminal charges or investigation were pending against the UCC or its affiliates and subsidiaries anywhere in the world. Further, Dow had publicly claimed that it had nothing to do with UCC’s criminal liabilities and would not assume any such liability. On the basis of this information, and documents furnished to it by the lawyer for the victims, the CBI on **July 13, 2001** moved an application in the Court of the CJM, Bhopal seeking orders for “verification of merger of UCC with Dow Chemical Company.”<sup>163</sup> The victim groups also filed, on **September 7, 2001** a separate application bringing the above facts on record and seeking summons to be issued to Dow as well as its directors to face criminal charges. Further, directions were sought to the CBI to submit the steps taken by it for extraditing the foreign accused.”<sup>164</sup> By an order dated **September 7, 2001** the CJM, Bhopal directed the CBI to furnish the detailed steps taken by it for extraditing Warren Anderson. On **April 9, 2002**, the CBI inter alia referred to the opinion dated July 31, 1998 of

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<sup>156</sup> *Supra* note 53, p.1.

<sup>157</sup> *Id.* at p.2.

<sup>158</sup> *Id.* at p.3.

<sup>159</sup> *Ibid.*

<sup>160</sup> Opinion dated August 6, 2001 of Soli J. Sorabjee, Attorney General for India.

<sup>161</sup> *Id.* p.2.

<sup>162</sup> *Ibid.*

<sup>163</sup> Application dated July 13, 2001 of the CBI in the Court of the CJM, Bhopal in M.J.C.No.91/92.

<sup>164</sup> Application dated September 7, 2001 filed by the CBI in the Court of the CJM, Bhopal in M.J.C.No.91/92.



Soli J. Sorabjee but not to be subsequent opinion dated August 6, 2001. According to CBI, “the last reference in this matter was received from MEA on March 15, 2001 requiring CBI to clarify some points raised by American Attorney relating to evidence against Mr. Warren Anderson and a clarifications were furnished by CBI to MEA on April 4, 2001.”<sup>165</sup>

4.9.15 On **May 24, 2002**, CBI filed an application in the Court of the CJM, Bhopal stating that in light of the judgment of the Supreme Court in *Keshub Mahindra*, “the earlier non-bailable warrant issued under s.304(2), 324, 326, 429 read with s.35 IPC was not relevant” and that fresh non-bailable warrant was required to be issued against Mr. Warren Anderson under s.304A, 336, 337 and 338 IPC.<sup>166</sup> The victim groups in July 2002 objected to this prayer pointing out that the application of the CBI was based on a total misunderstanding of the judgment of the Supreme Court in *Keshub Mahindra*.<sup>167</sup>

4.9.16 By a detailed order dated **August 28, 2002** the CJM, Bhopal rejected the prayer made by CBI and directed it to take steps to extradite accused no.1 and appraise the court by the next date of the steps taken by it.<sup>168</sup>

4.9.17 Thereafter, it took a whole year for the CBI to move the US Government to have Warren Anderson extradited. However, it now appears that the US Government has turned down the extradition request on two grounds: i) incomplete documentation; and ii) the fact that charges are yet to be framed against Warren Anderson. It will now be up to the Government of India to show that the documentation is complete and that the question of framing charges against Warren Anderson would arise only if he appeared before the Court of the CJM, Bhopal. However, as on date, it is not clear whether the Government of India is pursuing the matter further with the US Government. The CJM can, given the limited powers under the Cr.P.C, only reiterate the directions for extradition of the absconding accused. The remedy for willful disobedience for such direction is under the Contempt of Courts Act, 1971 which is cumbersome and ineffectual

#### **4.10 QUESTIONS THAT ARISE**

4.10.1 The long history of the steps for extradition reveals the difficulty in bringing a multinational corporation or its executives to India to answer criminal charges. It also reveals the complicity at every stage of the Government of India in delaying the request for extradition and in arguing against itself.

4.10.2 Among the questions that will remain unanswered are:

- (i) Why was Warren Anderson escorted out of Bhopal on the special plane of the Chief Minister on being granted bail on December 7, 1984?
- (ii) Why did the CBI and the Government of India take no steps whatsoever till 2003 to comply with the judicial order dated March 27, 1992 of the CJM, Bhopal to extradite Warren Anderson?

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<sup>165</sup> Reply dated April 9, 2002 by the CBI to the application of the victim groups in the Court of the CJM, Bhopal in M.J.C.No.91/92.

<sup>166</sup> Application dated May 24, 2002 filed by CBI in the Court of the CJM, Bhopal in M.J.C.No.91/92.

<sup>167</sup> Reply dated July 2002 filed by BGPSSS, BGIA and BGPMUS in the Court of the CJM, Bhopal in M.J.C.No.91/92. These groups also filed a rejoinder to the reply dated April 9, 2002 filed by the CBI to their application dated September 7, 2001.

<sup>168</sup> Order dated August 28, 2002 of the CJM, Bhopal in M.J.C.No.91/92.

- (iii) How could the Supreme Court have quashed criminal non-compoundable charges against the accused in civil proceedings when such an order was clearly without jurisdiction?
- (iv) How could the Supreme Court have modified the order of the CJM, Bhopal attaching the shares of the proclaimed absconder UCC in UCIL, at the instance of the Bhopal Hospital Trust an entity created by the very same proclaimed absconder UCC?
- (v) Was not the order of the Supreme Court in its civil appellate jurisdiction, modifying the order of the CJM, Bhopal and permitting sale of the attached shares of UCC in UCIL wholly without jurisdiction?
- (vi) Why did the CBI not include the evidence regarding the pre-disaster facts as part of its chargesheet which would have clearly demonstrated that both UCC and UCIL had full knowledge about the dangers posed by the plant at Bhopal?
- (vii) Why did CBI not file a review petition against the judgment of the Supreme Court diluting the charges against the Indian accused from s.304 part II IPC to s.304A IPC?
- (viii) Why did the Attorney General for India give a wrong opinion that the charge against Warren Anderson would also have to be modified to one under s.304A IPC in view of the judgment in the *Keshub Mahindra* case when it was clear that the case against Warren Anderson had been separated out from those of the Indian accused to whom alone that judgment applied?
- (ix) Why was it necessary to get the opinion of an American firm of Solicitors on whether the evidence gathered by the CBI was sufficient to bring home the charge against Warren Anderson?
- (x) What is the answerability of the system that is not able to bring about the conclusion of the criminal trial even 20 years after the disaster?

4.10.3 To revert to the main concern, it is clear that enforcing the criminal liability of any corporation, in particular a multinational corporation, in Indian courts remains elusive. Neither the substantive criminal law nor the procedural law (the IPC and the Cr.PC respectively) seem to be adequate to deal with the situation of manifest corporate criminality. More disturbing is the reluctance by the executive government to even make a request to the US Government for extradition of the accused who are either citizens or companies incorporated in that country. Unless we find answers to these questions, any attempts at pursuing criminal cases against multinational corporate accused are bound to end in disappointment and frustration.

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## CHAPTER 5: MEDICAL AND HEALTH ISSUES

### **5.1 BACKGROUND FACTS**

5.1.1 This section deals with the major litigation concerning medical issues. This will have to be read along with the separate report on medical issues. This section begins with a brief narration of background facts relevant to this section which includes a brief reference to the

Scheme requirements, the response of the State and role of the ICMR. These facts have to be appreciated alongside the other background facts narrated in the earlier section concerning compensation.

5.1.2 Thereafter the discussion turns to the litigation in the court. Although not much is known about the fate of the early PILs, one by Nishit Vohra in 1985 and the other by the BGPMUS in 1988, the one by the three victim groups filed in 1998 has seen some positive developments in terms of the appointing a monitoring committee and an advisory body to oversee the aspects of medical relief, rehabilitation and research. A separate part is devoted to the manner of the setting up and the functioning of the expert medical facility in the form of the hospital set up by the Bhopal Hospital Trust and now run by the Bhopal Hospital Memorial Research Trust. The section ends with highlighting some of the outstanding issues.

5.1.3 The background facts concerning the gas leak disaster which took place on the intervening night of December 2/3 1984 have been narrated in some detail in the section relating to compensation. The fact remains that on the day of the disaster itself several thousands died and many more injured. In the plaint filed by the Union of India in the Court of the Southern District, New York in 1985 it was stated that “As a direct and proximate result of the conduct of defendant Union Carbide numerous thousands of persons in Bhopal, the adjacent countryside and its environs suffered agonizing, lingering and excruciating deaths, serious and permanent injuries, including but not limited to acute respiratory distress syndrome, ocular and gastrointestinal injuries, and pain, suffering and emotional distress of immense proportion. The survivors, who experienced an unimaginable and unforgettable catastrophe, witnessing the virtual destruction of that entire world, have suffered and will continue to suffer severe emotional distress. Further injuries to such persons, and to generations yet unborn, are reasonably certain to occur.”<sup>169</sup> It was further stated that “As a direct and proximate result of the conduct of Defendant Union Carbide, numerous thousands of persons have been and will be required to undergo extensive medical examinations, rehabilitative care and treatment.”<sup>170</sup>

5.1.4 In its order made on May 4, 1989<sup>171</sup> admitting the review petitions challenging the settlement, that the Supreme Court acknowledged that the immediate deaths were to the tune of 2660 and that tens of thousands were physically impaired or affected in various degrees. It further said: “What added grim poignance to the tragedy was that the industrial enterprise was using Methyl Isocyanate, a lethal toxic poison, whose potentiality for destruction of life and biotic communities was, apparently, matched only by the lack of a pre-package of relief procedures for management of any accident based on adequate scientific knowledge as to the ameliorative medical procedures for immediate neutralization of its effects.”<sup>172</sup>

5.1.5 Further, the court on October 3, 1991 in its judgment in review petitions,<sup>173</sup> acknowledged that “The effect of the exposure of the victims to Methyl Isocyanate (MIC) which was stored in considerably large quantities in tanks in the chemical plant of the UCIL which escaped on the night of December 2, 1984 both in terms of acute and chronic episodes has been much discussed. There has been growing body of medical literature evaluating the

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<sup>169</sup> See para 44 of the Union of India’s complaint dated April 8, 1985 reproduced in Upendra Baxi and Thomas Paul, **Mass Disasters and Multinational Liability: The Bhopal Case**, N.M. Tripathi (1986) 8.

<sup>170</sup> *Id.* at para 45.

<sup>171</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.

<sup>172</sup> *Id.* at 40.

<sup>173</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

magnitude and intensity of the health hazards which the exposed population of Bhopal suffered as immediate effects and to which it was potentially put at risk.”<sup>174</sup>

5.1.6 By this time the court had the figures of “results of medical evaluation and categorization of the affected persons on the basis of the data entered in their medical folders as on October 31, 1990, which showed that the number of persons suffering temporary injuries was 1,73,282; permanent injuries 18,922; temporary disablement caused by temporary injury 7,172; temporary disablement caused by permanent injury 1,313 and permanent partial disablement 2,680.”<sup>175</sup>

5.1.7 The exact numbers may have been unclear but the nature of injuries suffered by the victims of the gas leak disaster was categorized under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (hereinafter Scheme). Paragraph 5 (2) of the Scheme required the claims for compensation received for registration to be placed, inter alia, under the following categories:

- (a) Death;
- (b) Total disablement resulting in permanent disability to earn livelihood;
- (c) Permanent partial disablement affecting the overall capacity to earn his livelihood;
- (d) Temporary partial disablement resulting in reduced capacity to earn livelihood;
- d(a) Injury of utmost severity
- d(b) Minor injury

5.1.8 Under paragraph 4 of the Scheme form no.1 is prescribed for a claim by an injured person. The types of injuries identified in para 7 of the form were as follows:

- “(A) Eye
- (B) Respiratory (Chest)
- (C) Mental Illness
- (D) GIT (Gastro Intestinal)
- (E) Gynaecological
- (F) Other than above”

5.1.9 Para 14 of the form required particulars regarding the condition of children born soon after the disaster and read as under:

“If pregnant at the time of Gas leakage: (Delivered child)

- (A) Normal Child..... Yes/ No
- (B) Abnormal Child..... Yes/ No
- (C) Died..... Yes/ No
- (D) Still-birth.....Yes/ No
- (E) Aborted..... Yes/ No”

The claimant was also in para 20 of the form required to give the “Code No. of ICMR.”

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<sup>174</sup> *Id.* at 612, para 29.

<sup>175</sup> *Id.* at 652-653.

## 5.2 THE RESPONSE OF THE STATE

5.2.1 There were two action plans proposed by the State of Madhya Pradesh. It is claimed that the in first action plan for the period 1990-97, a sum of Rs.96.02 crores was spent “largely on construction, equipping, staffing, and providing medicines for the gas victims through six hospitals and 24 dispensaries.”<sup>176</sup> It was claimed that between 1985 and 1997 the average outpatient attendance in the hospitals was 4,100 patients per day and the indoor patients in the bedded hospitals was 11,000 patients per year. The state government further claimed that the plan outlay for the First Action Plan ending March 31, 1997 was to the tune of Rs.188 crores and that the time period had been extended to September 30, 1998 with additional plan outlay of Rs.69.5 crores to be shared by the State Government and the Union of India in the ratio of 25%: 75%.<sup>177</sup> However according to the Union of India, the State Government had lagged behind in implementing the First Action Plan which resulted in enhancing the budget and the time schedules. In particular, it was noted that “although all the approved and sanctioned funds have been utilized, the physical targets have not been achieved.”<sup>178</sup>

## 5.3 RESEARCH BY ICMR

5.3.1 The Indian Council for Medical Research undertook research on the gas victims for a period of 10 years between 1985 and 1994, when it abruptly concluded its research. Its last published annual report was in 1992. The death rate in 1986 was 14.1 per thousand in the severely exposed areas as compared to 6.07 in the control area. The figures were 8.55 and 7.46 respectively in 1991. The total morbidity in 1987 and 1991 in the exposed localities was 15.26 and 31.86 respectively compared to the percentages of 4.24 and 25.44 in the control area. 42.3% of the exposed population developed, till November 1990, gas related symptoms. Even seven years after the disaster, the common problems which were found in the exposed population was COPD (Chronic Obstructive Pulmonary Disease), reactive airway dysfunction syndrome constituting mainly of bronchial asthma like feature, chronic bronchitis, restrictive lung disease, emphysema, bronchiectasis and pulmonary tuberculosis. The report noted that: “In some in-depth and detailed study of respiratory system, investigators are coming across many subjects, who, though, do not fit into any clear cut entity at present, but complain of exertional dyspnoea, chest pain, muscular fatigability and other symptoms.”<sup>179</sup> The 1992 Report further pointed out that “Even at the end of seven years of study, a large number of cases continue to be symptomatic and there is evidence of sustained and increasing trend of morbidities in the cohort population. Rates for still births, perinatal, neo-natal and infant mortalities were found to be higher in the affected, particularly be severely affected areas in comparison with the control area.”<sup>180</sup>

5.3.2 Another factor relevant in this context is that there was absolutely no medical protocol developed for treating the injured victims. This was because, as was acknowledged by the Supreme Court, “the processes in the Bhopal gas plant were so much shrouded in secrecy that

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<sup>176</sup> Bhopal Gas Tragedy Relief and Rehabilitation Department, Government of Madhya Pradesh, **Bhopal Gas Tragedy Relief and Rehabilitation, First Action Plan (1996-97): Physical Achievements**, 1.

