Chapter – 6

Right to Clean and Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

‘I realise that some of my criticisms may be mistaken; but to refuse to criticize judgments for fear of being mistaken is to abandon criticism altogether... If any of my criticisms are found to be correct, the cause is served; and if any are found to be incorrect the very process of finding out my mistakes must lead to the discovery of the right reasons, or better reasons than I have been able to give, and the cause is served just as well.”

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Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

The Frame
This chapter discusses the manner in which Indian Judiciary has, through its innovative interpretation, integrated right to clean and healthy environment as an integral part of right to life u/A 21 of the Indian Constitution. It briefly discusses the role of Public Interest Litigation (PIL) in facilitation of such interpretation. It analyses the peculiar difficulties faced by Indian Judiciary in resolving intricate issues posed by corporations generally and TNCs in particular regarding violation of right to clean and healthy environment.

The Focus
This chapter focuses on deciphering judicial approach in India, as reflected through its judgments, for enforcing accountability of TNCs for their violations of right to clean and healthy environment.

The Objective
The objective of the chapter is to develop an understanding of the judicial approach towards fixing accountability of TNCs for the violation of right to clean and healthy environment by them in India.

6.1 Introduction
In a democratic society like India, people’s trust in judiciary is the *sine qua non* for the rule of law. While enacting law is the function of legislature, interpreting the same law is the function of judiciary. Judicious interpretation of the law has played crucial role in the development of any nation. A good interpretation, in consonance with the requirements of fast changing society, can instill life into law and give it vitality to continue for many generations. Therefore, judicial independence is a carefully crafted and meticulously guarded feature of a democratic society.

6.2 Pre-independence Judicial Approach towards Right to Clean and Healthy Environment
During the colonial period, people were not much conscious about using provisions contained in various enactments for protecting environment. Therefore, they did not
frequently invoke them. Nevertheless, there were few judgments which provided some insights regarding judicial approach under this period.

In *Deshi Sugar Mill v Tupsi Kahar*² nearly a hundred persons living in the neighbourhood of the river *Daha* filed petition that two mills (namely – New Sugar Mill and Deshi Sugar Mills) have discharged effluents polluting the river. Court held that ‘sources of public water supply must be maintained pure and free from pollution by industrial factories’ and Sec. 133 of CrPC empowered the court to pass an order to prohibit discharge of an effluent into a river injurious to community’s health. However, court quashed the order due to lack of conclusive evidence. In *Raghunandan v Emperor*³ a complaint was filed alleging noise produced by machine in a factory causing public nuisance u/s 133 CrPC. Court concluded that noise made by working of engine was absolutely intolerable and a serious nuisance not only to complainant but also to neighbours preventing them from sleeping in night and concentrating on their work during the day. Courts continued to apply this provision even after many special laws relating to environment came into operation.⁴

### 6.3 Post-independence Judicial Approach towards Right to Clean and Healthy Environment

Indian Constitution has created independent judiciary entrusted with the paramount task of interpreting it.⁵ It has made Indian Supreme Court multi-jurisdictional⁶ and has entrusted Indian judiciary with the power of reviewing not only an administrative action but even a legislative action.⁷ Coupled with its control over appointment of judiciary⁸, power of Indian Supreme Court is unprecedented and unparalleled in the

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² [MANU/BH/0019/1925](#).
³ [AIR 1931 All. 433](#).
⁴ Few notable instances include – *Ram Singh (Dr.) v Babulal* AIR 1982 All. 285; *Gobind Singh v Shanti Swaroop* AIR 1979 SC 143; *Municipal Council Ratlam v Vardhiram* AIR 1980 SC 1622.
⁵ *WSSD: Johannesburg Principles on the Role of Law and Sustainable Development* affirmed ‘an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law’. Principles were adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002. See <http://www.dirco.gov.za/docs/2002/wssd0828a.htm> accessed 1 May 2017.
⁶ [MP Jain, Indian Constitutional Law (7th edn reprint, LexisNexis 2016) 204](#).
⁷ Supreme Court has held Judicial Review as part of the basic structure of the Constitution. See *L. Chandra Kumar v Union of India* AIR 1997 SC 1125, 1150.
⁸ Appointment of judges by Collegium System (comprising judges themselves) was introduced by *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 (Second Judges case) overruling *S.P. Gupta v Union of India* 1981 (Supp) SCC 87 (First Judges Case).
world, making it the most powerful one. In a country with abject poverty and illiteracy, such conferment is well conceived since Supreme Court is required to perform the role of custodian of Indian Constitution. Imposition of emergency in 1970s posed the most formidable challenge to the judicial independence in India and seemed to have hardened judicial resolve to reassert its independence post-emergency. Independent judiciary has emerged (as subsequent discussion will show) as the most potent instrument for upholding constitutional values and transforming judicial process particularly with respect to the right to clean and healthy environment (like many other human rights) and upholding the same. The judicial approach may be classified into following two phases –

6.3.1 First Phase (Compartmentalising Fundamental Rights and Directive Principles)

First phase was marked by adoption of compartmentalised approach by Supreme Court in interpreting Fundamental Rights and Directive Principles of State Policy (Directive Principles). Supreme Court held that in the event of any conflict between Fundamental Rights and Directive Principles, the former will prevail over the latter. Supreme Court did not use the aid of Directive Principles to interpret Fundamental Rights. It treated them as two separate compartments which were not inter-connected with each other.

System was reaffirmed and its composition enlarged in In Re: Special Reference No.1 of 1998 (1998) 7 SCC 739 (Third Judges case) and recently upheld in Supreme Court Advocates-on-Record Association v Union of India 2016 (5) SCC 1 (Fourth Judges case).

9 Jain (n 6) 18. See also ‘The range of judicial review recognised in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law.’ As per RS Pathak CJ. in Union of India v Raghbir Singh (Dead) By Lrs. Etc. 1989 AIR 1933, 1938.

10 ‘The Directive Principles of the State Policy, which by Art. 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III (Fundamental Rights) which, notwithstanding other provisions are expressly made enforceable by appropriate writs, orders or directions under Articles 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights’. As per SR Das J. in The State of Madras v Smt. Champakam Dorairajan AIR 1951 SC 226, 228. Court followed the same position in Mohd. Hanif Quareshi v Bihar AIR 1958 SC 731, In re Kerala Education Bill, AIR 1958 SC 956 and later in Rustom Cavasjee Cooper v Union of India AIR 1970 SC 564.
6.3.2 Second Phase (Harmonising Fundamental Rights with Directive Principles)

In the Second Phase, Supreme Court exhibited innovativeness of interpretation which was marked by twin characteristic features – firstly, Supreme Court abandoned the compartmentalized approach and started using the aid of Directive Principles to determine the ambit and scope of Fundamental Rights.11 Granville Austin provided Supreme Court a potent tool for this purpose by identifying conscience of Indian Constitution in Part III and IV. 12 The new harmonious approach was finally settled by Supreme Court in Minerva Mills Ltd. v Union of India13 by holding 42nd amendment (which gave priority to all Directive Principles over Fundamental Rights) as unconstitutional.