<sup>177</sup> Affidavit dated March 28, 1998 of Dr. M.K. Joshi, Chief Medical and Health Officer in W.P. (C) No.50 of 1998 in the Supreme Court of India, pages 5-6.

<sup>178</sup> Affidavit dated March 26, 1998 of B. Balagopal, Deputy Secretary, Government of India in W.P. (C) No.50 of 1998 in the Supreme Court of India, para 6.

<sup>179</sup> As extracted in Arun K. Pandey, **Bhopal Gas Tragedy**, Rajdhani Law Publishers (1994) 93-94.

<sup>180</sup> *Id.* at 94.

neither the composition of the deadly gas that escaped nor the proper antidote therefor were known to anyone in this country with the result that the steps taken to combat its effects were ineffective.”<sup>181</sup>

## 5.4 LITIGATION ON MEDICAL ISSUES

### *The Nishit Vohra petition*

5.4.1 A writ petition under Article 32 of the Constitution, W.P. (C) No.11708 of 1985 was filed in the Supreme Court by Dr. Nishit Vohra and certain other doctors seeking medical relief and rehabilitation for the victims of the Bhopal gas tragedy. In the said case, by an order dated November 4, 1985, the Supreme Court constituting the seven member committee to examine and submit a report on the appropriate medical treatment be afforded to the Bhopal gas victims. A matter of serious concern raised in that petition was that in the absence of any treatment protocol, all kinds of arbitrary remedies were being suggested and also a number of non-qualified and unqualified persons had set up shop in Bhopal in the garb of offering medical relief. The report of the Committee appointed by the Supreme Court is not unanimous. The two dissenting members of the said Committee recommended the Constitution of a National Medical and Rehabilitation Commission for Bhopal Gas Victims, to be constituted by the Supreme Court of India and to be made accountable to the court itself. It recommended that the Government of India should provide the resources to the Commission which would be comprised of persons of known expertise, commitment and scientific contribution. The Commission would be required to address the need for a community based approach to medical relief, toxicological perspective towards medical research, maintenance of proper medical records and dissemination of medical information and the conduct of epidemiological studies for the purposes of prescribing appropriate treatment. However, the fate of the *Nishit Vohra* case in the Supreme Court remains unknown since nothing was heard of that case thereafter.

### *Petition by victim groups*

5.4.2 One of the earlier petitions in the Supreme Court was W.P.(C) No.843 of 1988 filed by the Bhopal Gas Peedith Mahila Udyog Sangathan raising the issue of the arbitrary categorization of the victims of the gas tragedy in terms of the Claims Act. It appears that the Supreme Court by order dated April 28, 1989 gave a direction to the Director of Claims, Bhopal to file an affidavit indicating the basis for the characterization of the victims. Pursuant to this direction, a fairly detailed affidavit appears to have been filed in 1989 itself by the Directorate of Claims stating, inter alia, that three notices had been issued offering free medical check up in 18 different centres in Bhopal. Of the 6 lakh claimants, 3,41,000 responded and got their medical folders prepared. However, nearly 2.5 lakhs claimants had not availed of the facility. Since then 16 of the 18 centres had been closed down. The affidavit justified the existing categorization since the entire exercise had to be “conceived, conceptualized and concretized locally”.<sup>182</sup> However, there is no information available as to the fate of this petition thereafter.

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<sup>181</sup> The concurring judgment of Ranganathan J, in *Charan Lal Sahu v. Union of India* (1990) 1 SCC 613 at 730. The learned Judge was of the view that “the government should therefore insist, when granting licence to a transnational company to establish its industry here, on a right to be informed of the nature of the processes involved so as to be able to take prompt action in the event of an accident.”

<sup>182</sup> Affidavit dated February Nil, 1989 of R.Y. Durve, Additional Director, Directorate of Claims, Bhopal in W.P.(C) No.843 of 1988 in the Supreme Court.

5.4.3 Three of the victim groups, viz., Bhopal Gas Peedith Mahila Udyog Sangathan, the Bhopal Group for Information and Action and the Bhopal Gas Peedith Sangharsh Sahyog Samiti jointly filed Writ Petition (Civil) No.50 of 1998 in the Supreme Court of India on January 14, 1998. The petition pointed out that the gas leak had till then resulted in the deaths of over 10,000 people and in multi-systemic injuries to over 5 lakhs. Further, on an average 10 to 15 persons were dying per month as a result of exposure to MIC gas. The Madhya Pradesh government, through its Centre for Rehabilitation Studies, Bhopal had continued the work of monitoring the health status of the victims from where it was left off by the ICMR. The Report of the gas relief department dated December 3, 1997 indicated that 22.8% of the affected population suffered from general ailments, 62.46% from throat disorders, 3.32% from eye disorders, 5% from potential disorders and 4.61% from mental disorders. A study conducted in 1990 of 522 patients at two government hospitals meant for the gas victims revealed that over 35% patients had been prescribed irrational, banned or unnecessary medicines; 72% had been given medicines which had no effect at all. A study undertaken by the International Medical Commission on Bhopal (IMCB) confirmed that the victims received at best only temporary symptomatic relief. Further, “the inadequacies of the government’s health care system has led to a flourishing business situation for private medical practitioners. In the severely affected areas nearly 70% of the private doctors are not even professionally qualified, yet they form the mainstay of medical care in Bhopal.”<sup>183</sup> The petition also pointed out the findings of the Comptroller and Auditor General that there were numerous financial irregularities in the utilization of the grants already made. Another serious issue pointed out was that “70% of the equipment in the hospitals and clinics under the department of gas relief are dysfunctional”<sup>184</sup> and that there was a severe shortage of medicines and availability of medical facilities in Bhopal.<sup>185</sup> Accordingly, the petition inter alia sought the following reliefs:

- (i) Declaration that every victim of the Bhopal Gas Disaster was entitled to enforce the right to health guaranteed under Article 21 of the Constitution and to receive “free and appropriate medical assistance from the respondent Union of India and the State of Madhya Pradesh.”<sup>186</sup>
- (ii) A mandamus to the State Government to ensure that proper medical relief including supply of free medicines at the government hospitals and equipments and staff are available on a continuing basis;
- (iii) Direction to the State Government to formulate a plan for medical rehabilitation;
- (iv) A direction to ICMR to resume research studies until make public the report published from time to time;
- (v) The State Government to be directed to furnish a health card to each of the victims of the Bhopal Gas Tragedy; and
- (vi) Constitution of a National Medical Commission at Bhopal “to assess the current medical needs of the Bhopal Gas Victims and to suggest proper remedies for alleviating misery of the Bhopal Gas Victims.”<sup>187</sup>

Notice was issued in the petition on February 6, 1998.

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<sup>183</sup> W.P.(C) No.50 of 1998 in the Supreme Court of India, para 12.

<sup>184</sup> *Id.* at para 16.

<sup>185</sup> *Id.* at paras 24.1 and 2.

<sup>186</sup> W.P.(C) No.50 of 1998 in the Supreme Court of India, prayer (i).

<sup>187</sup> *Id.* prayer (vii).

### *Reply of the respondents*

5.4.4 In its reply affidavit dated March 26, 1998, the Union of India pointed to the failure of the state government to meet the targets set by the First Action Plan. Reference was made by the Union of India, the proposed construction of a specialty hospital by the Bhopal Hospital Trust, set up by the Union Carbide Corporation, the funds for which were released from the sale of shares attached in the criminal proceedings in which UCC had been declared a proclaimed absconder by the Chief Judicial Magistrate, Bhopal.<sup>188</sup> The Indian Council for Medical Research filed a very brief affidavit of three pages stating that the review committee of the ICMR had at a meeting on January 17, 1992 reviewed the progress of all the Bhopal related projects and had recommended that they had “achieved the objectives for which they were set up and hence they can now be concluded.”<sup>189</sup> Thus, it was averred that ICMR “have done their part with respect to the research to be conducted on Bhopal gas tragedy.”<sup>190</sup>

5.4.5 In their turn the State of Madhya Pradesh, by affidavit dated March 28, 1998 sought more funds towards implementation of a Second Action Plan. It was denied that there was shortage of equipment and medicines in the government hospitals. As regards the Indira Gandhi Hospital for Women and Children, it was ready to be commissioned and “the staff is being arranged/ requisitioned and shall be started very soon.”<sup>191</sup> The other project, the 540 bedded Kamala Nehru Hospital, was “likely to be completed in 6 months time after the funds are released by the Government, which is in process.”<sup>192</sup>

5.4.6 However, the Supreme Court was not impressed and in its order dated April 13, 1998, stated that “we are not satisfied with the correctness of the affidavit filed by Dr. Joshi as it is belied by other documents.”<sup>193</sup> A further opportunity was granted to state the correct position. The court required the State Government to appoint an officer in the rank of a Secretary to oversee the work of medical rehabilitation. On April 18, 1998, an additional affidavit was filed by the Government of Madhya Pradesh admitting there was a shortfall of medicines and that in the Jawaharlal Nehru Hospital if the stocks became nil local purchase of medicines was made. It was further admitted that out of the 163 major equipments in the hospitals, 31 were non-functional “due to various reasons. The State Government candidly accepts the delay in repair and undertakes to get them prepared at the earliest.”<sup>194</sup> It was further pointed out that the approval of the Second Action Plan with the plan outlay of Rs.319.76 crores was necessary in order to provide “best possible medical infrastructure for the Bhopal gas victims.”<sup>195</sup>

5.4.7 At the hearing on November 3, 1998, the court again conducted an elaborate hearing of the case and expressed its unhappiness about the situation in Bhopal in relation to medical relief and rehabilitation. It again required the State of Madhya Pradesh to file within two weeks a proper affidavit on three aspects viz., the availability of drugs, getting the hospitals operationalised and the continuance of research studies.

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<sup>188</sup> This aspect of the case is separately dealt with later in this Chapter.

<sup>189</sup> Affidavit dated March 17, 1998 of M.V. Pillai Assistant Director General, ICMR in W.P. (C) No.50 of 1998, para 7.

<sup>190</sup> *Id.* para 9.

<sup>191</sup> Affidavit dated March 28, 1998 of Dr. M.K. Joshi in W.P. (C) No.50 of 1998, para 15.

<sup>192</sup> *Ibid.*

<sup>193</sup> Order dated April 13, 1998 of the Supreme Court in W.P.(C) No.50 of 1998.

<sup>194</sup> Affidavit dated April 18, 1998 of Dr. M.K. Joshi, Chief Medical Officer in W.P. (C) No.50 of 1998, para 10.

<sup>195</sup> *Id.* para 11.



5.4.8 Thereafter the Government of Madhya Pradesh filed an additional affidavit on November 18, 1998 admitting to shortfall in supply of medicines; shortage of staff in the hospitals and in particular the pulmonary medicine centre and the absence of continued medical research. The inpatient facility at the Indira Gandhi Hospital, it was now promised, “shall be in operation latest by March 1999.”<sup>196</sup> The Kamala Nehru Hospital was also scheduled to be completed by March 1999.

5.4.9 At the hearing of the case on December 1, 1998, the Supreme Court expressed its unhappiness at the attitude of the state government and observed that there might be no other option but to appoint an independent medical commission for Bhopal.

5.4.10 The petitioners on January 7, 1999 filed a rejoinder affidavit reiterating a demand for the appointment of an independent medical commission. Petitioners placed on record a detailed note setting out the terms of reference of such commission, the manner of its functioning, its composition and conduct. It was suggested that the commission should report directly to the Supreme Court of India.<sup>197</sup> The petitioners placed on record sample affidavits of five individual victims recounting the difficulties experienced by them in receiving treatment in the government run hospitals and clinics in Bhopal. Further, the results of the research conducted by the Centre for Rehabilitation Studies, annexed to the affidavit of the State Government revealed a sudden increase in causes of the death due to lung disease in the affected areas from 17.5% in 1996 to 44.91% in 1997.

5.4.11 In response to this, an additional affidavit was filed on January 22, 1999 by the Government of Madhya Pradesh. It was conceded that “there is an admitted delay in commissioning of the new hospital which the State Government very much regrets.”<sup>198</sup> Further, it was pointed out that “there will be considerable financial difficulty in the next financial year onwards if the Union of India decides not to renew the Action Plan and stops the 75% funding as per the Action Plan.”<sup>199</sup> The Government of Madhya Pradesh informed the court that “out of the total plan outlay of Rs.258 crores, Rs.198.44 crores was already spent. The main balance was regarding purchase of equipment worth about Rs.40 crores.”<sup>200</sup> It was also admitted that “research so far done by State may not be really adequate. It certainly needs a better infrastructure like ICMR so that the doctors also get the feedback for future treatment.”<sup>201</sup>

5.4.12 Another affidavit is filed on February 23, 1999 informing the court that one Mr. D.S. Mathur, Principal Secretary had been appointed in the same capacity to the Bhopal Gas Tragedy Relief and Rehabilitation Department.

5.4.13 By an order dated March 31, 1999 the Supreme Court took note of the first status report filed by Mr. D.S. Mathur. The court asked the Government of India to explain why it had not yet released Rs.27 crores as part of its contribution to medical relief under the First Action Plan.

### *Status Reports and their Truth*

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<sup>196</sup> Affidavit dated November 18, 1998 of Dr. M.K. Joshi, Chief Medical Officer in W.P. (C) No.50 of 1998, para 8.

<sup>197</sup> Rejoinder affidavit dated January 7, 1999 of Abdul Jabbar Khan in W.P. (C) No.50 of 1998, Annexure-RA/1.

<sup>198</sup> Affidavit dated January 22, 1999 of Dr. M.K. Joshi in W.P.(C) No.50 of 1998, para 6.

<sup>199</sup> *Id.* para 4.

<sup>200</sup> *Id.* para 10.

<sup>201</sup> *Id.* para 15.

5.4.14 Thereafter, three status reports came to be filed by the State of Madhya Pradesh claiming progress to have been made in matter of medical relief and rehabilitation. Nevertheless, when the matter was heard on January 25, 2000 the petitioners pointed out to the court from these status reports themselves, that despite Rs.258 crores having been spent thus far on alleged medical relief to the Bhopal victims, the two hospitals, viz., the Indira Gandhi Mahila Evam Bal Chikitsalaya and the Kamala Nehru Hospital, were still incomplete and non functional to their optimal capacity. The State Government now informed the court that in order to make the Kamala Nehru Hospital operational a further sum of Rs.6.25 crores was required while in respect of the other hospital for Rs.4 crores was required. The court issued directions to the Chief Secretary, State of Madhya Pradesh “to place at the disposal of Mr. D.S. Mathur within six weeks from today a sum of Rs.11 crores so as to enable the completion of the work and to have these two hospitals fully operational as expeditiously as possible and certainly within a period of four months from today.”<sup>202</sup> It is made clear that “the amount so placed at the disposal of Mr. Mathur shall be used only for the purchase of the equipment and making the hospitals operational and functional and no part of this money shall be used for incurring any expenses in the payment of salaries.”<sup>203</sup> The court disapproved of the constant wrangling between the governments at the State and the Centre regarding finances and said “it is of no concern of this court to decide as to where from this money is to come from, how much is to be shared by the State Government or by the Government of India... as far as this court is concerned, health is a state subject and it is the primary duty of the State of Madhya Pradesh to provide adequate medical facilities to the gas victims. It is for this reason we are compelled to pass these orders and issue necessary directions.”<sup>204</sup>

5.4.15 In response to the 5<sup>th</sup> status Report filed in July 2000, the petitioners filed an affidavit on September 3, 2000 pointing out that the Kamala Nehru Hospital was yet to be made operational despite Rs.22 crores having been already spent on its construction. The 181 sanctioned posts in the hospital remained unfilled. Several super specialty departments like Paediatric surgery and Paediatric medicine were being planned and these were not really relevant for the treatment required by the gas victims. The practice of purchasing equipment through the Hospital Services Consultancy Corporation (HSCC) was also seen as providing a scope for large-scale corruption. Victims suffering from cancer had grown in number but free treatment was being restricted to those earning less than Rs.500/- per month and this resulted in a larger number of such cancer victims being denied medical relief.

5.4.16 In response to the 6<sup>th</sup> Report of the Principal Secretary submitted on January 23, 2001, the Counsel for the petitioners, in order to verify the facts visited the hospitals in Bhopal and found that the situation was far from satisfactory. Equipments were either in a state of repair or simply not being used because they were not relevant to the treatment being offered. There was an unreasonable condition that each of the victims should produce a copy of the final order on the claim petition before being eligible for receiving treatment in the hospitals. This condition was there even in the hospital of the Bhopal Hospital Trust. Numerous documents were required to be produced by the victims to prove the victims’ status and only then treatment was being offered. The situation in Kamala Nehru Hospital was alarming in that many of the were empty with hardly any patients. The treatment offered at the BHT hospital

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<sup>202</sup> Order dated January 23, 2000 passed by the Supreme Court in W.P. (C) No.50 of 1998.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.* On the same day i.e., January 25, 2000, the court disposed of a writ petition filed by Krishna Mohan Shukla in which one of the points raised concerned the lack of proper medical research and non-functioning of the hospitals. The court observed that it would be more appropriate being this aspect in W.P. (C) No.50 of 1998. The Krishna Mohan Shukla petition is dealt with separately elsewhere in this Report.

also did not appear to be relevant for the gas victims. The status of the Jawaharlal Nehru and Shakir Ali hospitals was also pathetic with there being far too many patients in relation to the available beds. Further, the patients were asked to purchase medicines from outside and undergo tests unrelated to their ailments.

5.4.17 At the hearing on April 25, 2001, the Supreme Court took exception to the screening procedure and observed “we fail to understand as to how such a condition can be imposed.”<sup>205</sup> The reply affidavit dated May 21, 2001 of the State Government admitted to the screening procedure being adopted and justified it by stating that “in order to evolve certain system for identifying gas victims there has to be some documentary proof.” At the hearing on July 25, 2001, the Court emphasised the need for issuance of permanent identity cards to each of the gas victims to enable them to receive free medical aid throughout their lives. The court however, made it clear that “lack of identity cards would be no ground for depriving the gas victims of medical aid if the persons are otherwise so entitled, pending issuance of the identity cards.”<sup>206</sup>

#### *Unattended issues*

5.4.18 The counsel for the petitioners made a second visit in the hospitals in Bhopal and an affidavit were filed on August 8, 2002. The problems faced by the victims was categorized as under:

- (i) **Accessibility:** It was pointed out that insistence on production of proof of below poverty line (BPL) status as a pre-condition of providing free cancer treatment was unfair and ought to be discontinued. Further, despite the order dated July 25, 2001 of the Supreme Court, most of the hospitals were insisting on the victim producing the copy of the final award on the claim petition before affording treatment.
- (ii) **Medicines:** Many patients were being prescribed the same medicines for variety of illnesses without proper investigation. Copies of prescriptions issued even in the clinics run by the BHT showed that “harmful and useless drugs had been prescribed.”<sup>207</sup> Further, the quality of drugs being procured was giving cause for concern. There was a severe shortage of medicines in many places including the Homeopathy, Ayurveda and Unani medicine clinics. The other problem was the practice of procuring medicines only a few months prior to the expiry date.
- (iii) **Blood banks:** There was no separate facility for a blood bank for the Bhopal gas victims although the gas affected area was demarcated as a separate health district.
- (iv) **Medical needs:** Medical research had arbitrarily being discontinued and therefore it was not possible for the victim to receive appropriate treatment. Despite identification of psychiatric diseases among the victims, no department had been started nor were there any full time psychiatrists.
- (v) **Staff:** Most hospitals were under-staffed and even the doctors employed were not working full time.
- (vi) **Mismanagement:** There was either misutilisation or non-utilisation of funds. There was no proper documentation which would enable any person to know the exact number of gas victims treated in the hospitals. Expensive equipment were being

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<sup>205</sup> Order dated April 25, 2001 of the Supreme Court in W.P. (C) No.50 of 1998.

<sup>206</sup> Order dated July 25, 2001 of the Supreme Court in W.P. (C) No.50 of 1998.

<sup>207</sup> A brief note on “prescriptions collected from the Bhopal Hospital Trust” by Dr. Atanu Sarkar, annexed to the affidavit dated August 8, 2002 of Abdul Jabbar Khan in W.P. (C) No.50 of 1998.

allowed to deteriorate due to poor maintenance. Many hospitals lacked a coordinated referral system for serious cases.

5.4.19 It was suggested that all gas victims should be issued the identity cards; there must be a uniform treatment protocol, there must be a free check up organized for all gas victims, there should be a mechanism to deal with complaints effectively in order to ensure greater transparency and accountability and information on availability of drugs and their prices should be made available to the gas victims.

*Towards an independent monitoring mechanism*

5.4.20 At the hearing of the case on January 9, 2004, after going through the records, the court observed that there will have to be an independent monitoring of the medical relief and rehabilitation of the Bhopal gas victims. The court desired that counsel for the parties should submit the proposals in regard to three issues:

- (i) the composition of and the terms of reference a committee (comprised of medical personnel, NGOs and eminent persons, all located in Bhopal) to be constituted for attending to the day-to-day problems faced by the victims of the Bhopal Gas Tragedy in regard to medical relief and rehabilitation;
- (ii) the constitution of an advisory body of reputed persons of professional excellence to advise on the type of treatment as well as research for the benefit of the victims; and
- (iii) the provision of adequate budget by both the governments and the centre and the state to ensure proper medical relief and rehabilitation of the victims as well as for the medical research.

5.4.21 In response to the suggestion by the court at the hearing of the cases on July 20, 2004, the petitioners suggested in consultation with the State Government names of persons who could be appointed to the Advisory Committee and Monitoring Committee. Ultimately, on August 17, 2004 the Supreme Court constituted the following Advisory Committee and Monitoring Committee:

*Advisory Committee*

1. Director General ICMR – Chairman
2. Dr. P.M. Bhargava – Member
3. Dr. C.C. Chaubal – Member
4. Dr. Shyam Agarwal – Member
5. Dr. Deepak Mehta – Member
6. Dr. C. Satyamala – Member\*\*
7. Director AIIMS

*Monitoring Committee*

1. Mr. O.P. Mehra, Ex-IAS – Chairperson\*
2. Dr. H.H. Trivedi, Member
3. Dr. M.H. Kanhere, Member
4. Mr. Purnendu Shukla, Member
5. Director of Medical Education – Convenor

5.4.22 By a separate order dated September 17, 2004 the terms of reference of the two committees was settled. The scope of functioning of the Monitoring Committee was:

1. Quality adequacy and availability of medicines.
2. Suitability, availability and maintenance of medical equipments.
3. Deployment of adequate, competent medical personnel and staff and their availability.
4. Complaints and grievances of gas victims in relation to the above matters.
5. Effectiveness of the functioning of emergency medical services of Bhopal gas victims.
6. Safe disposal of medical wastes.
7. Registration of patients and issuance of health cards.
8. Treatment of cancer and T.B.
9. Provision of supplemental support medical services through hospitals and clinics based on ayurveda, unani and homeopathy.

5.4.23 The terms of reference of the Advisory Committee were:

1. Examination of current treatment practices followed in the government hospitals for Bhopal gas victims.
2. Recommending appropriate line of treatment.
3. Recommending on structure in content of medical research.
4. Recommending community health initiatives and on kinds of medical equipment and medicines required to improve the quality of treatment being offered to Bhopal gas victims.

5.4.24 The Monitoring Committee was directed to submit a report on its activity through its Chairman once in every three months to the Supreme Court. The Advisory Committee had to likewise submit a report once in every six months. Both Committees were to simultaneously send a copy to the Government of Madhya Pradesh. The petitioner groups were permitted to make suggestions/ submissions before the two Committees. The logistic support to the Committees was to be provided by the Government of Madhya Pradesh. Either of the Committees, any of the petitioners and the Government of Madhya Pradesh could apply to the Supreme Court in regard to the functioning of and implementation of suggestions of the Committees. The case was directed to be listed after four months.

## **5.5 THE BHOPAL HOSPITAL TRUST**

### *The directions to UCC in the Review Judgment*

5.5.1 In its judgment in the review petition challenging the settlement, the Supreme Court dealt with the question of medical surveillance costs and the operational expenses of the expert medical facility in the form of “a full fledged hospital of at least 500 bed strength with the best of equipment for treatment of MIC related afflictions.”<sup>208</sup> While State of Madhya Pradesh was asked to provide land for the hospital free of cost, “the capital outlays on the

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<sup>208</sup> *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584 at 683, para 203.

hospital and its operational expenses for providing free treatment and services to the victims should, both on humanitarian considerations and in fulfillment of the offer made before the Bhopal court, be borne by the UCC and UCIL.”<sup>209</sup> It was observed that “such a hospital should be a fully equipped hospital with provisions for maintenance for a period of 8 years which in our estimate might together involved the financial outlay of around Rs.50 crores. We hope and trust that UCC and UCIL will not be found wanting in this behalf.”<sup>210</sup>

#### *Creation of the BHT*

5.5.2 As a result of the judgment of the Supreme Court in the review petitions, the criminal proceedings against Warren Anderson (Accused no.1), UCC (Accused no.10), UCC (E) (Accused no.11), UCIL (Accused no.12) and the Directors of UCIL (Accused nos.2 to 9) revived in the Court of the CJM, Bhopal. Without going into the details of the developments in the criminal case, which are dealt with in a separate section in this Report, it may be mentioned that accused nos.1, 10 and 11 failed to appear before the CJM, Bhopal and were declared proclaimed absconders. UCC’s 50.9% shareholding of UCIL was attached, since that was the only property that UCC available in India. Getting wind of this attachment (which was ordered on April 30, 1992), the UCC on April 15, 1992 created the Bhopal Hospital Trust (BHT) in London with Sir Ian Percival as its sole trustee. UCC endowed its entire shareholding in UCIL to the BHT.

#### *Diluting the attachment and sale of attached shares*

5.5.3 The obligation on the UCC and UCIL to provide funds for an expert medical facility in Bhopal remained unfulfilled through this period. In December 1993, an application was filed by the Union of India in the Supreme Court seeking implementation of these very obligations by the UCC. This application was heard in the Supreme Court on December 10, 1993 when the senior counsel for the UCC (which was absconding from the criminal court), Sir Ian Percival and senior counsel for victims organizations were present. The sole trustee “suggested that the attachment effected by the criminal court be lifted so that the objective which was to build a hospital for the benefit of the victims is achieved.”<sup>211</sup> Sir Ian Percival suggested sale of the attached shares and setting apart a sum of Rs.51 crores from the said proceeds for the purposes of the hospital with the balance amount continuing to remain under attachment. The court agreed and said “on a consideration of the matter, we are left with the impression that the suggestion made by the Trustee is eminently reasonable, worthy of consideration and can form the basis on which the matter could be resolved.”<sup>212</sup> The case was put off to February 11, 1994 for the Union of India and the sole trustee to meet and discuss the modalities for implementation of the suggestion. At the subsequent hearing on February 14, 1994, the Supreme Court modified the CJM’s order of attachment to permit the sale of the shares. A sum of Rs.65 crores was thereafter to be held in a separate account with the State Bank of India in the name of the sole trustee of BHT “to be utilized exclusively for the benefit of the beneficiary, viz., the Bhopal Gas Hospital to be constructed at Bhopal... no part of the fund in the said account shall be permitted to be diverted to any purpose other than the

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<sup>209</sup> *Id.* at 683-684, para 204.

<sup>210</sup> *Ibid.*

<sup>211</sup> Order dated December 10, 1993 passed by the Supreme Court in I.A.Nos.24-25 in C.A.Nos.3187-88 of 1988, p.6.

<sup>212</sup> *Id.* p.7.

purposes of the Bhopal Gas Hospital at Bhopal.”<sup>213</sup> Further, “the Government of India shall permit Rs.5 crores out of the sale proceeds to be transmitted to the account of the Sole Trustee, Bhopal Hospital Trust to be held in England in pound sterling to meet the expenses of the administration of the Trust.”<sup>214</sup>

5.5.4 These orders came as a shock to the victim groups who had again not been heard by the court. They filed applications on April 13, 1994 seeking recall of the order dated February 14, 1994 on the ground that the court had again acted at the instance of the proclaimed absconder, UCC when in fact the funds for the hospital had to be brought in by it separately and not by sale of the attached shares. On July 13, 1994, an amended petition was filed by the victim groups questioning the validity of the creation of the Trust, the order for sale of shares and the transfer of funds to an account to be operated by the Sole Trustee. Meanwhile, consequent upon these orders, the Government of India in August 1994 set up an Empowered Committee to oversee the construction of the hospital and Ian Percival was appointed as Co-chairman of the Committee. The Government of Madhya Pradesh provided 50 acres of land free of cost to BHT for constructing a hospital.

#### *Clarification of the order*

5.5.5 The applications for review were heard by the Supreme Court on October 20, 1994, by the first order, the court rejected the contention that the order dated February 14, 1994 should have been made conditional on UCC submitting to the jurisdiction of the court. The court explained it away saying it was BHT who had moved the court and not UCC. The court clarified that “we have neither expressly nor by implication pronounced on the question whether the purported pledge of the shares by UCC with the Sole Trustee was bonafide and valid or whether the order of attachment was properly made.”<sup>215</sup> The second contention was that any amount in excess of Rs.51 crores should revert to the author of the Trust. The court responded by saying that the account would be jointly in the name of UCC and the Sole Trustee but that the only authority authorized to operate the account on behalf of the UCC would be the CJM who ordered the attachment. The third contention that Rs.5 crores ought not to have been permitted as administrative expenditure to the Sole Trustee was rejected. It was clarified that “any expenditure other than those connected with or incidentally to the sale of securities and the hospital construction shall have to be borne by the UCC independently of the sale proceeds.”<sup>216</sup>

5.5.6 On September 20, 1995 Ian Percival moved an application in the Supreme Court seeking more money for the hospital. In this application, he pointed out that the sale of UCC shares in UCIL to the McLeod Russell Group in Calcutta yielded a sum of Rs.170 crores. This money earned interest further the dividend monies were also added to it. After allocating monies to BHT to the tune of Rs.125 crores, there was, as of August 31, 1995 a sum of Rs.183 crores continuing to remain under attachment. Ian Percival now prayed that either the whole or part of this remaining amount of Rs.183 crores “may be released from attachment and made available to the Trustee to be used by him for the above purposes under the terms of the Trust Deed of the Bhopal Hospital Trust.”<sup>217</sup>

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<sup>213</sup> Order dated February 14, 1994 of the Supreme Court in C.A.Nos.3187-88 of 1988 reported in (1994) 1 SCALE 811.