Supreme Court’s interpretation of Art. 21 presented classical exposition of such an approach. Court set the stage of transformation of Art. 21 by overruling A.K. Gopalan v State of Madras14 in Maneka Gandhi v Union of India15 when it held that Art. 14, 19 and 21 are not mutually exclusive and any law providing procedure for depriving personal liberty must meet the requirements of Art. 19 as well as Art. 14. As a result, Art. 21 came to be characterized as ‘procedural Magna Carta protective of life and

11 ‘We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other’. As per KS Hegde J. in Chandra Bhavan Boarding and Lodging, Bangalore v The State of Mysore 1969 (3) SCC 84, 93.
12 “The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Part III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the constitution. The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles thus connect India’s future, present, and past, adding greatly to the significance of their inclusion in the constitution.’ Granville Austin, The Indian Constitution: Cornerstone of a Nation (14th edn, Oxford University Press 2014) 63.
13 ‘The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin’s observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. Snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony and the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.’ As per YV Chandrachud CJ. AIR 1980 SC 1789, 1806.
14 AIR 1950 SC 27.
15 AIR 1978 SC 597.
Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

Supreme Court rightly understood meaning of ‘life’ in Art. 21 as ‘something more than mere animal existence… extends to all those limbs and faculties by which life is enjoyed.’ The following observations of Supreme Court expressed true ambit of the meaning of right to life –

But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

The above understanding of right to life proved the basis for broadening its scope to include certain Directive Principles as its integral part on a case to case basis. In

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16 As per VR Krishna Iyer J. in P.S.R. Sadhanantham v Arunachalam AIR 1980 SC 856, 858.
18 As per PN Bhagwati J. in Francis Coralie Mullin v Administrator, Union Territory of Delhi AIR 1981 SC 746, 753.
case of infringement of a fundamental right, Supreme Court has recognised its power to award compensation u/A 32.\(^{20}\)

Secondly, Supreme Court relaxed the rule of *locus standi* and permitted a public spirited citizen to knock its door in case of violation of fundamental right to access justice on behalf of those who were otherwise incapable of accessing it due to their impoverishment, illiteracy etc.\(^{21}\) Such relaxation led to emergence of the Public Interest Litigation (PIL) movement in India championed by social activists who approached the court seeking its intervention against the State’s apathy towards their plight and encouraged at the same time by the approach of Supreme Court. It led to the transformation in the perception of people about the very *raison d’etre* of the Supreme Court itself.\(^{22}\) PIL called for non-adversarial response of the State thereto.\(^{23}\)

Supreme Court issued interim orders, appointed commissions to ascertain true facts, appointed *amici curiae* to provide expert inputs, showed preparedness to monitor compliance with its directions in order to do complete justice. But at the same time,


\(^{21}\) ‘But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.’ As per PN Bhagwati J. in *Bandhua Mukti Morcha v Union of India* 1984 (3) SCC 161, 190.

\(^{22}\) Renowned Indian jurist Prof. Upendra Baxi remarked ‘The Supreme Court of India is at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians.’ See Upendra Baxi, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ (1985) Vol. 4, Article 6 Third World Legal Studies <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1125&context=twls> accessed 4 May 2017.

\(^{23}\) ‘We have on more occasions than one said that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have notes and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives.’ As per PN Bhagwati J. (n 21) 183.
concerns have been raised like – delay; frequent issue of directions without any judicial monitoring resulting in their non-implementation. This sentiment is well expressed in the following observation:

In many cases, though rekshaks (protector) became bhakshaks (killers) with their unresponsive, irresponsible and misresponsive attitude, but the court coolly digested the matter, forgetting its constitutional oath, obligations and sanction. The piecemeal orders did not allow fabrication of a comprehensive environmental justice. The ancient Indian environmental culture, heritage and lessons of yesteryear hardly catch the eye of the judges.

Nevertheless, PIL has been regarded as a ‘testament to Indian democracy and invaluable tool in addressing executive inaction.

### 6.4 Judicial Craftsmanship of Integrating the Right to Clean and Healthy Environment as Part of Right to Life u/A 21

Integration of right to clean and healthy environment in right to life u/A 21 has been the result of a combination of Supreme Court’s willingness and long drawn struggle on the part of social activists. Variety of regulatory instruments have been used in India particularly after 1970 but they, by and large, remained unenforced or mismanaged resulting in NGOs knocking doors of the judiciary for their effective implementation. First indication of Supreme Court taking environmental concerns into considerations came in the form of a PIL in Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh. However, the real basis of assertion of its jurisdiction in environmental matters was disclosed by the Supreme Court nearly three years later in Subhash Kumar v State of Bihar. Petitioner alleged that Tata Iron & Steel Co. Ltd. was discharging effluents in the Bokaro river which had rendered its water unfit for either drinking or agricultural purposes and accordingly sought directions against the Director of Collieries, West Bokaro Collieries as well as the

27 AIR 1985 SC 652.
28 AIR 1991 SC 420.
company to stop such discharge. Respondents contended that effective steps had already been taken to prevent such discharge and there was no discharge at present. They further pointed out that Bokaro river remain dry for nine months in a year. Supreme Court declared that right to clean and healthy environment is an integral part of Right to life u/A 21. Nearly three years later, Supreme Court again reiterated this position. After nearly five years, Supreme Court in Vellore Citizens Welfare Forum v Union of India was confronted with a PIL pointing towards enormous untreated effluents from around 900 tanneries and other industries being discharged into agricultural fields, road-sides, waterways, open lands and finally into river Palar polluting its entire surface and sub-soil water and thereby causing non-availability of potable water to inhabitants in Tamil Nadu. It held that ‘precautionary principle’ and ‘polluter pays principle’ are integral part of Indian environmental law having regard to its constitutional and statutory framework. According to the Court, even otherwise, these principles have become part of domestic law by virtue of their acceptance as part of customary international law. Supreme Court reiterated this position nearly three years later in A.P. Pollution Control Board v Prof. M.V. Nayadu (Retd.) in reference to an impugned decision of A.P. Pollution Control Board rejecting

29 Supreme Court observed:
‘The word ‘environment’ is of broad spectrum which brings within its ambit, “hygienic atmosphere and ecological balance”. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Art. 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution etc. should be regarded as amounting to violation of Art. 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.’ Virendra Gaur v State of Haryana 1995 (2) SCC 577, 580.

30 ‘In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.’ As per Kuldip Singh J. ibid 2722.

31 AIR 1999 SC 812.
application of M/s Surana Oils and Derivatives (India) Ltd. for setting up industry for production of B.S.S. Castor Oil derivatives. Rejection came in the wake of GOM 192 dated 31 March 1994 which prohibited various types of development within 10 km radius of two lakes (Himayat Sagar & Osman Sagar). Supreme Court further elaborated on the meaning of ‘precautionary principle’ and ‘polluter pays principle’ with the aim of enhancing their appropriate application by the concerned authorities including courts. The above judgments of Supreme Court unambiguously clarified that right to clean and healthy environment is an integral part of right to life u/A 21 of Indian Constitution. Since then, Supreme Court has based many of its leading judgments on the right to clean and healthy environment.

Recently, Supreme Court in Sterlite Industries (India) Ltd. v Union of India (UOI) justified imposition of hefty fine on a company. Environmental clearance granted to the company was challenged before Madras High Court which directed closure of its plant. Supreme Court imposed compensation of ₹ 100 crores on the company for causing air and water pollution by its operations during 1997-2012. It justified the amount fixed as a deterrent on the basis of application of principle of absolute liability – more prosperous the enterprise, greater the quantum. However, Supreme Court overruled High Court judgment ordering closure of plant for various reasons, namely – 29 out of 30 directions issued by Tamil Nadu Pollution Control Board (TNPCB) on the basis of Report of National Environmental Engineering Research Institute (NEERI) were complied with remediying pollution; interests of 1300 employees of plant as well as contractual employees; dependence of ancillary industries; huge revenue to Central and State Governments (excise duties, custom duties, income tax and VAT) and contribution to 10% of total cargo volume of Tuticorin port.

Supreme Court in M.C. Mehta v Kamal Nath delivered another leading judgment when it took suo motu cognizance of a news report published in Indian Express highlighting environmental degradation caused by Span Motels Pvt. Ltd. (owner of

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33 ‘Vellore judgment has referred to these principles briefly but, in our view, it is necessary to explain their meaning in more detail, so that Courts and tribunals or environmental authorities can properly apply the said principles in the matters which come before them.’ As per M Jagannadha Rao J. ibid 820.


35 ibid 605.

36 ibid.

37 (1997) 1 SCC 388.
Span Resorts for tourists in Kullu-Manali Valley in Himachal Pradesh) by diverting the course of Beas river through bulldozers and earth movers as part of its another venture (Span Club). This was done because earlier the river had changed its course and had washed the project away. Court held that ‘doctrine of public trust’ being part of English common law, is part of law in India. Court cancelled and set aside the lease by applying the doctrine and directed the Motel – to pay compensation by way of cost for restitution of environment and ecology; show cause for imposition of pollution fine; construct a boundary wall at a distance of not more than 4 meters from its main building to separate it from the river basin; and not discharge untreated effluent. Later on, Supreme Court decided against imposing pollution fine but issued notice for awarding exemplary damages. Court fixed amount of ₹ 10 lakh as exemplary damage in the interest of public as well as justice.

Doctrine was again applied by Supreme Court in T.N. Godavarman Thirumulpad v Union of India (UOI) which involved the issue of conservation, preservation and protection of forests and ecology involving diversion of forest land for non-forest purposes. Reiterating that any threat to ecology can lead to violation of right of enjoyment of healthy life guaranteed u/A 21, Court directed all projects, excluding government projects like hospital, dispensaries and schools, need to pay Net Present Value (NPV) which relates not to propriety rights but to environmental protection; payment to Compensatory Afforestation Fund Management and Planning Authority (CAMPA) was constitutionally valid. Later on, a PIL challenged a governmental order allowing 15 acres of land to M/s Maruti Coal and Power Ltd. for setting up coal washery (non-forest purpose). Supreme Court found the land not to be forest land. Regarding the PIL as filed with ulterior motive, it dismissed the petition with exemplary costs of ₹ 1 lakh on petitioner which was directed to be utilized for preservation of forests.

In Lafarge Umiam Mining (P) Ltd v Union of India, the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit then – use for private ownership or commercial purposes.” As per Kuldip Singh J. ibid 407.
Lafarge Surma Cement Ltd. (incorporated in Bangladesh) established a cement manufacturing project at Chhatak in Bangladesh. It had a captive limestone mine of 100 ha at Phlangkaruh, Nongtrai, East Khasi Hills District in the State of Meghalaya which it leased out to its wholly owned subsidiary (Lafarge Umium Mining Pvt. Ltd.) in India for limestone mining. EC given by MoEF was challenged. Supreme Court preferred to apply constitutional doctrine of proportionality to environmental matters as part of judicial review process in contradistinction to merit review. Accordingly, Court found that limestone mining going on for centuries in the area has got intricately mixed up with culture and unique landholding and tenure system of Nongtrai village. It expressed satisfaction with the due diligence exercise undertaken by MoEF regarding forest diversion.

Besides, there are various other significant judgments of Supreme Court contributing to the right to clean and healthy environment. However, in few judgments, Supreme Court seemed to have tilted the balance in favour of right to development instead of right to clean and healthy environment. Various High Courts have also followed suit and accordingly have played their role in strengthening the right to clean and healthy environment.

44 (2011) 7 SCC 338.
45 ibid 380.
Another distinguishing feature of this environmental jurisprudence developed by Supreme Court is awarding of damages u/A 21 read with Art. 32 of the Indian Constitution.\(^{49}\) In this context, Supreme Court has observed:

Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.\(^{50}\)

PIL has played a particularly significant role in recognition and enforcement of the right to clean and healthy environment through the pro-active role of the Supreme Court. Court has developed peculiar environmental jurisprudence through the use of above two features leading to issue of many path-breaking directions through its judgments. But at the same time, Supreme Court has also cautioned against the abuse of PIL for personal gains.\(^{51}\) In furtherance of the same, Supreme Court has regulated the procedure for entertaining petition involving individual/personal matter which permits environmental protection as one of the ground.\(^{52}\) It is distinct


\(^{51}\) ‘Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the Court, preventing speedy remedy to other genuine Petitioners from this Court. Personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation.’ As per KN Singh J. in Subhash Kumar v State of Bihar AIR 1991 SC 420, 424.

\(^{52}\) ‘Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.’ Compilation of Guidelines to be Followed for Entertaining Letters/Petitions in this
acknowledgment of the paramount role of PIL in violations of right to clean and healthy environment.

### 6.4.1 NGT – Pillar for Future of Environmental Jurisprudence

Another development which will have far reaching ramifications on the efficacy of environmental laws and jurisprudence in India is the establishment of NGT. Courts in many litigations relating to violation of right to clean and healthy environment has acknowledged the lack of its expertise to adequately appreciate the complexity involved in issues alleging environmental damage. Supreme Court has pointed out that increasing burden on the judiciary in the form of backlog of cases cause delays in timely judicial intervention in disputes involving environment which can be further detrimental to the environment. Further, it has acknowledged its limitation in appreciating scientific and technical implications involved in the environmental disputes. In order to resolve this problem, Supreme Court has time and again expressed the need to establish specialized environmental courts in India and requested Law Commission of India to submit report thereon. Law Commission recommended the need to establish ‘Environment Courts’ comprising persons with judicial/legal experience to be assisted by persons having scientific qualification and experience in the field of environment. Government accepted these recommendations by establishing National Green Tribunal (NGT) by enacting National Green Tribunal Act (NGTA) in 2010 as discussed in chapter 4. NGTA confers specific mandate on NGT u/s 20 to apply the principle of sustainable development, precautionary principle and polluter pays principle. Within a short life span of seven years, NGT has passed many judgments (having widespread ramifications) aimed at strengthening the right to clean and healthy environment. Its
judgments show an approach distinct from that of Supreme Court focusing more on prevention compared to clean up and pollution control. Following two graphs gives an overview of its performance –

**Graph I (Categorisation of cases filed in the National Green Tribunal)**

![Graph showing categorisation of cases filed in the National Green Tribunal]

Being a Tribunal with limited jurisdiction and Supreme Court being its appellate authority, its effectiveness will invariably depend on the backing of Supreme Court.\footnote{Chowdhury (n 57) 92.}