<sup>214</sup> *Id.* This part of the proceedings is discussed in the Chapter relating to criminal proceedings.

<sup>215</sup> *Union Carbide Corporation v. Union of India* (1994) 4 SCALE 973.

<sup>216</sup> *Id.* This aspect of the matter is again discussed in the section relating to the criminal liability.

<sup>217</sup> I.A.Nos.30-31 of 1995 in C.A.Nos.3187-88 of 1988, prayer (a).

### *The Victims' protest against Ian Percival*

5.5.7 The victim groups filed an application for directions on November 29, 1995 pointing out that it was clear from the proceedings thus far involving the BHT that “neither UCC nor the so-called Trust wants to raise a single penny on their own for the victims but are using the device of the Trust to virtually frustrate the attachment of the properties of UCC in the criminal proceedings.”<sup>218</sup> The application urged that permitting Ian Percival to dilute the force of the attachment should be prevented as it would otherwise defeat the ends of justice. UCC had to find funds for complying with the orders of the court separately and not from the attached monies. Accordingly, it was prayed that Ian Percival be deleted from the joint account holding of the accounts of the State Bank of India; it should be the Union of India alone there should be permitted to handle the monies obtained to the sale of shares and that Ian Percival be directed to furnish full accounts of all monies spent thus far from the sale proceeds of the attached shares.

5.5.8 These applications by the victims were heard along with the applications filed by the Sole Trustee by the Supreme Court on December 1, 1995. While no orders were made on the applications by the victims, the court noted their objections and invited the counsel for UCC in the earlier proceedings to ascertain the response of the UCC to the plea of the Sole Trustee. It required the Sole Trustee to place on record the plans and estimates in terms of costs and time schedule for the construction of the hospital.<sup>219</sup>

5.5.9 By way of an additional affidavit dated February 2, 1996, Ian Percival placed before the court further details of a plan where apart from the main 260 bedded hospital there would be ten mini units located in the neighbourhoods of the affected communities to offer primary health care. In addition, he proposed the addition of a cardio thoracic unit in the hospital and a research cum teaching unit. Further, he pointed out that the sum of Rs.183 crores would, together with interest would approximately increase to about Rs.214 crores. In this affidavit, Ian Percival attached a letter to him dated October 29, 1994 from the International Medical Commission on Bhopal (IMCB) which emphasized that “the answer to the Bhopal Health Care Delivery Problem is not the shortage of hospital facilities as such, but the absence of health care at a community and primary level.”<sup>220</sup> Further, the IMCB were categorical that “we do not see that the solution of the problem is a new hospital.”<sup>221</sup>

### *Facilitating the obliteration of the attachment: More monies released to Percival*

5.5.10 At the hearing on February 6, 1996, counsel for the UCC placed on record a fax message dated January 31, 1996 received from the UCC that “on its fulfilling the recommendation in the order of October 3, 1991, the proceedings terminated and its role in respect of payment for the hospital stood completed.”<sup>222</sup> Further UCC stated through its counsel “that whether this court accepts or rejects the Trustee’s request in respect of the proceeds for the sale of shares, the subject matter of the attachment order of the Bhopal Court, is a matter for the Trustee and the Court and not the concern of the UCC.”<sup>223</sup> The court was still unclear whether the attachment should be lifted and the monies released for

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<sup>218</sup> I.A.Nos.36-37 of 1995 in C.A.Nos.3187-88 of 1988, para10.2.

<sup>219</sup> *Union Carbide Corporation v. Union of India* (1996) 1 SCALE (SP) 14.

<sup>220</sup> Annexure-C to I.A.Nos.30-31 of 1995 in C.A.Nos.3187-88 of 1988.

<sup>221</sup> *Id.*

<sup>222</sup> *Union Carbide Corporation v. Union of India* (1996) 2 SCALE (SP) 46.

<sup>223</sup> *Ibid.*



construction of hospital. It now required the Empowered Committee to examine the proposals of the Sole Trustee to either convert the 260 bed hospital into a 500 bed one with a 30 bed cardio thoracic surgery department at an additional cost of Rs.121.40 crores or to construct a 260 bed hospital with a 30 bed cardio thoracic unit and many units at different selected occasions at a cost of Rs.10.5 crores, the total cost of which may be in excess of Rs.121.40 crores.

*IMCB's suggestions as to appropriate medical care*

5.5.11 At the hearing on February 27, 1996, the victim groups placed on record the affidavit of Dr. Marinus Verweij of the International Medical Commission on Bhopal (IMCB) which proposed an alternative model which envisaged establishing 140 small community care centres, 60 new primary care centres without beds and 10 primary/ secondary centres with 20 inpatient beds. It was pointed out that the emphasis should be on secondary and primary level health care instead of a hospital and that the estimate for this would be Rs.190 crores. Annexed to the affidavit was extracts from the final Report of IMCB based on scientific studies.<sup>224</sup> Thereupon, the court on February 27, 1996 directed the Empowered Committee to examine “both the proposals and, if necessary, modify its earlier recommendation if it feels that such modification would be to the advantage of the victims of the tragedy.”<sup>225</sup>

5.5.12 The Empowered Committee considered the proposals put forth by the IMCB on March 11, 1996 but decided to approve the Sole Trustee's proposal of a 260 bedded hospital together with a cardio thoracic unit, research cum teaching unit and 10 mini units.<sup>226</sup> At the hearing on April 3, 1996, the court approved the decision of the Empowered Committee. As regards the release of funds, the court noted that on the last occasion, the UCC had stated that the amount from the sale of the shares may be made available for the construction of the hospital and that “the attachment had thus lost its sting because in any case UCC is not claiming that amount, confiscated or otherwise. There is, therefore, no difficulty in directing the release of that amount from attachment. We, therefore, direct that out of the attached amount a sum of Rs.187 crores be released for the construction of the hospital.”<sup>227</sup> The court now turned its attention to the question of entrustment of the hospital to an autonomous body and sought the views of the Empowered Committee.<sup>228</sup> On May 6, 1996, the court asked the sub-committee to decide this issue as early as possible. On the submission by the counsel for the victim groups that the Sole Trustee had not furnished accounts for the monies made available to him, the court required him to submit accounts as early as possible.<sup>229</sup>

*Percival wants more*

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<sup>224</sup> Earlier, the BGPMUS filed an affidavit dated February 26, 1996 urging the court to reject the plans put forth by Ian Percival.

<sup>225</sup> Order dated February 27, 1996 of the Supreme Court in I.A.Nos.28-31 and 36-37 in C.A.Nos.3187-88 of 1988.

<sup>226</sup> Affidavit dated March 27, 1996 of M.M. Srivastava, Director, Ministry of Chemicals and Fertilizers, Government of India in I.A.No.28-31 and 36-37 of 1996 in C.A.No.3187-88 of 1988. A further affidavit was filed by IMCB on March 28, 1996 before the Supreme Court reiterating its earlier alternative proposals and that the BHT plans were not in the best interests of the victims.

<sup>227</sup> *Union Carbide Corporation v. Union of India* (1996) 3 SCALE (SP) 64.

<sup>228</sup> At the meeting of the Empowered Committee on May 1, 1996 it was decided to constitute a sub committee to examine this question: See the affidavit dated May 4, 1996 of Jit Ram, Deputy Secretary, Government of India in I.A.Nos.28-31 and 36-37 of 1996 in C.A.Nos.3187-88 of 1988.

<sup>229</sup> *Union Carbide Corporation v. Union of India* (1996) 4 SCALE (SP) 58.

5.5.13 Differences cropped up between the Sole Trustee and the sub committee as regards the composition and structure of the autonomous body. The former felt that there were too many bureaucrats. The buck was passed to the Empowered Committee which promptly sent it back to the sub committee. By this time, it appeared that the hospital would not be commissioned before December 1997.<sup>230</sup> In its order dated July 22, 1996, the court observed that the idea of the autonomous body was “not to load it with public servants but have a fine mix of both experts, government participation as well as public participation.”<sup>231</sup>

5.5.14 Ian Percival filed a fresh application on September 13, 1996, which revealed that there were serious differences between him and the Empowered Committee on the utilization of funds. He sought a direction that the earlier order dated April 3, 1996 did not warrant “much less require, the transfer of funds from their existing accounts to the Empowered Committee.”<sup>232</sup> Meanwhile, the tensions between the Sole Trustee on the one hand and the Empowered Committee on the other hand continued as was evident in the affidavit of the Government of India filed in September, 1996 which referred to the meeting of the Empowered Committee of September 6, 1996 and the affidavit of Ian Percival dated February 2, 1997 which referred to the minutes of the Empowered Committee’s meeting on October 23, 1996. Basically, the Sole Trustee was not prepared to let go of his control of the decisions in regard to the construction of the hospital. He also filed an affidavit on February 5, 1997 making open his disagreement with the Government of India and asking for the release of the balance sum of Rs.60 crores which lay under attachment. The Supreme Court washed its hands off the controversy regarding the accounts. By its order dated February 14, 1997 it merely said “we had not applied our minds nor had it been decided to change the arrangement which was obtaining prior to the making of the order dated April 3, 1996”<sup>233</sup> and, that when the court used the expression in ‘Empowered Committee’ it “did not intend to alter the existing arrangement nor create a new body for the construction of the hospital.”<sup>234</sup> Thus, Ian Percival was again given a free hand in regard to the construction of the hospital.

*Percival’s unaccounted benefits*

5.5.15 By this time, the accounts of BHT up to December 30, 1996 were filed. On July 10, 1997 the victim groups filed an affidavit in the Supreme Court pointing out that the Sole Trustee was clearly misusing his powers and had also misutilised the funds. The accounts showed that the Trustee had paid himself fees to the extent of Rs.1.71 crores in 1995 and Rs.1.90 crores in 1996. Towards travel and accommodation he had utilized Rs.14.06 lakhs in 1995 and Rs.22.3 lakhs in 1996. This was all the most surprising since the actual expenditure during this period towards the construction of the building itself was only Rs.7.35 crores. From page 12 of the accounts it was clear that he had with himself an amount of Rs.362.84 crores, whereas the total payments of monies made thus far did not exceed Rs.60 crores. The victims wondered why, in the above circumstances, the Sole Trustee should need a further sum of Rs.60 crores. There was absolutely no justification for the Sole Trustee to enrich

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<sup>230</sup> Affidavit dated July 19, 1996 of Jit Ram in I.A.Nos.28-31 and 36-37 of 1996 in C.A.Nos.3187-88 of 1988.

<sup>231</sup> *Union Carbide Corporation v. Union of India* (1996) 5 SCALE (SP) 4.

<sup>232</sup> I.A.No.41 of 1996 in C.A.Nos.3187-88 of 1988 dated September 13, 1996, prayer (i). A supplementary affidavit dated November 6, 1996 was filed by Ian Percival apologizing for incorrectly assuming that the Government of India was acting on behalf of the Empowered Committee when it made its submission which is recorded in the order dated April 3, 1996. Now insisted that the clarification sought for was even more important.

<sup>233</sup> Order dated February 14, 1997 passed by the Supreme Court in I.A.Nos.40-41 of 1996 in C.A.Nos.3187-88 of 1988.

<sup>234</sup> *Id.*

himself at the cost of the Bhopal victims and this was reason enough for the court to direct that he be removed as a joint account holder.<sup>235</sup> The Government of India also filed an affidavit asking that Ian Percival should be asked to explain the administrative expenses incurred by him.<sup>236</sup> Ian Percival took exception to the allegations against him and filed an affidavit on August 25, 1997 justifying the expenses incurred by him. He even annexed a certificate issued by a firm of solicitors retained by him (Speechly Bircham) dated May 8, 1997 certifying that the fees charged by the Sole Trustee was “eminently reasonable having regard to the importance and the scale of the Sole Trustee’s responsibility and what has been and is required of him.” At the hearing on November 11, 1997, the Union of India pointed out to the court that in the absence of the details of the expenditure incurred by the Sole Trustee with respect to administrative expenses it could not respond to his affidavit in this regard. The Sole Trustee then promised to file the details.<sup>237</sup>

5.5.16 The Sole Trustee thereafter on December 15, 1997 explained the broad heads of expenditure. He estimated that his fees and charges in each of the years 1995-96 to the extent of Rs.2.5 million “represents the cost to me of a room rents, heating, lighting, telephones, and the like and costs of chambers staff.”<sup>238</sup> The Sole Trustee did not give any details except saying that 70% of the expenses was “the cost of direct action which I have been obliged to take in India.”<sup>239</sup> The Sole Trustee filed a further statement on January 5, 1998 wherein he stated that none of the expenditure outlined in his accounts was chargeable to UCC.

5.5.17 The victim groups filed an affidavit in the Supreme Court on February 4, 1998 pointing out that the Sole Trustee had charged a sum of Rs.440 lakhs for the years 1995-96 under the heads of office costs, other professional charges excluding travel and accommodation. It also appeared that during the year 1996-97 the Sole Trustee had transferred a sum of Rs.6.7 crores to England to meet his administrative costs in UK and all this was without the permission of the court. On its part, Union of India also filed an affidavit pointing out that the Sole Trustee had still not furnished a detailed break up. Even according to the Union of India, 8,14,432 pounds had been incurred as expenses in the UK. It also pointed out that a sum of Rs.23.18 lakhs incurred under administrative expenses in India had been taken from account no.1 and that this was improper. However, the court did not pay much attention to this aspect.

#### *The new Trust*

5.5.18 The entire focus thereafter shifted to the constitution of the autonomous body. UCC by a Deed dated April 3, 1998 appointed Ian Percival’s son, Robert Percival and his lawyer Edward Nugee as new Trustees of BHT. Further, in January 1998 the Sole Trustee filed a draft Trust Deed for the creation of the new Trust to manage the hospital at Bhopal. The Union of India gave its response to the draft expressing two concerns:

- (i) Lack of any firm commitment regarding transfer of funds from BHT to the new trust; and

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<sup>235</sup> Affidavit dated July 10, 1997 of N.D. Jayaprakash in I.A.Nos.36-37 in C.A.Nos.3187-88 of 1988.

<sup>236</sup> Affidavit dated August 16, 1997 in I.A.Nos.36-37 in C.A.Nos.3187-88 of 1988.

<sup>237</sup> *Union Carbide Corporation v. Union of India* (1998 1SCALE (SP) 32

<sup>238</sup> Statement of the Sole Trustee dated December 15, 1997 submitted along with a letter of the same date of his lawyers in the Supreme Court.

<sup>239</sup> *Id.*

- (ii) “Lack of representation to the Government of India, the State Government and the representatives of the victims/ NGOs” among the trustees.<sup>240</sup>

5.5.19 Ian Percival died and at the hearing on April 17, 1998 the court sought the views of the Empowered Committee regarding the draft Trust Deed and the commissioning of the hospital. An approved draft Trust Deed was placed before the court with an affidavit dated April 29, 1998. However, the State of Madhya Pradesh disagreed with this proposal of the Union of India.

5.5.20 The victims filed an additional affidavit on May 1, 1998 pointing out that passbooks were being issued in one mini unit falsely projecting that “BHT was formed in February 1994 on the directions of the Supreme Court of India from the funds of Union Carbide Limited available in India. Sir Ian Percival, a renowned British Lawyer and a member of the Queens Privy Council was appointed as a Sole Trustee to established on run the hospital.” The Supreme Court was asked to issue a suo motu notice of contempt to BHT for making such false statements. No action was taken on this. A further affidavit was filed on May 4, 1998 pointing out that the draft Trust deed purported to have been drawn up on April 4, 1998 was in fact faxed to India on April 3, 1998. By an affidavit dated May 13, 1998, Robert Percival informed the Supreme Court that his cooption into the Empowered Committee in the place of his father had already been approved at the meeting of the Empowered Committee held on April 16, 1998. The affidavits of victim groups were never answered.

5.5.21 The Supreme Court never really looked into the accounts of the Trust thereafter. At the hearing on August 21, 1998 it was informed that the Bhopal Memorial Hospital Trust had been constituted with Justice A.M. Ahmadi as its Chairman. The court was now assured that the accounts would now be submitted by the new trust within 12 weeks and the Board of Trustees of the new Trust “shall look into the said accounts and seek any direction, if considered necessary, from this court.”<sup>241</sup> The accounts were not filed within 12 weeks and the court on April 5, 1999 condoned the delay in filing accounts.<sup>242</sup> One year later, at a hearing on August 3, 1999 the court was informed that the accounts have been filed and repeated its direction that the Board of Trustees of the new Trust would look into the accounts. On January 25, 2000, the matter was closed as having become infructuous.

## **5.6 SIGNIFICANT ASPECTS OF THE LITIGATION CONCERNING MEDICAL ISSUES**

5.6.1 The long and tortuous process of the litigation concerning medical issues, as narrated above, raises several issues which may be summarized as under:

- i) Absence of appropriate medical care for the victims of the Bhopal gas disaster till date;
- ii) Arbitrary and unjustified decision to abandon medical research in 1994;

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<sup>240</sup> Affidavit dated March 27, 1998 of B. Balagopal, Deputy Secretary, Government of India in I.A.Nos.36-37 in C.A.Nos.3187-88 of 1988.

<sup>241</sup> *Union Carbide Corporation v. Union of India* (1998) 5 SCALE (SP) 2.

<sup>242</sup> *Union Carbide Corporation v. Union of India* (1999) 2 SCALE (SP) 666.

- iii) Failure by the Union of India and the State of Madhya Pradesh to make UCC part with the details concerning MIC and its affects on the human body;
- iv) The failure of the Supreme Court, till 2004, to respond to the real needs of the Bhopal gas victims;
- v) The inexplicable indulgence shown by the Supreme Court to permit UCC to completely dilute the attachment of shares held by it in UCIL under the pretext of complying with the Supreme Court's direction to it to contribute 50 crores for an expert medical facility in Bhopal;
- vi) The court permitting the Bhopal Hospital Trust to utilize over Rs.300 crores obtained from the sale of shares towards construction of the hospital whereas the original cost was envisaged as Rs.50 crores;
- vii) The Supreme Court not enquiring as to what happened in huge sum of Rs.400 crores and the utilization of over Rs.7 crores by the Sole Trustee, Sir Ian Percival, towards his own fees and expenses, contrary to the orders of the Supreme Court;
- viii) The reluctance of the court to enforce the accountability mechanisms for 20 long years. In the meanwhile, the Governments and the Centre and the State spent over Rs.200 crores purportedly towards providing medical facilities for the Bhopal gas victims which have time and again being proved to be wholly inadequate and inappropriate;

## **5.7 THE OUTSTANDING ISSUES**

5.7.1 Several questions remained to be answered. Can we ever find an appropriate treatment protocol for treatment of the Bhopal gas victim? If the after affects of MIC are so calamitous and irreversible, and continue over a long period of time, should not there be a legal remedy for the victim? Who should bear the cost of medical relief? Should the victim be made to bear the cost of medical treatment from the compensation amount or is it not the obligation of the UCC and its subsequent manifestations as well as the State jointly and severally? What is the answerability of the court for its actions?

5.7.2 The entire episode concerning the Bhopal Hospital Trust raises disturbing questions. The former Chief Justice of India who dealt with the matter on judicial side, and passed questionable orders diluting the attachment of the shares and releasing huge funds to the Trust for construction of the hospital, was subsequently, upon his retirement, appointed as Chairman of the new Trust formed to run the hospital. The propriety of this action was never really questioned.

5.7.3 The Supreme Court asked the new Trust to look into the accounts submitted by Ian Percival and to come to the court for directions. The accounts submitted had been commented upon adversely by the Union of India as well as the victims groups. It revealed several instances of unjustified expenditure by the Sole Trustee from out of the funds made available to him. Will the new Trust get these accounts verified? Considering the fact that there are several government nominees on the Trust managing the affairs of BHT, ought not they get qualified auditors to audit these accounts? Why is this information being kept secret?

5.7.4 The role of the Supreme Court has already been commented upon earlier. What is significant is that in the matter of lifting the attachment on the shares and permitting their sale, the Supreme Court again neglected to hear the victims. Even when it was petitioned by them later, it went on the defensive mode justifying its order rather than make amends. At every stage, the court accepted the proposals put forth by the Sole Trustee and negated every constructive suggestion made by the victim groups. When they pointed out instances where the Sole Trustee had misrepresented facts, misappropriated funds, and clearly acted in excess of his powers, the court simply ignored the victims.

5.7.5 The role of the Indian Council for Medical Research also calls for adverse comment. There appears to be no justification for abandoning medical research particularly when, till date, no treatment protocol has been devised to treat the problems of the Bhopal gas victims. The premier medical research body cannot wash its hands off the problem till such time appropriate medical relief is not given to the Bhopal gas victims. It remains to be seen whether the constitution by the Supreme Court of the Advisory Committee in 2004 with the ICMR being part of it will improve the situation. Meanwhile, ICMR should make public all the information it has on the surveys and research conducted by it on the Bhopal gas victims thus far.

## CHAPTER 6: ENVIRONMENTAL ISSUES

### **6.1 BACKGROUND FACTS**

6.1.1 Union Carbide Corporation (UCC) opened an assembly plant for manufacturing batteries in Calcutta way back in 1923.<sup>243</sup> UCC's operations in India were conducted through its subsidiary company Union Carbide India Limited (UCIL) in which UCC held 50.9% of the equity share capital. The balance 49.1% was held by various Indian investors including public financial institutions wholly owned by the Government of India. In 1969, UCIL set up a plant for formulating a range of pesticides and herbicides including 'Sevin'. The plant was set up on land leased for 99 years from the State of Madhya Pradesh. Sevin was produced by reacting Methyl Isocyanate (MIC) and alpha naphthol. Sevin kills pests by paralysing their nervous systems. At this time MIC was imported from the US in steel containers. As far back as 1963, a confidential research undertaken for UCC by the Mellon Institute in Carnegie Mellon University, Pittsburgh revealed that MIC was "highly toxic by both pre-oral and skin penetration routes and presents a definite hazard to life by inhalation."<sup>244</sup> Soon after the plant began its operations in 1969, squatter settlements began to come up around the plant site and this provided informal poor quality housing to the employees and local population.

6.1.2 UCC decided to back integrate its operations in Bhopal. In other words, it decided to manufacture the chemicals that were used for the manufacture of Sevin and one of these chemicals was MIC. This would entail expansion of UCC's operations for which additional finances would have to be raised. However, with the enactment of the Foreign Exchange Regulation Act (FERA) in 1973 by the Parliament, the stipulation was that 25% of the estimated cost of expansion would have to be raised through issue of new equity to the local

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<sup>243</sup> Ward Morehouse and M. Arun Subramaniam, **The Bhopal Tragedy** (Council on International and Public Affairs, 1986) 2.

<sup>244</sup> *Id.* At 41. UCC's own technical manual indicated that certain metals and metallic alloys had to be excluded from contact with MIC since "the heat evolved can generate the reaction of explosive violence".

shareholders and the Indian public. This would in turn result in UCC's equity in UCIL being reduced to less than 51%. In order to avoid this, UCIL decided to transfer additional technology regarding manufacture of MIC for the purposes of locating the MIC plant within the premises of the existing plant at Bhopal. This transfer of a high technology input not available in India enabled UCC to be granted statutory exemption from the applicability of the shareholding limits imposed by FERA. Thus, UCC was able to ensure that its equity shareholding remained in tact at 50.9% of UCIL's equity.<sup>245</sup>

6.1.3 Even at this time, it was clear that the locating of the MIC plant at the site of the existing plant posed serious environmental risk on account of contamination of ground water. UCC's engineering department at South Charleston in a document dated July 21, 1972 discussed the "danger of polluting subsurface water supplies in the Bhopal area" and noted that "new ponds will have to be constructed at one to two-year intervals throughout the life of the project" in order to prevent this danger.<sup>246</sup> Initially, it was proposed that new ponds will have to be constructed at 1 to 2 year intervals for collecting the waste which should be disposed of and which would be highly toxic and acidic. In addition, a waste liquid incinerator was proposed to tackle the problem of ground water contamination. However, neither of these proposals was implemented. Instead, UCC decided to construct three solar evaporation ponds at the UCIL plant site and the back integration plan was approved by UCC at a cost of 20 million US dollars.<sup>247</sup>

6.1.4 Thus UCC was aware of the enormous environmental risk that would result from the use of the technology for manufacture of MIC at a plant which had serious design defects even to begin with. The location of the plant adjacent to a residential neighbourhood and barely two kilometers from the railway station was as a result of maximizing the benefits to the company even while pausing a grave risk to the neighbourhood under the 1975 Bhopal Development Plan of the Government of Madhya Pradesh, the local zone regulations did not permit the MIC unit to be located within two kilometers of the railway station and in fact initially UCIL's application for a municipal permit was rejected. However, UCC was able to use its influence with governmental authorities to ensure that the permit was eventually granted.<sup>248</sup>

6.1.5 That UCC was aware of the environmental risk that the MIC plant posed is evident from the fact that the personnel of the Bhopal plant were even at the stage of commencement of operations sent to UCC's offices in the U.S.A. for training in "environmental pollution/control".<sup>249</sup> However, the documents subsequently discovered revealed that UCC applied double standards when it came to similar plant operated by it in Institute, West Virginia in the United States.<sup>250</sup> For instance, while the plant in West Virginia was designed with computerized warning and monitoring systems, the UCIL plant at Bhopal relied on manual

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<sup>245</sup> The decisions of UCC in this regard are now part of the judicial record as a result of discovery proceedings in the class action suit in the US district court Southern District of New York (*Sajida Bano v. UCC*) and has been referred to in the plaintiff's response to the statement of material facts. Hereinafter these documents are collectively referred to as 'discovery documents'. The document under reference is Ex.1 of the discovery documents. Also see Upendra Baxi and Amita Dhanda (Eds.) **Valiant Victims and Lethal Litigation: The Bhopal Case** (N.M. Tripathi, 1990) 118 (hereinafter Valiant Victims)

<sup>246</sup> Ex.3 of discovery documents.

<sup>247</sup> Ex.6 of discovery documents.

<sup>248</sup> Para 78 of statement of Amended Class Action Complaint dated 4.1.2000 in *Sajida Bano v. UCC* (hereafter Class Action Complaint).

<sup>249</sup> Ex.8 of the discovery documents.

<sup>250</sup> Para 80 of Class Action Complaint.

gauges. Moreover, the capacities of the storage tanks, vent gas scrubbers and the flare tower were substantially greater in the plant at Virginia. Further, emergency preparedness and evacuation plans were in place at the Virginia plant whereas they were non-existent at Bhopal.<sup>251</sup>

6.1.6 Within two years of the commencement of the manufacturing of MIC at the UCIL plant in Bhopal, problems emerged. On December 25, 1981 a leak of Phosgene gas took place at the UCIL plant killing one worker. This was followed by another incident of leak of gas on January 9, 1982 as a result of which 25 workers had to be hospitalized. The protest by the workers against the absence of any safety measures went unheeded. In March 1982, there was yet another leak from one of the solar evaporation ponds. On or about March 25, 1982 UCC officials were informed that there had been a major failure of the solar evaporation ponds and that “unfortunately, emergency pond has also shown some signs of leakage.”<sup>252</sup> In April 1982 a UCIL document noted that the continued leakage was causing great concern.<sup>253</sup> In May 1982 UCC sent its US experts to UCIL plant to conduct an audit. The team noticed leaking valves and a total of 61 hazards, 30 of which were major and 11 of which were in the MIC/ Phosgene units.<sup>254</sup> UCC’s internal ‘Operational Safety Survey’ of May 1982 listed, among the action steps, the containment of “spillage of Sevin residues”.<sup>255</sup> In September 1982, UCIL delinked the alarm from the siren warning system so that only their employees would be alerted over minor leaks without “unnecessarily” causing “undue panic” among neighbourhood residents.

6.1.7 The sequence of events thereafter have already been set out in the earlier Chapters and are therefore not being repeated here.

## 6.2 POST-DISASTER FACTS

6.2.1 Pursuant to the commencement of criminal proceedings against UCC and UCIL and the executives of the two companies, the investigative agency sealed the MIC unit of the UCIL plant. However, the other portions of the plant were fully under the control of UCIL and UCC. On June 3, 1985, the UCIL officials informed the investigative authorities that “decontamination activities in several areas other than the MIC area is currently scheduled or on going. We will appreciate receiving your early approval for the clean up within the MIC area.”<sup>256</sup> On October 29, 1985, UCIL informed UCC “there has been a substantial reduction in the inventory of most of the hazardous chemicals” but that “some material remains in tank bottoms” of which “CSA (chlorosulfonic acid) is one such example.”<sup>257</sup> On May 27, 1986, UCIL informed UCC that the storage tanks at the UCIL plant “contain approximately 15 tons of sludge which is largely chlorosulfonic acid” and UCIL sought advice of the UCC “on how this job can be done.”<sup>258</sup> The clean up efforts were still on in 1987 and 1988 but the problem remained. UCIL in a note to UCC on September 23, 1988 concluded “we are not in a position

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251 *Id.* Para 81.