Its recent judgment involving a foreign ship is pertinent to mention. In Samir Mehta v Delta Shipping Marine Services SA\footnote{Original Application No. 24 of 2011 and M.A. No. 129 of 2012, M.A. Nos. 557 and 737 of 2016 (23 August 2016) <http://www.greentribunal.gov.in/Writereaddata/Downloads/24-2011%28PB-1-Judg%29OA23-8-2016.pdf> accessed 12 May 2017.} a ship (M.V. Rak Carrier) was carrying 60,000 MT of Coal from Lubuk Tutung, Indonesia to Dahej in Gujarat for thermal plant of Adani Enterprise Ltd. It sank in August 2011 approximately 20 nautical miles from the coast of South Mumbai causing oil spill on a large scale. Its sinking with consignment of coal on board and accompanying oil spill caused widespread and serious pollution of marine environment. Pollution was expected to continue due to non-removal of wreckage from seabed. Documents for the ship was found to be improperly issued despite the same being unseaworthy. Applying the principle of sustainable development, polluter pay principle and precautionary principle on the basis of ‘No Fault Liability’, NGT imposed environment compensation of ₹ 100 crore on Delta Shipping Marine Services (SA) of Panama (the owner of the ship), Delta Group International (broker in Commercial and Brokerage agreement with Delta Shipping Marine Services (SA) of Panama) and Delta Navigation W.L.L. (a group company of Delta Group International who has signed a Charter Party Agreement with charterer M/s. Libra Shipping Services) for sinking of ship and causing marine pollution. NGT lifted the corporate veil and found that owner of the ship, Delta Group

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Graph II (Statistical representation of the National Green Tribunal cases)\textsuperscript{59}
\end{center}
International and Delta Navigation W.L.L. were having common business and financial interests. According to NGT, they did not bother to repair the ship despite repeated requests in this regard by master of the ship as they found sinking more economical than repairing it and continuing voyage till it reached the stage when sinking was the only option left. NGT passed the order *ex parte* since owner of ship did not make appearance. NGT also imposed compensation of ₹ 5 crore on Adani Enterprise Ltd. (consignee) for failure to make any efforts to remove cargo from sunken ship or in taking any preventive steps to ensure that cargo does not cause pollution. Placing reliance on judgment of Supreme Court in Sterlite Industries case, NGT noted that precise determination of amount of damage caused by pollution is not possible and therefore it will necessarily involve ‘hypothesizing or guess work’. NGT also constituted a committee to advise if removing the ship wreck or leaving it as it is will be beneficial for environment.

Integration of right to clean and healthy environment within right to life u/A 21 of the Indian Constitution has emerged as a foundational pillar on which judiciary initiated and driven environmental jurisprudence is structured. As discussed above, the contribution of Supreme Court in developing rich environmental jurisprudence in India with right to clean and healthy environment as its central pivot has been unprecedented and unparalleled in the world. Due to such path-breaking role, Supreme Court has gained worldwide acclaim for its contribution.

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62 ‘Indian is a country with a hoary past, yet its experiments with democracy, as established under its great constitution will undoubtedly be one the most exciting chapter in its history, and as the other organs of state evolved into their present form and created the present political system, so has its apex court. The Supreme Court of India, perhaps the most powerful constitutional court in the world both in terms of the ambit of its jurisdiction as well as the fact that it is the protector of democracy in the second most populous country in the world, influencing the fortunes of one billion people in the nineties is very different from the Court of the fifties or even the sixties. It has always been true to its duty to protect the constitutional rights of the citizens of India, yet the perceptions of these rights have drastically changed over the past fifty years. From a Court committed to protecting rights recognized in the classical legal formats, and unfortunately those rights are predominantly property rights, it became a Court exercising its vast jurisdiction to redress the grievances of citizens as far as was possible within judicially manageable standards, keeping in view the chronic bureaucratic apathy and legislative sluggishness which marked the governance of this developing nations. Somewhere along the way it lost interest in merely protecting conventional rights; its attention now focused on the downtrodden, underprivileged Indian whose voice had hitherto usually been lost in the wilderness. This approach has now become the signature of this court, and as long as this holds sway, the Court will continue to be haven for environmental activists. This approach needs a brave and innovative face, and those who seek new paths will undoubtedly sometimes lose themselves in the wilderness.’ Harish Salve, ‘Justice Between Generations: Environment and Social Justice’ in BN Kirpal, Ashok H Desai, Gopal Subramanium, Rajeev Dhavan and Raju Ramchandran (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2nd impression, Oxford University Press 2006) 379.
6.5 Corporations (including TNCs) and Right to Clean and Healthy Environment – Analysis of Select Judgments

While the right to clean and healthy environment got recognition as a fundamental right u/A 21 as integral part of right to life through judicial interpretation as discussed above, allegations against corporations (TNCs in particular) of violating it through business activities undertaken by them have presented unprecedented and extremely intricate issues for the judiciary to resolve. The following analysis of judgments discusses the judicial approach regarding such complex issues.

6.5.1 Oleum Gas Leak involving Shriram Foods and Fertilizer Industries

Factual Matrix

Delhi Cloth Mills Ltd. was a public limited company having its registered office at Delhi. It was running Shriram Foods and Fertilizer Industries (Shriram) having one Plant wherein production of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, superphosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth was undertaken. Plant was commissioned in 1949 and it employed 263 persons. It was surrounded by a densely populated area wherein 2 lakh people were living within a radius of 3 kms.

Management of Shriram and the government took note of the hazardous nature of its caustic chlorine plant only after the Bhopal gas leak disaster. Labour Ministry hired ‘Technica’ (a UK firm of consultants) to report on potential problems related thereto which submitted its report in June-July 1985. In response to a question in Parliament, Minister of Chemicals and Fertilizers assured that required steps to ensure safety standards would be taken at the earliest for protecting interests of workers as well as that of general public. As a result, Delhi Administration constituted Manmohan Singh Committee (comprising a chairman and three members) which submitted a detailed report regarding caustic chlorine plant recommending safety as well as pollution control measures.

On 4 December 1985, oleum gas leaked from one of its units. Leak was caused by collapsing of a structure that led to bursting of a tank (containing oleum) mounted thereon. It affected many people including workmen. This major leakage caused the death of an advocate practicing in Tis Hazari Court due to inhalation. On the same
day, Lt. Governor of Delhi constituted ‘Seturaman Committee’ (comprising four experts) to inquire into the incident which submitted its report on 3 January 1986. It dealt mainly with safety procedures in sulphuric acid plant from which oleum gas leaked. Although it was not based on any in-depth study of the safety and pollution control measures in caustic chlorine plant, it did make some pertinent observations regarding possible hazard of caustic chlorine plant to the community. Within two days, oleum gas leaked (though minor) again from pipe joints.

On 6 December 1986, District Magistrate Delhi issued an order u/s 133 (1) of CrPC directing Shriram to stop manufacturing and processing hazardous and lethal chemicals including chlorine etc. within two days and to remove them from such place within 7 days and not to store them again. Next day, Inspector of Factories, Delhi, issued an order u/s 40 (2) of Factories Act 1948 prohibiting Shriram from using caustic chlorine and sulphuric acid plants till adoption of adequate safety measures. On 13 December 1985, Assistant Commissioner (Factories) of Municipal Corporation of Delhi (MCD) issued show cause notice u/s 430 (3) of Delhi Municipal Corporation Act, 1957 to Shriram for revoking its licence. Shriram showed cause on 23 December 1985, but next day Assistant Commissioner (Factories) prohibited Shriram from industrial use of premises having chlorine caustic plant.

_M.C. Mehta v Union of India_63
(20 December 1986)

Petitioner filed a writ petition in the Supreme Court. Court permitted petitioner to constitute ‘Agarwal Committee’ (comprising three experts). Committee submitted its report to the Court pointing out many inadequacies in the plant and concluded that elimination of hazard to public would be impossible, if plant is not relocated. Faced with the question whether to restart operations of caustic chlorine plant, Court constituted ‘Nilay Chaudhary Committee’ (comprising chairman and two members) which submitted its report containing recommendations that must be complied with by Shriram’s management to reduce hazards of possible chlorine leak. Report agreed with recommendations of Manmohan Committee in this regard.

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63 (1986) 2 SCC 176. (Bench comprising PN Bhagwati, CJ., DP Madon and GL Oza JJ).
Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

**Issue**

Whether Shriram’s caustic chlorine plant be permitted to be reopened and if so, subject to what conditions?

**Petitioner’s Contention**

Reopening of the caustic chlorine plant should not be permitted owing to dangerous nature of chlorine. Even utmost care cannot completely rule out the possibility of accidental leakage.

**Shriram’s Contention**

Reopening of the caustic chlorine plant should be permitted as recommendations made by Manmohan Singh Committee and Nilay Chaudhary Committee have been implemented, thereby completely reducing the possible hazard to workers and neighbouring community.

**Contention of Lokahit Congress Union and karamchari Ekta Union**

Agreeing with Shriram’s contention, reopening of caustic chlorine plant should be permitted. Refusal to do so would cause non-operation of plants manufacturing downstream products and render their 4000 workmen jobless.

**Contention of Union of India and Delhi Administration**

Reopening of the caustic chlorine plant should not be permitted. However, it left the decision to the wisdom of the Court to pass any order, if it is satisfied regarding compliance of recommendations of Manmohan Singh Committee and Nilay Chaudhary Committee by Shriram. Reopening, even if permitted, should be subject to imposition of strict conditions for ensuring safety of workmen as well as people in the neighbouring area.

**Judgment**

Court constituted a four member committee to ascertain whether recommendations of Manmohan Singh Committee and Nilay Chaudhary Committee have been implemented. Committee submitted its report on 3 February 1986 recommending that Shriram had complied with all the recommendations made by the two committees.
except shed construction on space where filled cylinders were kept. Further, Court took note of unanimity amongst all the committees that relocation of the chlorine plant was the only long term solution which the Court felt should be taken care of by Government through devising a National policy. However, Court was mindful of the fact that Shriram’s chlorine plant supplied water to the Delhi Water Supply Undertaking and the latter would have to find alternative source from distant places if the former was not permitted to be reopened. Court emphasised that chemical or other hazardous industries cannot be done away with simply because of the dangers they pose. However, their hazards can be minimized by maximizing safety requirements and locating them in such a manner that people do not live in their vicinity.

Weighing all the above considerations and attempting to strike a balance, Court permitted reopening of the caustic chlorine plant subject to strict conditions stipulated by it till the decision of issue of shifting of caustic chlorine plant. Non-compliance with the conditions will result in withdrawal of permission. It suspended the orders of Inspector of Factories and Assistant Commissioner (Factories). Court appreciated petitioner’s role and as a token of appreciation directed Shriram to pay ₹ 10,000 by way of costs. Court also recommended setting up of Ecological Sciences Research Group and environmental courts.

*M.C. Mehta v Union of India*\(^{64}\)

(10 March 1986)

Facing operational and practical difficulties regarding certain conditions imposed as discussed above, Shriram sought clarifications from Supreme Court. However, Court regarded it, in substance, as an application for modifications thereof. Court appreciated the operational and practical difficulties and accordingly modified its directions.

*M.C. Mehta v Union of India*\(^{65}\)

(20 December 1986)

Court finally disposed of the matter by delivering the judgment on the following two issues –

\(^{64}\) (1986) 2 SCC 325. (Bench comprising DP Madon, GL Oza and PN Bhagwati, JJ.).
\(^{65}\) (1987) 1 SCC 395. (Bench comprising PN Bhagwati, CJ., Ranganath Misra, GL Oza, MM Dutt, and KN Singh JJ.).
(a) Whether private corporation is a State u/A 21 of the Indian Constitution?

Applicant’s Contention

On the basis of US doctrine of State Action and functional and control test laid down by Supreme Court, certain features made Shriram a State u/A 21 of Indian Constitution - being a public company limited by shares; engaged in industry vital to public interest having potential effect on life and health of people; placed under regulatory mechanism created by State in the form of IDRA 1951, Bombay Municipal Corporation Act, Air Pollution Act, Water Pollution Act and Environment Protection Act.

Shriram’s Contention

Regulatory mechanism was laid down in exercise of police power of regulation of the State. Such regulation was insufficient to convert business activity of a private corporation into State u/A 21 of Indian Constitution. Moreover, such mechanism merely regulated the manner of doing business. Further, US doctrine of State Action was inapplicable in Indian context. Once an authority is regarded as ‘other authority’ u/A 12, it is State for all its activities and functions unlike the US functional dichotomy classifying some functions as State action and others as private action. Drafters of Indian Constitution have clearly specified those rights which are available against private parties like Art. 17, 23 and 24. So any expansion by including even a private corporation as State u/A 12 would disrupt the constitutional scheme of fundamental rights.

Judgment

At the outset, Supreme Court regarded doctrine of State action as evolved in the peculiar historical context of US as irrelevant and therefore inapplicable to Indian social conditions which vastly differ from that of US.

Court referred to its observations in Ajay Hasia v Khhalid Mujib66 and Som Prakash Rekhi v Union of India67 in order to appreciate significance of a corporation in

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66 ‘the inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute’. (1981) 1 SCC 722, 737.
constitutional context. In fact, Supreme Court went to the extent of reviewing entire case law on the issue and posed a very pertinent following question:

Why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations.68

Court acknowledged its contribution in the last few years in advancing human rights jurisprudence through enhancing respect for human rights and social conscience in corporate structure by expanding horizons of Art. 12. It recalled apprehensions being expressed that bringing public sector corporations under the scope of Art. 12 will kill private entrepreneurial activity69. However, Court was convinced that such apprehensions could not be permitted to hinder the advancement of human rights jurisprudence.70 However, all these bold observations and review of its judgments relevant to the issue resulted in an anti-climax when Court left the issue undecided. It felt that it did not get sufficient time to listen to detailed arguments by the counsels and reflect on the issue since hearing concluded on 15 December 1986 and it was called upon to deliver judgment on 19 December 1986 (within four days of hearing). So, Court left it for a proper and detailed consideration at a later stage, if it becomes necessary to do so.