252 Ex.10 of discovery documents.

253 *Id.*

254 Para 84 of Class Action Complaint.

255 Ex.11 of discovery documents.

256 Ex.12 of discovery documents.

257 Ex.13 of discovery documents.

258 Ex.14 of discovery documents.



to develop any proposal for the disposal of the two tarry residues” and that “we do not have any practicable solution to resolve the problem of disposal of Sevin tar.”<sup>259</sup>

6.2.2 In 1989, UCC formulated a proposal titled “Site Rehabilitation Project – Bhopal Plant” which is discussed at a meeting on June 27 and 28, 1989. This document sets out a detailed break up of the total volume of solid and liquid wastes at the UCIL plant, catalogues and describes at least 11 pits containing waste material of different kinds and notes that “the evaporation ponds are three in number and contain effluent collected over several years during the operation of the plant... the polyfilm may have developed leaks resulting into permeation of the effluent into the soil.”<sup>260</sup> Thereafter, UCC formulated a final plan titled “Bhopal Site Rehabilitation and Assets Recovery Project” one of the primary objectives of which was the rehabilitation of the evaporation pond site to a condition suitable for returning to state government for setting up an industrial estate.”<sup>261</sup> It may be mentioned here that as a condition of the lease the state government would take back the land on which the UCIL plant was located only if it was returned in the same state it was when leased out. Importantly, this document acknowledged that “there is no precedent in India of a plant site, at which operations for manufacturing chemicals were carried out, rehabilitated to a condition safe for use as a light industrial site... it would be necessary to seek assistance an advice of an expert organization having first hand experience in this field. Since no Indian organization has had similar exposure, it has been decided to appoint M/s A.D. Little and Company of USA which has considerable experience in this field... At the instance of the MP State Government, it is proposed to appoint National Environmental Engineering Research Institute (NEERI) for carrying out the above investigation under the overall guidance of M/s A.D. Little and Company.”<sup>262</sup>

6.2.3 NEERI submitted its first report in 1990 stating that there was no contamination of the groundwater in and around the plant site. Subsequent documentation show that UCC itself doubted NEERI’s conclusions since their internal notes revealed that majority of liquid samples collected from the area “contained naphthol or Sevin in quantities far more than permitted by ISI for inland disposal.”<sup>263</sup>

6.2.4 The role of both the Union of India and the State of Madhya Pradesh in this entire phase is intriguing. First, the Union of India did not at any point in time make any claim against the UCC for environmental pollution despite knowing fully well that the plant contained large quantities of toxic residues. In fact, despite the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 providing for environmental damage as a separate head of claim, the suit filed by the Union of India against the UCC contained no such prayer.<sup>264</sup> On September 30, 1991, the Madhya Pradesh government complained to the UCIL that there were unresolved issues yet to be settled and that these included: (i) disposal of 40 tons of Sevin and Napthol tar residues left at the Bhopal plant; (ii) an environmental impact assessment of dumpsites within the premises of UCIL; (iii) de-contamination of solar

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<sup>259</sup> Ex.18 of discovery documents.

<sup>260</sup> Ex.19 of discovery documents.

<sup>261</sup> Ex.20 of discovery documents.

<sup>262</sup> *Id.*

<sup>263</sup> Ex.31 of discovery documents. This UCIL internal document titled ‘Presence of toxic ingredient in soil/ water samples inside plant premises’ warns: “The seriousness of the issue needs no elaboration. It is earnestly suggested that the subject be given due consideration and studies initiated without further delay.”

<sup>264</sup> See **Valiant Victims** *supra* note 3 at 11.

evaporation ponds; (iv) de-contamination of the pipelines tanks and other associated accessories.

6.2.5 In 1993, UCIL's site manager visited UCC's offices where he met with the personnel of Arthur D. Little (ADL) the firm retained by UCC to advise on the clean up of the plant site at Bhopal. The site manager made a presentation for UCC on the environmental investigation of the plant site at Bhopal. This presentation indicated that "one bore well indicates Naphthalene pollution; soil in Temik pond area and burnt Naphthalene area polluting; soil in waste disposal sites contaminated."<sup>265</sup> This presentation further showed that the incineration of Sevin and Naphtol residues in a cement kiln was still being considered.

6.2.6 At a meeting on May 31, 1994, regarding the "Bhopal plant site environmental investigation project" it was recognized that NEERI lacked the expertise for carrying out the testing of the soil as they did not have a quality control and quality assurance programme. Thus, it was decided that "NEERI will be carrying out sampling an analysis in accordance with the standard methodology and protocols recommended by ADL."<sup>266</sup>

6.2.7 In September 1994, UCC's shares in UCIL were sold to McLeod Russel Ltd. and UCIL was renamed as Eveready Industries India Limited (EIL). EIL retained NEERI and Arthur D Little to conduct further decontamination studies.

6.2.8 On July 26, 1995, the Madhya Pradesh Pollution Control Board moved an application in the Court of the Chief Judicial Magistrate, Bhopal seeking permission to take samples of "tar residues" and other materials lying at UCIL premises at Bhopal; sampling of contaminated soils from dumpsite and that "for this purpose, the representative of the Board with scientists of NEERI, Nagpur and IICT, Hyderabad, may be allowed to do so."<sup>267</sup> A separate application was moved on the same date that there were Sevin and Naphtol tar residues at the UCIL site and that they had to be transferred from the present place to another safe godown and also for sampling these residues at the time of shifting of the material. However, it appears that no orders were passed on these applications.

6.2.9 On October 16, 1997, NEERI submitted a second report again maintaining that there was no contamination of groundwater and soil around plant site. However, ADL in its analysis of the 1997 Report of NEERI categorically observed "there does not appear to be sufficient information to discount a potential impact to ground water from contaminated soils present on the facility."<sup>268</sup>

6.2.10 In July 1998, EIL relinquished its lease to the State of Madhya Pradesh even without remedying the site. Thereafter, in September 1998, State of M.P took control of the land and put up notices in nearby residential areas warning against drinking the water as it was contaminated.

6.2.11 In November 1999, Greenpeace, an international environmental NGO, come out with an independent report of test of soil and water samples collected in areas around the plant site and confirmed extensive contamination.<sup>269</sup> The report categorically stated that the survey

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<sup>265</sup> Ex.64 of the discovery documents.

<sup>266</sup> Ex.72 of the discovery documents.

<sup>267</sup> Prayer (a) of application of the MP Pollution Control Board dated 26.7.1995 before the Chief Judicial Magistrate, Bhopal.

<sup>268</sup> Ex.88 of the discovery documents.

<sup>269</sup> Greenpeace, **The Bhopal Legacy**, November 1999.

conducted by Greenpeace of the plant site in Bhopal “has demonstrated substantial and, in some locations, severe contamination of land and drinking water supplies with heavy metals and persistent organic contaminants both within and surrounding the former UCIL pesticide formulation plant.”<sup>270</sup> It was recommended that, with a view to eliminating further exposure of communities surrounding the contaminated site to hazardous chemicals, “contaminated wastes and soils must be safely collected and securely contained, until such time as they can be effectively treated. Such treatment must entail the complete removal and isolation of toxic heavy metals from the materials, and complete destruction of all hazardous organic constituents.”<sup>271</sup> As regards the samples of Sevin still found in the plant it was observed that “due to corrosion, a storage tank once used to contain the manufactured Sevin was ruptured and leaking. The contents, along with runoff from other areas of the plant, were being carried by rainwater into this drain.”<sup>272</sup> As regards contamination of the ground water and wells in the areas surrounding the plant is concluded that “the presence of chlorinated methanes, ethenes, ethanes and benzenes in the well waters near former UCIL plant is undoubtedly due to the long-term industrial contamination of surrounding environment from this plant. Consumption of water, contaminated by chemicals that have been found in this study, for long periods could cause significant health damage.”<sup>273</sup> Finally, it was recommended that the financial, operational and legal responsibility for the de-contamination of the site and the surrounding community “must be borne by the former and/ or current owner(s)/ operator(s) of the production facility” and that all components of the de-contamination programme from survey and design phases through to completion “should be subject to oversight by independent international experts.”<sup>274</sup>

### 6.3 THE US LITIGATION

#### *The Claim*

6.3.1 In November, 1999, Sajida Bano, Hasina Bi and five other individual victims along with five victim groups jointly filed a class action complaint in the US District Court, Southern District of New York against UCC and Warren Anderson seeking compensative damages as well as punitive and exemplary damages under several heads of claims.<sup>275</sup> The amended complaint asserted 15 claims falling into three broad categories – counts one through six sought civil damages under the Alien Torts Claims Act (ATCA), for dangers caused by the gas leak disaster, violations of various international norms of environmental, criminal and human rights law. Counts seven and eight sought judgments of civil contempt and fraud in connection with UCC’s failure to honour the conditions under which Judge Keenan had in May 1986 dismissed the earlier action accepting the defence of *forum non conveniens* and directed that UCC would submit the jurisdiction of the Indian civil courts. Counts nine through fifteen sought monetary and equitable relief under various common law theories for environmental harms attributable to the UCIL plant in Bhopal but not related to the gas leak disaster.

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<sup>270</sup> *Id.* at page 4.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Id.* at 13.

<sup>273</sup> *Id.* at 23.

<sup>274</sup> *Id.* at 26.

<sup>275</sup> See the Amended Class Action Complaint dated January 4<sup>th</sup> 2000 – [*Sajida Banu & Ors v. UCC and Anr.* (Index No.99CIV.11329 (JFK))]

### *Keenan's First Order*

6.3.2 UCC and Warren Anderson filed motions to dismiss the claim and for summary judgment. By an order dated August 28, 2000, Judge Keenan of the Southern District Court of New York granted UCC's motions to dismiss and denied the plaintiff's cross motions.<sup>276</sup> It was held that under the ATCA, no claim lay since the fugitive disentitlement doctrine did not prevent UCC from defending the action.<sup>277</sup> It was further held that the Bhopal Claims Act deprived the plaintiffs standing to maintain the claim and in the alternative the 1989 settlement orders of the Indian Supreme Court barred all claims related to the disaster. The District Court did not specifically address the additional environmental claims and ordered the entire case closed.

### *First Remand by Court of Appeals*

6.3.3 The plaintiffs appealed to the Court of Appeals which, by a judgment dated November 15, 2001, held that while the District Court had properly dismissed the plaintiffs claims under the ATCA, it had "erred in dismissing the plaintiffs common law environmental claims".<sup>278</sup> The court of appeal held that the additional environmental claims were unrelated to the Bhopal gas disaster and therefore the district court could not have dismissed the entire claim without addressing this issue. The case was remanded to the district judge to consider the claim against UCC and Warren Anderson on the ground of environmental damage unrelated to the gas leak disaster itself.

### *Keenan's Second Order of Dismissal*

6.3.4 When the case went back to the District Court, the plaintiffs filed a discovery motion which was allowed. UCC consequently produced over 4,000 documents. These were analysed and a further petition was moved for directions to UCC to provide additional documentation. This was also allowed by Judge Keenan by an order dated June 20, 2002. Thereafter, on September 20, 2002, the plaintiffs filed affidavits on the basis of about 100 "smoking gun" documents before Judge Keenan.

6.3.5 For a second time, the District Court of Judge Keenan, by a judgment dated March 2003, dismissed the claim holding that:

- i) the plaintiff Hasina Bi's claims for personal injury and property injury were barred by the statutes of limitations set forth in the New York Civil Practice Law and Rules (CPLR);
- ii) the Bhopal Organisations lacked the standing to bring claims for money damages on behalf of their members; and

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<sup>276</sup> *Bano v. Union Carbide Corporation* (2000) US District Lexis 12326 (S.D.N.Y., Aug. 28, 2000).

<sup>277</sup> It was contended for the plaintiff that since UCC had refused to submit to the jurisdiction of the criminal court in Bhopal and had been declared proclaimed absconder, it was fugitive from the courts in India and therefore could not seek to raise any defence in the US Courts to the action under the ACTA.

<sup>278</sup> Judgment dated November 15, 2001 of the US Court of Appeals for the Second Circuit (*Sajida Bano v. UCC & Anr*), page 1.

- iii) the injunctive relief that UCC should be held liable for and made to clean up the contaminated lands of the UCIL plant site at Bhopal was not feasible;<sup>279</sup>

6.3.6 Thus, for the second time Judge Keenan rejected the claim of the plaintiffs even on the basis of the common law claim for environmental damage. The plaintiffs again appealed to the Court of Appeals.

#### *Second Remand by Court of Appeals*

6.3.7 By a judgment dated March 17, 2004, the US Court of Second Circuit affirmed all of the findings of the District Court except on one area. The Court of Appeals was of the view that the Hasina Bi's claims for property damage could not have been rejected on the basis that through the manifestation of personal injuries in 1990, she had constructive knowledge of the damage to her property. The Court of Appeals felt that since it was the Greenpeace Report of November, 1999, that for the first time conclusively established contamination of the land both within and surrounding the UCIL plant site in Bhopal, it was a question of fact "to be resolved as to when Bi learned, or with reasonable diligence should have learned, of the alleged damage to her property."<sup>280</sup> Further, while the CPLR provided limitation period only with respect to claim for damages, to the extent that the relief claimed included "injunctive relief in the form of remediation of her property or the remediation of the former UCIL plant site, those claims are not barred."<sup>281</sup> However, the Court of Appeals agreed with the District Judge that in the absence of any indication that the Government of Madhya Pradesh would cooperate in the plant site remediation, the injunctive relief sought in that regard was not possible of being granted. Nevertheless, since the case was again being remanded to the District Court to consider the plaintiffs claims for damage to her property, the Court of Appeal believed that "the District Court should be free to revisit its dismissal of the claim for plant site remediation in the event that the Indian Government or the State of Madhya Pradesh seeks to intervene in the action or otherwise urges the court to order such relief."<sup>282</sup>

6.3.8 Therefore, for the third time in three years, the case came back to the Court of Judge Keenan, this time to determine which is the point of time when Hasina Bi learnt of the damage to her property as a result of contamination of the plant and whether she was entitled to damages on that basis. Further, the District Judge now called upon the plaintiffs to produce before him any assurance by the Government of India and the State of Madhya Pradesh that they would cooperate in the clean up of the plant site as a prelude to his considering the possibility of granting such injunctive relief.

#### *Delayed response of Union of India*

6.3.9 This led to a flurry of activity. To begin with the lawyer for the plaintiffs in the US Courts, H. Rajan Sharma addressed a letter dated April 9, 2004 to the Attorney General for India, Soli Sorabjee, drawing his attention to order of the US Court of Appeal and requesting for to send a communication to the District Court simply stating that "there is no objection to Union Carbide paying for and undertaking the cleanup of the badly contaminated plant site in

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<sup>279</sup> The summarizing of the findings of Judge Keenan are set out in the judgment of the US Court of Appeals for the Second Circuit in its judgment dated March 17, 2004 in *Sajida Banu v. UCC and Anr.*

<sup>280</sup> *Id.* at unnumbered page \_\_\_\_.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

order to remove the source of the contamination in the area.”<sup>283</sup> However, the Government of India and the Government of Madhya Pradesh refused to oblige by sending this simple communication, which had to be sent by June 30, 2004. A letter dated May 5, 2004 was sent by the International Campaign for Justice in Bhopal to the Government of India repeating the request and pointing out that “By making Union Carbide pay for clean-up, the Indian Government is in a position to make Bhopal a demonstration of the best practices in remediation of contaminated sites, and build capacity within the Indian regulatory and scientific systems to deal with such problems elsewhere.”<sup>284</sup> Even this did not persuade the Government of India.