67 “It is well known that "corporations have neither bodies to be kicked, nor souls to be damned" and Government corporations are mammoth organisations. If Part III of the Constitution is halted at the gates of corporations Justice Louis D. Brandeis’s observation will be proved true: The main objection to the very large corporation is that it makes possible -- and in many cases makes inevitable -- the exercise of industrial absolutism. It is dangerous to exonerate corporations from the need to have constitutional conscience: and so, that interpretation, language permitting, which makes governmental agencies, whatever their mei, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperia.’ AIR 1981 SC 212, 230.
68 M. C. Mehta (n 65) 1 SCC 395, 417.
69 Ramana Dayaram Shetty v International Airports Authority of India AIR 1979 SC 1628.
70 SC expressed its conviction in the following words: ‘Such apprehension expressed by those who may be affected by any new and innovative expansion of human rights need not deter the Court from widening the scope of human rights and expanding their reach ambit, if otherwise it is possible to do so without doing violence to the language of the constitutional provision. It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists’. M. C. Mehta (n 65) 419.
(b) **Whether an enterprise engaged in hazardous activity is liable for accidents and if yes, what is the extent thereof?**

Supreme Court expressed the need to go beyond the strict liability rule laid down in *Rylands v Fletcher* and develop a new jurisprudence (catering to peculiar circumstances then prevailing in India) to resolve the issue. It laid down a new principle of absolute liability admitting of no exceptions unlike the strict liability principle in the following words:

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 which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and 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.

Court justified the principle on the ground that only such enterprise has the resources to discover and guard against hazards and to warn against potential hazards. Further, it viewed such liability as part of social cost of carrying such hazardous or inherently dangerous activity. It declared that cost of any accident arising thereby should be

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71 (1861-73) All ER Rep 1.

72 Supreme Court observed: ‘This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order’. M. C. Mehta (n 65) 420.

73 ibid.
absorbed and all who suffer thereby should be indemnified irrespective of whether such activity should be conducted carefully or not.

Regarding the quantum of damage, Court invoked deep pocket theory to hold that the measure of compensation should be ‘co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise’.

*Researcher’s Observation*

The case did not involve a TNC. Although Supreme Court disappointed by not deciding the first issue, it laid down the principle of absolute liability which had the potential of being used as a tool to be deployed in future to instances involving violation of right to clean and healthy environment. Further, it created legal basis for awarding deterrent quantum of damages in case of an enterprise established by a TNC since TNCs are largest and most prosperous of all forms of business in the world having financial sources to pay and technological resources to warn also.

**6.5.2 Bhopal Gas Leak Disaster involving Union Carbide Corporation**

*Factual Matrix*

Union Carbide Corporation (UCC) was a New York based corporation which had affiliate and subsidiary companies across the world. It supervised them through its four regional offices. It incorporated Eveready Company (India) Ltd. as its subsidiary in India on 20 June 1934 and controlled it through Union Carbide Eastern Inc. with its office in Hong Kong (regional office). Its name was changed to Union Carbide India Ltd. (UCIL) on 24 December 1959. UCC was majority shareholder holding 50.9% shares in UCIL. 22% shares of its shares were owned by LIC and UTI.

It was manufacturing Sevin and Temik (pesticides) at its Bhopal Plant. Methyl Isocyanate (MIC), a highly toxic gas, was an ingredient in the production of these pesticides. On the night of 2 December 1984, MIC leaked in substantial quantities from one of its storage tank. Its catastrophic consequences were self evident resulting

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74 ibid 421.
into death of nearly 3000 people; serious injuries to many others; death, damage and infection to livestock; interruption of businesses; environmental pollution adversely affecting ecology and disturbing flora and fauna. Mr. Warren Anderson (Chairman, UCC) visited Bhopal on 7 December 1984 but was arrested and subsequently released on bail.

Suits were filed in various US courts and well as in District Court of Bhopal by individual claimants against UCC and UCIL during December 1984 to January 1985. On or about 6 February 1985, Judicial Panel on Multi-District Litigation consolidated all such suits in various US courts assigning them to US District Court, Southern District Court of New York.

Bhopal Gas Leak Disaster (Processing of Claims) Ordinance was promulgated in 1985 since Central Government and Madhya Pradesh Government and their other concerned agencies had to incur lot of expenditure for containing and mitigating the adverse effects of Bhopal Gas Leak Disaster. It provided for appointment of Commissioner for Welfare of Disaster Victims and formulation of Scheme regarding processing claims. On 29 March 1985, Indian Parliament enacted The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (hereinafter Bhopal Act) with the objective of speedy, effective and equitable disposal of claims relating to the Bhopal Gas Leak Disaster. Bhopal Act authorized Indian Government to exclusively represent victims as *parens petriae* to protect their interests fully and to pursue their compensation claims speedily, effectively, and equitably to their best advantage. Under Bhopal Act, a Scheme was published on 24 September 1985. In pursuance of Bhopal Act, UOI filed complaint before US District Court, Southern District Court of New York on 8 April 1985. As a matter of fundamental human decency, Judge Keenan realized the need for temporary relief without any delay and accordingly directed formation of three member Executive committee to frame issues and expeditious trial of settlement negotiations. On 24 September 1985, Indian Government framed the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (Bhopal Scheme) u/s 9 of the Bhopal Act.
On 12 May 1986 Judge Keenan allowed UCC’s application on \textit{forum non conveniens} and dismissed the matter\textsuperscript{75} subject to three conditions namely - submission of UCC to jurisdiction of Indian courts and waiver of limitation based defences; consent of UCC to satisfy any judgment delivered by Indian court against it subject to fulfillment of minimal due process requirements; subjecting UCC to discovery under United States Federal Rules of Civil Procedure, in case plaintiffs appropriately demand. Private plaintiffs filed motion of fairness hearing on 21 May 1986 which he declined on 28 May 1986 that too at the request of UOI due to paltry amount being offered as part of proposed settlement. On 26 June 1986, individual plaintiffs filed appeal against the order of Judge Keenan in US Court of Appeals for Second Circuit. UCC filed appeal before US Court of Appeal for Second Circuit on 10 July 1986 challenging entitlement of UOI to US mode of discovery without challenging the other two conditions. On 28 July 1986, UOI filed cross-appeal before US Court of Appeal contending non-disturbance of any condition imposed by Judge Keenan.

On 5 September 1986, UOI filed suit for damages in District Court of Bhopal which granted temporary injunction restraining UOI from selling assets, paying dividends or buying back debts. District Court of Bhopal lifted injunction on the basis of an undertaking tendered by UCC on 27 November 1986 to preserve and maintain unencumbered assets to the extent of US $ 3 billion. On 16 December 1986, UCC filed a written statement contending their non-liability on the ground of being a different legal entity which never exercised any control over UCIL.

On 14 January 1987, US Court of Appeal for Second Circuit affirmed Judge Keenan decision while deleting third condition regarding discovery and \textit{suo motu} setting aside second condition regarding consent of UCC to satisfy any judgment delivered by Indian court against it subject to fulfillment of minimal due process requirements.