6.3.10 It required the victims and representatives of the victim groups to come to New Delhi, sit on a fast and make numerous visits to the offices of the Government of India and meetings with the Union Law Minister to make them finally relent and send a letter on June 29, 2004 to the Court of the Southern District of New York communicating the no objection of the Government of India to the clean up of the plant site if so directed to be done by the UCC.

6.3.11 The victim groups are now trying to gather and place facts concerning other possible Bhopal gas victims who could be plaintiffs in the class action in the US Court.

## **6.4 PIL IN THE SUPREME COURT CONCERNING HAZARDOUS WASTES**

6.4.1 The general indifference by the state to the problems posed by the dumping of large quantities of hazardous wastes by industries, compounded by the non-implementation of the Hazardous Wastes (Management and Handling) Rules, 1989 led to the filing of a PIL in 1995 by the Research Foundation for Science Technology in the Supreme Court. By an order dated October 14, 2003,<sup>285</sup> reiterated the applicability of the precautionary principle and the polluter pays principle which have become part of the Indian law.<sup>286</sup> The court also accepted the recommendations made by the High Powered Committee (HPC) constituted by the court earlier. It took note of the report of the HPC which inter alia referred to the law enacted in the USA in the wake of the Bhopal gas tragedy, namely, Emergency Planning and Community Right to Act, 1986 which required preparation of emergency response plans by the companies with involvement of local community. The court also noted that “though Bhopal gas tragedy took place in our country, no such legislation has been enacted so far.”<sup>287</sup> A monitoring committee was constituted by the court to oversee that there was a timely implementation of the court’s further directions which inter alia required preparation of inventories in the various states of waste dump sites and the rehabilitation plan. The monitoring committee has since visited the Bhopal plant site and taken note of the need for clean up.

## **6.5 MAJOR LEGISLATIVE CHANGES**

6.5.1 The *Environment Protection Act, 1986* made in the background of the Bhopal Gas Leak Disaster. Although, the statement of objects and reasons does not mention it and merely states that “it was found necessary to enact a comprehensive law on the subject to implement

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<sup>283</sup> Letter dated April 9, 2004 by H. Rajan Sharma to Soli Sorabjee, Attorney General for India.

<sup>284</sup> Letter dated May 5, 2004 by the ICJB to the Government of India.

<sup>285</sup> *Research Foundation for Science Technology v. Union of India* (2003) 9 SCALE 301.

<sup>286</sup> Reference was made to the Tanneries case [*Vellore Citizens’ Welfare Forum v. Union of India* (1996) 5 SCC 647] and *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) 2 SCC 79.

<sup>287</sup> *Supra* note 43 at 320.

the decisions of the United Nations Conference on the human environment held in Stockholm in June 1972”, the catalyzing event clearly was the Bhopal gas leak disaster. The Act penalizes violations with imprisonment for a term which may extend to 5 years or fine which may extend to one lakh rupees, or with both.<sup>288</sup> In addition, where the offender is a company, every person who, at the time the offence was committed, was directly in-charge of, and was responsible to the company for the conduct of the business of the company as well as the company shall be “deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.”<sup>289</sup> In addition, under the *Environment (Protection) Rules* a number of environmental standards, industry-wise, have been prescribed in the schedules. Further, under Rules 6, 8 and 25 of the Act, the Central Government has been empowered to make rules for regulating environment pollution for different areas. In terms of the EPA, a large number of rules have been made. What is immediately relevant and clearly inspired by the Bhopal gas disaster are the *Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996* which constitutes a hierarchy of Crisis Groups and the Central, State, District and local levels. Among the list of hazardous and toxic chemicals listed out in part II of schedule I to the Rules is methyl isocyanate (MIC) at serial no.268. Then we have the *Manufacture, Storage and Import of Hazardous Chemicals Rules, 1998* which talks of the general responsibilities of the occupier in control of an industrial activity and the obligation regarding notification of major accident. These rules require preparation of safety reports and safety audit reports, onsite emergency plans by the occupier and requirement by the occupier mandatorily to “take appropriate steps to inform persons outside the site either directly or through District Emergency Authority who are likely to be in an area which may be affected by a major accident about: (a) the nature of the major accident hazard; and (b) the safety measures and the “Dos” and “Don’ts” which should be adopted in the event of major accident.”<sup>290</sup>

6.5.2 Among the chemicals named in the schedule to these rules in the list of toxic and hazardous chemicals is MIC. Then there are the *Hazardous Wastes (Management and Handling) Rules* which list out the wastes in Schedule II which includes “inorganic cyanide compounds” and naphthalene.

6.5.3 All the above statutory instruments have come about clearly as a result of the Bhopal gas disaster.

6.5.4 Although, the *Air (Prevention and Control of Pollution) Act, 1981* and the 1983 Rules made thereunder as well as the *Water (Prevention and Control of Pollution) Act, 1974* and the 1975 Rules thereunder were all in force at the time of the Bhopal gas leak disaster, it is clear that no action whatsoever was initiated against the UCC or UCIL under the statutes. The reasons for this will remain a mystery.

6.5.5 The other statute which has witnessed changes as a result of the Bhopal gas leak disaster is the *Factories Act, 1948* in which a whole chapter has been introduced to provide

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<sup>288</sup> S.15 of the Environment (Protection) Act, 1986.

<sup>289</sup> S.16 of the Environment (Protection) Act, 1986. S.17 envisages offences by government departments themselves.

<sup>290</sup> Rule 15.

for adequate warnings to be given to the neighbourhood of a factory about the health and safety hazard caused by the running of the factory.<sup>291</sup>

## 6.6 ENVIRONMENT JURISPRUDENCE

6.6.1 Since the Bhopal gas leak disaster, the Supreme Court of India has responded in an activist mode in PIL concerning environmental issues. Many of the known principles of international environmental law have now become part of the Indian environmental jurisprudence. The Polluter Pays Principle was developed in the decision in *Vellore Citizens Welfare Forum v. Union of India*<sup>292</sup> (hereafter *Tanneries Case*). There the court found that the pollution caused by 900 leather tanning units in Tamil Nadu had caused extensive damage to the ground water sources over a vast area. Despite taking note of the fact that the leather industry was a major foreign exchange earner, the court was constrained to order closure of the polluting units since the leather industry “has no right to destroy the ecology, degrade the environment and pose a health hazard. It cannot be permitted to expand or even continue with the present production unless it tackles by itself the problem of pollution created by it.”<sup>293</sup> Apart from the deterrent pollution fines that were directed to be paid by the erring units, they were made to set up on a time-bound schedule, common effluent treatment plants to prevent any further damage to the water sources. The polluter pays principle has been applied in the *Bichhri Case*,<sup>294</sup> and in cases concerning shrimp farms,<sup>295</sup> distillery units in Tamil Nadu,<sup>296</sup> polluting units in Andhra Pradesh<sup>297</sup> and more recently multinational soft drinks manufacturers guilty of defacing the rocks of the hill sides of Himachal Pradesh by indiscriminate painting of advertisement hoardings.<sup>298</sup>

### Precautionary Principle

6.6.2 The *Tanneries Case* witnessed the court delineate the precautionary principle which required state authorities to “anticipate, prevent and attack the causes of environmental degradation.”<sup>299</sup> This principle was applied by the court to strike down the notification issued by the Government of Andhra Pradesh exempting an oil industry located in the vicinity of two major water reservoirs from the purview of an earlier ban imposed on the setting up of such units within a 10k.m. radius of the two reservoirs. The incontrovertible evidence contained in the scientific reports of independent expert bodies showed that there was every possibility that the unit would pose a potential threat to the major drinking water source and that, in such circumstances, “an order of exemption carelessly passed, ignoring the ‘precautionary principle’, could be catastrophic.”<sup>300</sup> At the initial stage of this case, the court

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<sup>291</sup> The two statutes that deal with the aspect of payment of compensation, i.e., the Public Liability Insurance Act, 1991 (as regards interim compensation) and the National Environmental Tribunals Act, 1995 (as regards payment of final compensation) are discussed in an earlier chapter.

<sup>292</sup> (1996) 5 SCC 647.

<sup>293</sup> *Id.* at 657.

<sup>294</sup> *Supra* note 11.

<sup>295</sup> *S.Jagannath v. Union of India* (1997) 2 SCC 87.

<sup>296</sup> *In Re: Bhavani River-Shakti Sugars Ltd.* (1998) 6 SCC 335.

<sup>297</sup> See for e.g., *Indian Council for Enviro-Legal Action v. Union of India* (1995) 3 SCC 77 where a compensation package was worked out for farmers affected by their only source of irrigation, a river in Andhra Pradesh, was polluted by discharge of untreated effluents by industries alongside its banks and

<sup>298</sup> *T.N.Godavarman Tirumalpad v. Union of India* (2002) 7 SCALE 417 and 419.

<sup>299</sup> *Supra* note 12 at 658.

<sup>300</sup> *A.P.Pollution Control Board (II) v. Prof. M.V.Nayudu* (2001) 2 SCC 62 at 79. More recently, the Supreme Court declared as illegal the action of the Government of Karnataka excluding the land brought under



had occasion to explain that the inadequacies of science in being able to assimilate the impact of environmental harm had led to the replacement of the “assimilative capacity” rule with the precautionary principle. This in turn had led to the “special principle of burden of proof in environmental cases where burden as to the absence of injurious effects of the actions proposed is placed on those who want to change the status quo.”<sup>301</sup> Applying this principle to the case, the court found that the industrial unit question had failed to discharge the onus of showing that there would be no danger of pollution even if it adopted the suggested safety measures.

## 6.7 QUESTIONS CONCERNING ENVIRONMENTAL ISSUES

6.7.1 Several questions arise in the context of the claims arising from environmental damage caused and still being caused on account of the UCIL plant at Bhopal. First, the inexplicable inaction on the part of the State. It will remain a mystery why neither the Union of India nor the State of Madhya Pradesh did not make any attempt to pursue any claim for environmental damage as a result of the gas leak disaster. It cannot be said that the Union of India was unaware of the environmental damage caused by UCIL and UCC. This is clear from the fact that the scheme under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 envisages claims be made not only for death and injury but also for environment damage. Further, although in its plaint in the Court of the District Judge, Bhopal, the Union of India mentioned that its claim was also for “extensive damage to personal and business property resulting in disruption of industrial, commercial and governmental activities throughout the city of Bhopal, the adjacent countryside and its environs...”<sup>302</sup> As well as “widespread damage” caused to “the environment in and around Bhopal and to living cattle there”<sup>303</sup>, when the settlement was arrived at between the UCC and the Union of India, no amount was quantified in earmarked for environmental damage. This is clear from the terms of settlement produced by both UCC and Union of India jointly before the Supreme Court.<sup>304</sup>

6.7.2 Second, the failure of the state to mandate clean up of the site and protect the already exposed population. The above narrative also shows that despite both Union of India and the State of Madhya Pradesh being in the know of the attempts to clean up the plant site, even after the settlement and up to 1998 when the land was handed back to the State of Madhya Pradesh, neither of them bothered to either inform the public or take any steps for cleaning up the environment, making a claim against the UCC and the UCIL, or moving the court for directions to them to restore the land to its original condition. What is worse, was that the Union of India and the State of Madhya Pradesh displayed total indifference to the happenings in the United States as regards the claims filed by Sajida Bano. Even when all that was required was for both governments to give a statement to the court in the US that they had no objection to the UCC being directed to do the clean up and that they would cooperate in the implementation of such an order, the two governments dithered and it required protests and a hunger strike to make them relent and see reason.

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mining by the Kudremukh Iron Ore Company Ltd. excluded from the purview of notification issued under s.35 (1) of the Wildlife (Protection) Act 1972 declaring the Kudremukh National Park to be a national park: *T.N.Godavarman Tirumalpad v. Union of India* (2002) 8 SCALE 204.

<sup>301</sup> *A.P. Pollution Control Board v. Prof. M.V.Nayudu* (1999) 2 SCC 718 at 734-35.

<sup>302</sup> Para 39 as set out in Upendra Baxi, *Valiant Victims*, 9.

<sup>303</sup> *Id.* in para 40 (h) of the plaint it is averred that UCC was obliged to provide emergency aid and relief including “H. expenditure for monitoring the environment, including plants and vegetation.”

<sup>304</sup> *UCC v. Union of India* (1989) 1 SCC 674.

6.7.3 The litigation in the US also indicates that enforcing liability against a polluting multinational corporation, whose operations cause extensive damage in a country outside of US, is a long drawn and cumbersome affair. The courts in the US are more inclined to accept the motions to dismiss filed by the delinquent MNC on technical grounds like limitation and jurisdiction and it is difficult for non US citizens to enforce liability for environmental damage against US corporations. The degree of proof required envisages detailed documentation and an ability to sustain the litigation over a long period of time. This would in turn require commitment of financial resources which may not be forthcoming except where litigation is conducted on a contingency fee basis. As things presently stand, corporations and businesses are more likely to succeed in thwarting litigation in courts through the device of technical defences by employing the best possible legal talent. It is an unequal battle both within and outside the courts. As regards, the ability to lobby with the state for legislative changes and stricter standards, it has been a losing battle for victims and victims groups. In India at least, far from tightening the statutory framework concerning protection of the environment, there has been an indifference displayed towards enforcement of the existing law. This has necessitated PIL, the impact of which remains to be assessed.

## CONCLUSION

### *A litany of failures*

When the lethal MIC gas leaked from the factory of Union Carbide India Limited (now Eveready Industries India Limited) on the intervening night of December 2/ 3, 1984, it triggered off not just one mass disaster, but several of them. Twenty years after the event, we have voluminous data that reveals a mind-boggling myriad of multiple disasters on several fronts. These have not been accounted for in assessing the pain and suffering undergone by the victims. It does not require any complex analysis to announce the failure of the existing system – administrative, legal and medical – to cope with the tragedy.

This Report demonstrates how the fundamental assumptions about the working of the Indian legal system, projected in the court of Judge Keenan in New York way back in 1985, were seriously flawed. It is clear now that UCC's expert witness in those proceedings, Nani Palkhivala, was way off the mark when he glibly asserted on affidavit: "There is no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation."<sup>305</sup> He compounded this with an undeserved praise of the Indian Bar. He took umbrage to the criticism of the Indian Bar in the affidavit of Union of India's expert Marc S. Galanter which had stated that "The pessimism and passivity that Bhopal has inspired in India's leading lawyers is a realistic recognition that it calls for a kind of law practice worlds away from the individualistic doctrine-centered courtroom advocacy that makes up their repertoire."<sup>306</sup> Palkhivala retorted: "To say that the Bar in India is ill-equipped to deal with the Bhopal cases is a slanderous reflection on the legal profession in India, unredeemable by the plea of truth."<sup>307</sup>

The truth is now plain for everyone to see. Few would now disagree with Marc Galanter that "At its best, the Indian legal system's treatment of civil claims is slow and cumbrous...