\textsuperscript{75} ‘The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.’ As per Judge Keenan \textit{In re Union Carbide Corp. Gas Plant Disaster} 634 F.Supp. 842, 867 (S.D.N.Y. 1986).
On 2 April 1987, court made a written proposal to all parties to consider reconciliatory interim relief for gas victims. In September 1987, UCC and Indian government sought more time from District Court of Bhopal for exploring possibilities of settlement. Both Indian government and UCC announced failure of settlement negotiations in November 1987 and District Judge of Bhopal extended the time. District Judge of Bhopal ordered interim relief of ₹ 350 crores on 17 December 1987. UCC filed a civil revision against the order. On or about 4 February 1988, Chief Judicial Magistrate of Bhopal issued notice for warrant on UCC, Hong Kong in a criminal case filed by CBI against UCC in which charge sheet was filed under sections 304, 324, 326, 429 IPC read with Sec. 35 IPC and the charge was against M/s Warren Anderson, Keshub Mahindra, Vijay Gokhale, J. Mukund, Dr. R.B. Roy Chowdhay, S.P. Chowdhary, K.V. Shetty, S.I. Qureshi and UCC of USA, UCC of Hong Kong and UCC having Calcutta address.

Madhya Pradesh High Court stayed operation of order of District Judge of Bhopal granting interim relief and on 4 April 1988 modified it and granted interim relief of ₹ 250 crores. According to the Court, it had jurisdiction under substantive law of Torts to grant interim relief u/s 9 of CPC. On 30 June 1988, District Judge of Bhopal restrained UCC from settling with any individual gas leak plaintiffs.

**Union Carbide Corporation v Union of India**

(14 February 1989)

Both UCC and UOI challenged the above-mentioned order in Supreme Court – former for grant of interim relief and UOI for reduction in quantum of compensation. Court granted special leave. Supreme Court carefully considered the case for several days and regarded it as ‘preeminently fit for overall settlement’. It approved the following settlement as just, equitable and reasonable –

- a) Payment by UCC of US $ 470 million to UOI by 31 March 1989 in full settlement of all claims, rights and liabilities related to and arising out of Bhopal Gas Disaster.

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77 Court gave following reasons - facts and circumstances placed by the parties; their pleadings; massive data submitted; material relating to proceedings in US; offers and counter offers by parties at various stages of different proceedings; involvement of complex issues of law and fact and submissions made thereon; enormity of human suffering; and compelling need for providing immediate and substantial relief to victims. ibid 675.
b) Transfer of all civil proceedings related to and arising out of the Bhopal Gas Disaster, in return, to Supreme Court and conclusion thereof in accordance with the terms of this settlement, and

c) Quashing of all criminal proceedings related to and arising out of the disaster, wherever pending.

While approving the above award, Court appreciated the dedicated assistance and sincere cooperation’ of counsels involved.

Union Carbide Corporation v Union of India 78
(15 February 1989)

Next day, Supreme Court supplemented the above order by another order giving detailed modalities 79 and consequences 80 thereof.

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78 ibid 674.
79 a) It joined UCIL as necessary party in order to effectuate it.
    b) UCC to pay to UOI US $ 425 million on or before 23 March 1989 less US $ 5 millions already paid by UCC under order of US court; UCIL to pay US $ 45 millions on or before 23 March 1989 at the then prevailing exchange rate; these payments should be made to UOI as claimant for the benefit of all victims of Bhopal Gas Disaster under Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme 1985 but not as fines, penalties or punitive damages.
    c) It directed UOI and 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 settlement are defended by them and disposed of in accordance with order.
    d) Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority were joined and shall not be proceeded with before such court or authority except for dismissal or quashing in accordance with the order.
    e) After full payment, undertaking given by UCC under order dated 30 November 1986 in Bhopal District Court shall stand discharged and all orders passed in suit no. 1113 of 1986 and/or in revision therefrom shall stand discharged.
    f) Any contempt proceedings initiated against parties or counsels involved and arising out of proceedings in lower courts shall stand dropped.
    g) Such amount to be deposited with Registrar in a Bank in accordance of court directions. See ibid 676. (emphasis supplied)

80 ‘finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all Indian citizens and all public and private entities with respect to all past, present or future deaths, personal injuries, health effects, compensation, losses damages and civil and criminal complaints of any nature whatsoever against UCC, UCIL, Union Carbide (Eastern), and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents representatives, attorneys, advocates and solicitors arising out of, relating to or connected with the Bhopal Gas Leak Disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens, public or private entities were extinguished without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme 1985 and all such civil proceedings in India were transferred to Supreme Court and dismissed with prejudice and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.’ ibid 677.

‘After full payment, undertaking given by UCC pursuant to order dated 30 November 1986 in Bhopal District Court stands discharged all orders passed in Suit No. 1113 of 1986 and/or in any revision therefrom, also stand discharged.’ ibid 678.
Researcher’s Observation

a) UCC knew fairly well the state of law existing in India at that time as well as judicial approach of awarding modest quantum of damages as compared to US courts. Therefore, extracting a judgment from US Court rejecting Indian claim on the ground of *forum non conveniens* was a huge victory for UCC.

b) This settlement order included sweeping terms. The twin orders had the effect of giving complete immunity to the culprits including the TNC involved and its subsidiaries from any further liability of any kind in Bhopal Gas Disaster. Being a negotiated settlement, UCC proved to be a better bargainer. It got the best of the deal through this settlement award and clearly emerged as the single largest beneficiary thereof.

c) Settlement Order was silent about the basis of computation of amount of settlement. Victims felt cheated. Experts regarded settlement amount as paltry perpetrating insult to the injury. They regarded it as justice being purchased through negotiation with seal of approval from Supreme Court.

d) Approach of Supreme Court in approving a negotiated settlement can be seen in consonance with the global trend prevailing at that time in which TNCs preferred to not let disputes about their liability decided on merits but settle out of court thereby avoiding hefty fines and compensation. It can at best be regarded as a fit case of environmental damage through business operations and thereafter purchase justice through closed door negotiations and bargain.

Being a democratic country, Supreme Court faced scathing criticism for its approach. People questioned the basis on which it had approved the amount of settlement. It compelled the Court to pass the following order providing the basis for determining the amount of settlement.

*Union Carbide Corporation v Union of India (UOI)* 81
(4 May 1989)

Supreme Court justified the need for settlement order on the basis of various factors – urgent relief to save thousands of people suffering from death, disease, destitution etc.; likelihood of delay in resolving complex legal questions involved; attempts by

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Judge Keenan in US court towards resolving the dispute through negotiation; exclusive authority of Government to represent and act on behalf of victims and neither counsels expressing any reservations thereto; validity of Bhopal Act and preparedness of court to review settlement if it was declared void in the pending litigation. It also added a caveat that if evidence produced before the court showed that UCC at any point of time offered to pay any sum higher than amount of settlement order (i.e. $ 470 million), it would *suo motu* issue show cause notice for setting aside the same, relegating the parties to their respective original position.