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<sup>305</sup> Affidavit dated December 18, 1985 of Nani Ardeshir Palkhivala in support of defendant UCC's motion for dismissal on Forum Non Conveniens Grounds – reproduced in Upendra Baxi and Thomas Paul (prepared) **Mass Disasters and Multinational Liability: The Bhopal Case**, N.M. Tripathi (1986) 222 at 225.

<sup>306</sup> Affidavit dated December 5, 1985 of Marc Selig Galanter in support of Union of India's Claim, reproduced in **Mass Disasters**, p.161 at 185-186.

<sup>307</sup> *Supra* note 1 at 226.

Complex and innovative litigation beyond the experience of lawyers and judges, involving many parties, vast amounts of evidence, the need for judicial rulings on many points for procedure, evidence, liability and damages, would multiply the possibilities of delay.”<sup>308</sup>

Wrong too was the Supreme Court which justified its acceptance of the settlement on February 14, 1989 on the ground that “this court, considered it a compelling duty, both judicial and humane, to secure **immediate relief** to the victims.”<sup>309</sup> Twenty years after the settlement, neither has the relief to the victim been adequate nor immediate. The presumptions on which the settlement was worked out, 3,000 dead and 100,000 injured, were under-estimations five times the actual figures. Though later orders of the Supreme Court directing monitoring of medical relief and disbursement of balance compensation may be seen as an exercise of a jurisdiction of atonement, there are no easy answers to the failures of the judicial system that have irredeemably re-victimised the Bhopal gas victim.

There have been failures in acknowledging the victims of the disaster by the devices of exclusion, arbitrary categorization and arbitrary re-categorisation. Further, the costs and losses arising out of the Bhopal gas leak disaster have had to be borne by the victim. As pointed out by a legal scholar “There is considerable neglect of the costs that are generated in an accident or disaster which, therefore, remains beyond the reckoning that is undertaken in determining compensation. The externalizing of losses and costs, apart from making of compensation an inadequate guide to understanding the cost of the accident or disaster, also reveals the law’s expectation that a victim bear a part of the cost. The consequent impoverishment that results is not, it would appear, within the law’s ken.”<sup>310</sup>

The failure to develop a jurisprudence to deal with the legal issues arising out of a mass disaster is clearly inexcusable particularly when the status of risk and safety in Indian industry is no better than it was in 1984. Developing a law is only part of the solution, implementing it effectively would be an even greater challenge. The medical profession too requires to introspect its failures in providing appropriate relief to the gas victim. The situation has called for an interdisciplinary approach which has sadly not been forthcoming. Ultimately, the lack of informed response by civil society to the disaster will continue to remain the biggest barrier to justice for the Bhopal gas victim and several others who continue to languish amidst unsafe and hostile environments.

#### *Pending cases*

Those who ask if the cases concerning the Bhopal gas disaster are not yet concluded, need to be informed that they should not conclude till justice has been done to every victim. Each strand of litigation is pending at various stages and the questions that have arisen remain unsatisfactorily answered.

As regards the payment of compensation, the outstanding issues concern the implementation of the order dated October 26, 2004 passed by the Supreme Court directing disbursement of the balance compensation. It remains to be seen whether Union of India will be asked to make good the deficit in the payment of compensation to every other victim whose claims have either been rejected or not processed at all.

The criminal case is far from concluded. The trial of the Indian accused in the Court of the CJM, Bhopal for the offence under s.304A IPC is likely to go on for at least 2 more years. It

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<sup>308</sup> *Supra* note 2 at 178.

<sup>309</sup> *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38 at 43.

<sup>310</sup> Usha Ramanathan, **A Critical Analysis of the Laws Relating to Compensation for Personal Injury**, Thesis submitted for the Degree of Doctor of Philosophy, Delhi University (September 2001), 356.

is anybody's guess whether the ultimate result of the trial would satisfy either the prosecution or the accused. It is likely that further rounds of litigation by way of appeal will ensue. As regards the absconding accused, Warren Anderson, UCC and UCC (E), the belated attempt by the Union of India to seek explanation of Warren Anderson has already met a roadblock. It remains to be seen whether the Union of India will pursue its case any further.

The medical and health issues facing the Bhopal gas victims have finally received an acknowledgment in the proceedings in the Supreme Court. The Advisory Committee and the Monitoring Committee constituted by the court in August 2004 would have to become operational. The effectiveness of these overview mechanisms needs to be assessed.

The litigation concerning environmental pollution and the consequential demand for clean up of the toxic plant site at Bhopal has also entered a critical stage. Whether the victims will be able to show continuing damage to their person and property will to a large extent determine the outcome of this round of litigation in the US.

### *Unsettled truths*

The truths unraveled by court proceedings are indeed unsettling. First, the extent of concealment and subterfuge practised by UCC and UCIL in screening away from scrutiny the extent of risk to which the MIC plant at Bhopal was subjecting the local population. The enormous lies of the UCC and UCIL now stand exposed. It is indeed disturbing that despite the Union of India and the State of Madhya Pradesh knowing fully well the extent of contamination of the plant site, neither of those entities did anything at all to enforce the liabilities of the UCC and UCIL and claim damages under this head.

The settlement which the Supreme Court approved on February 14/ 15, 1989 stands severely flawed with every passing day. There now appears no possible justification for the order made on those two fateful dates. Every assumption on which the orders were based was wrong both on facts and on law. Notwithstanding the defiant posture of the Supreme Court in its review petition that its powers under Article 142 justified its approval of the settlement, which foreclosed all present and future civil and criminal claims, the court itself has had to reject the judgment in the review proceedings as an applicable precedent for future cases. The wrong remains an irremediable wrong. It bears repetition that the assumptions on which the settlement is approved was that the number of deaths was 3,000 and the number injured in the range of 1,00,000. In March 2003, the official figures of the awarded death claims stood at 15,180 and awarded injury claims at 5,53,015. The underestimation was slightly above 5 times. The range of compensation which was assumed in the settlement order would be payable was Rs.1 to 3 lakhs for a death claim, Rs.25,000/- to Rs.1 lakh for temporary disablement and Rs.50,000/- to Rs.2 lakhs for permanent disablement. Each death claim has been awarded not more than Rs.1 lakh and on an average an injury claim has been settled for as little as Rs.25,000/-.

The failure of the judiciary to account for the views of the Bhopal Gas victim has been pervasive. The failure to hear the victim has been at each of the followings stages:

- i. At the time approving the unjust settlement
- ii. At each stage of the criminal proceedings in the Court of the CJM, Bhopal, the High Court and the Supreme Court
- iii. At the stage of issuing directions for sale of the attached shares of UCC and release of the sale monies to the Sole Trustee of the Bhopal Hospital Trust.
- iv. At the stage of approving plans for the construction of Hospitals by the BHT.

v. At the stage of allowing the appeals of the Indian accused (Keshub Mahindra etc.) and converting the offence from S.304 (Part II) to S.304-A IPC.

Till date, there is no medical protocol for treating the respiratory and other problems faced by the Bhopal gas victims. Astonishingly, till date UCC has got away by refusing to disclose the exact composition of the deadly MIC concoction that leaked into the air on the intervening night of December 2/ 3, 1984 in Bhopal killing several thousands and injuring many more. It is possible, even today, for a multinational corporation to set up a plant to manufacture MIC in India and be completely absolved of any liability thanks to the Indian Parliament amending the Factories Act, 1948 in 1987 to introduce s.7B(5). If another gas leak takes place, there will be no binding principles of tortious liability evolved by the courts which can be applied to seek damages. For the courts and the lawyers, the Bhopal gas tragedy is not a precedent in tort law. Hazardous activity will be subsidized by the pitifully low valuation of the Indian life by the Indian law and adjudicatory processes themselves.

20 years after Bhopal, we are still struggling to enforce criminal liability of corporations. Bhopal makes this seem an impossibility. No attempt had been made to strengthen the criminal law regime – both substantive and procedural. Rogue corporations have little to fear if they operate from Indian soil.

The polluting corporation does not have to fear being saddled with clean up costs as long as it has an obliging state machinery that will help keep its dark secrets. In fact, by their inaction, the Government of India and the Government of Madhya Pradesh may have ensured that UCC is not saddled with any liability at all for the permanent environmental damage it has caused. The principles of environmental jurisprudence are good for Indian corporations but not for multinationals. Is anyone listening?

#### *The dramatis personae and their strategies*

First the invincible multinational corporation, the UCC. At every stage from its entry into India, UCC dictated the terms on which it would function. It was never asked inconvenient questions. It knew how to play the regulatory regime by breaking the rules and yet not having to answer for its actions. UCC benefited immensely from the cancerous spread of corruption through the administrative apparatus which looked the other way when everything about the UCIL plant in Bhopal was wrong.

UCC resorted to every known tactic in the lawyers' book. First, it went into a denial mode. Then, it blamed the event on an alleged sabotage by a disgruntled worker. Then, when that did not wash, it bought its way out of the system by offering a settlement. It used the Indian law in the US courts, with the help of Indian legal experts, to beat the Indian plaintiffs. Hey presto! UCC successfully presented the *forum non conveniens* defence which was readily lapped up by Judge Keenan of the Southern District Court of New York.

Then, UCC hired the best available legal talent in India to put up a spirited defence in the civil proceedings. At every stage it was able to dictate the pace of the proceedings. If the case had to be heard immediately and by a bench of five Judges of the Supreme Court, it would. If the case had to be settled in the next 24 hours, it would. Even in the review proceedings, UCC never went on the back foot. It remained defiant till the end. UCC decided it would never submit to the criminal courts and it did not.

UCC decided to beat the orders of the CJM, Bhopal by creating a Trust and endowing it with all its shares in UCIL, to immunize it from impending attachment. And UCC succeeded. It was able to get the Supreme Court of India to lift the attachment, order the sale of those shares and use the money so obtained for constructing an expert medical facility of its choice and to be controlled by its chosen nominee, Sir Ian Percival. Effectively, there were no

barriers to UCC pursuing its agenda in the proceedings in Indian courts. Even in the new Trust set up to manage the hospital, BHT nominees are members.

Marc Galanter foresaw all of this in his seminal piece, “Why the ‘haves’ come out ahead: Speculations on the limits of legal change”<sup>311</sup> written three decades ago. In an empirical study of litigated tort cases in the US, Galanter demonstrated that the repeat players (RPs) could make the system work for them far more effectively than could the one-shotters (OSs). Galanter found that not only could RPs “play for rules as well as immediate gains”, but they could “also play for rules in litigation itself, whereas an OS is unlikely to.”<sup>312</sup> This is because, for an RP, “anything that will favourably influence the outcomes of future cases is a worthwhile result. The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of the same kind.”<sup>313</sup> Witness how UCC was able to use Article 142 of the Constitution to bend every known rule of constitutional, civil and criminal adjudication to justify the settlement.

The other players have learnt little from the Bhopal gas leak disaster litigation fiasco. The legal profession denied legal aid to the Bhopal gas victim. The failure to afford access to justice to the victim is lost on the lawyers. In handling the cases for compensation before the claims courts in Bhopal, the lawyers have resorted to contingency fee arrangements, just like they do in motor vehicle cases. While one set of lawyers have shown great concern about how the litigation will affect their livelihood and income, another set litigating in the Supreme Court have offered their services for victim groups pro bono. There has been no introspection on the widely divergent responses that the disaster has invoked in the bar.

The state machinery too has not seen the litigation at an opportunity to construct a core team of specialist lawyers to deal with such contingencies. The quality of lawyering on the side of the state has not been able to match that of those appearing for the multinational corporation. The state has not been able to bring about results favourable to itself in the litigation in the courts.

The judiciary is probably best aware that the entire litigation concerning the Bhopal gas disaster is a testimony to its inability to cope with the problem. It is yet to acknowledge that it is incapable of rendering complete justice to the victim given the constraints of resources and powers. There is every opportunity of learning from the innumerable mistakes committed in the course of the litigation concerning the Bhopal gas disaster and enter into a corrective phase. There is much more to be done in the jurisdiction of atonement.

### *Setting an agenda*

The list of steps to be undertaken collectively would indeed be a long one. What appears to be immediate, in the context of the legal issues arising out of the Bhopal gas leak disaster, can be summarized thus:

- Constructing an administrative and legal regime that is victim friendly and does not erect barriers to private initiatives. This follows from the experience of the Union of India taking over the entire litigation for enforcement of civil liability from the victim and to disastrous results.

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<sup>311</sup> *Law and Society Fall* 1974, 95.

<sup>312</sup> *Id.* at 100.

<sup>313</sup> *Ibid.*

- Evolving a comprehensive disaster management plan which examines the needs of those affected from the point of view of several disciplines. This would avoid a reductionist approach in dealing with the problems faced after the event.
- Reviewing thoroughly the statutory legal framework from the perspective of mass disasters that are man-made. The enforcement of the statutory obligations is another part of the same exercise that has to be undertaken simultaneously. This would involve weeding out of those provisions of statutes that provide impunity to corporate offenders.
- Putting in place an effective system of legal services and legal aid for those in the neighbourhood of factories and potential risk bearers. Spreading awareness about the risk of hazardous industrial activity among the affected populations should be a mandatory legal obligation of any enterprise undertaking such activity. This would also ensure the enforcement of the victim's right to information.
- The role of the State in avoiding its constitutional and statutory obligations requires severe interrogation. How do we ensure that the crisis management mechanisms, that are now required to be put in place by the State, are actually operational and effective?
- The role of the Indian legal system in general and the Indian judicial system in particular calls for systemic changes that place the victim of a mass disaster at the centre and not merely incidental to the functioning of the system. A reorientation of both the judiciary as well as the legal profession in their response to mass disasters is imperative. It is possible to involve the disciplinary bodies of lawyers and the judicial academies both at the centre and the states in this exercise.
- Corporate accountability mechanisms required to be built into the law, both civil and criminal. The PLIA requires to be enforced strictly and strengthened to cover a wider range of situations in which industrial disasters take place. The law ought not to permit the costs and losses to be borne by the victim but by the tortfeasor. Processes that ensure the avoidance of risk and promote the requirements of safety ought to be made mandatory by appropriately amending the applicable statutes that govern the functioning of enterprises.

It is indeed a disturbing thought that if another Bhopal would be happen today, we may not be responding differently despite the knowledge of earlier failures. The reluctance to act cannot be explained except on the anvil of the dichotomy of 'us' and 'them'. If indeed, the wind on the intervening night of December 2/ 3 1984 had blown in a different direction, it is possible that attitudes and systems may have changed by now.

It is appropriate to recall the words of Prof. Upendra Baxi: "The broken world of Bhopal victims invites a jurisprudence of human solidarity."<sup>314</sup> It is indeed a tribute to the resilience and spirit of the Bhopal gas victim that has made her endure the agonizing suffering over all these years. It also calls for a salute to the perseverance of the victim in hoping and waiting for justice. We can ill afford complacency and pessimism in responding to their needs.

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<sup>314</sup> Upendra Baxi, 'Introduction', **Valiant Victims and Lethal Litigation: The Bhopal Case**, Indian Law Institute (1990) lxix.