Supreme Court revealed that UCC offered US $ 350 million plus appropriate interest thereon at prevailing US rates totaling US $ 426 million and UOI regarded any sum less than US $ 500 million as unreasonable. However, in the end both sides left the determination of final amount to the wisdom of Supreme Court which it determined to be US $ 470 million. Supreme Court gave detailed basis in support of its computation.82

Supreme Court cautioned that its judgments can neither be reached nor altered in response to pressures generated by public agitations. A wrong judgment could be corrected but only with procedure established by law i.e. appeals. It defensively observed:

Like all other human institutions, this court is human and fallible. What appears to the court to be just and reasonable in that particular context and setting, need

82 2660 deaths & 30,000-40,000 serious injuries (including both permanent total and partial disabilities of varying degrees) (as per UOI and not disputed by anyone before Madhya Pradesh High Court). Madhya Pradesh High Court applied the Principle of Absolute Liability as well as Deep Pocket Theory as laid down in Oleum Gas Leak case and awarded compensation of ₹ 250 crore (₹ 2 lakhs for death; ₹ 2 lakhs for total permanent disability; ₹ 1 lakh permanent partial disablement; ₹ 50,000 temporary partial disablement). It discarded the standards of compensation usually awarded in cases involving fatal accidents under Motor Vehicles Act since they would altogether lead to an amount less than ₹ 20 crores in all. Basing itself on prima facie findings of Madhya Pradesh High Court, Supreme Court allocated the following amount to arrive at just settlement – for fatal cases at 3000 where compensation could range from ₹ 1 lakh to ₹ 3 lakhs totaling to ₹ 70 crores (approximately 3 times of what would be awarded under Motor Vehicles Act); for 30,000 personal injury cases (of permanent total or partial disability) compensation could range from ₹ 2 lakhs to ₹ 50,000 per individual as per the total or partial disability and degrees thereof totaling ₹ 250 crores; For 20,000 cases of temporary total or partial disability compensation ranging from ₹ 1 lakh to ₹ 25,000 totaling ₹ 100 crores; Nearly 2,000 cases of injuries of utmost severity compensation of even ₹ 4 lakhs per individual might have to be considered totaling to ₹ 80 crores; For 42,000 cases of such serious personal injuries leaving behind total or partial incapacitation either of permanent or temporary character totaling to ₹ 500 crores; ₹ 25 crores for creating specialized institutional medical treatment for cases requiring expert medical attention and their rehabilitation and after care; ₹ 225 crores for cases of a less serious nature, comprising minor injuries (20,000), loss of personal belongings (15,000), loss of livestock (10,000) etc. accounting for nearly one and a half lakhs more claims of such kind. See ibid 45-47.
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not necessarily appear to others in the same way. Which view is right, in the ultimate analysis, is to be judged by what it does to relieve the undeserved suffering of thousands of innocent citizens of this country.83

**Researcher’s Observation**

a) Environmental damage did not figure in the calculation of final amount of settlement by the Supreme Court. If Government was at fault by not ensuring its inclusion, Supreme Court was more at fault in granting approval to such a settlement. It was duty bound to ensure that environmental damage was included.

b) It is interesting to note that Supreme Court was disturbed by the outrage expressed by the people in the manner of its handling this case and the same was reflected in some of its observations mentioned above. However, since Supreme Court is supreme yet fallible and India being democracy, whose Constitution protects freedom of speech and expression as fundamental rights, people perceptions will definitely be expressed through agitation even against the judgments of the court. One wonders why the Supreme Court did not make public the above details of arriving at the settlement while granting approval to settlement award. Had it done so, its approval order would have become truly speaking thereby avoiding much of the criticism. Had people not generated pressure, perhaps court would not have come out with this order justifying the basis of settlement order at all.

c) One can understand the approach of the US court to settle the disputes through negotiation which had many precedents in US but nothing justifies Supreme Court to continue and adopt such approach instead of deciding on merits.

d) Supreme Court made the delay its *fate accompli*. Message was loud and clear – even in case of mass disaster, Supreme Court was not inclined to innovate in order to expedite the process. Was it the same court which innovated the principle of absolute liability to suit Indian conditions and fixed liability on enterprises involved in hazardous activities which involved only one death? Was it the same court which relaxed *locus standi* to encourage PIL? This becomes more disturbing when looked in the backdrop of US court trusting

83 ibid 51.
Indian judiciary with requisite capacity and skills for delivering adequate justice to so many victims.  

e) If the court was in doubt about the liability of UCC, the best course of action for it would have been to decide on merits after full arguments. Had UCC succeeded in proving its innocence according to applicable law, why should it pay? But in case it failed to do so, no one else but UCC should pay setting a precedent in India in this regard for TNCs (as foreign investors and transferors of technology) from abroad.

f) At no point of time, UCC accepted liability either before Indian or US courts. However, had the Supreme Court insisted on deciding the dispute on merits, it would have enabled the court to develop new jurisprudence as it did in Oleum Gas Leak Case. But with due respect, Supreme Court caved into pressure and agreed to approve settlement award through negotiation instead of on merit.

g) It is interesting to note that this period also coincided with the phase which marked the evolution of Supreme Court as a peoples’ institution as discussed earlier.

Charan Lal Sahu v Union of India  
(22 December 1989)

Factual Matrix

Petitioner challenged constitutional validity of the Bhopal Act.

84 ‘Keenan reviewed thoroughly the affidavits of experts on India’s law and legal system, which described in detail its procedural and substantive aspects, and concluded that, despite some of the Indian system’s disadvantage, it afforded and adequate alternative forum for the enforcement of plaintiffs’ claims.

The Indian judiciary was found by the court to be a developed, independent and progressive one, which has demonstrated its capability of circumventing long delays and backlogs prevalent in the Indian courts’ handling of ordinary cases by devising special expediting procedures in extraordinary cases, such as by directing its High Court to hear them on a daily basis, appointing special tribunals to handle them, and assigning daily hearing duties to a single judge. He found that Indian courts have competently dealt with complex technological issues. Since the Bhopal Act provides that the case may be treated speedily, effectively and to the best advantage of the claimants, and since the Union of India represents the claimants, the prosecution of the claims is expected to be adequately staffed by the Attorney General or Solicitor General of India.

The tort law of India, which is derived from common law and British precedent, was found to be suitable for resolution of legal issues arising in cases involving highly complex technology.’ In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India 809 F.2d 195, 199 (2nd Cir. 1987).  

85 (1990) 1 SCC 613. (Bench comprising Sabyasachi Mukherjee, CJ., KN Singh, S Ranganathan, AM Ahmadi and KN Saikia JJ.).
Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

Issue

Is the Bhopal Act constitutionally valid?

Petitioner’s Contention

Bhopal Act violated Art. 14, 19 and 21 of the Indian Constitution. It was enacted to provide locus standi to represent victims only in US. It never intended to give exclusive right to Central Government to sue on behalf of victims both in India and abroad. After such usurpation, victims had no control over proceedings. They were deprived of their right to – decide, if at all, to compromise; terms thereof; be heard by the court before effecting such compromise.

Settlement violated principles of natural justice and fundamental rights of petitioner and therefore should be set aside. Victims should have been heard before finalizing the settlement since Bhopal Act did not bar right to pre-decisional hearing by court either expressly or by necessary implication.

UOI was a joint tort-feasor along with UCC and UCIL since it granted permission to such factory to be established within the city of Bhopal without proper safeguards and thereafter permitted habitation neighbouring it and thereby exposed people to greater danger. Besides, it held 22% shares in UCIL. Therefore, UOI suffered from conflict of interest. Hence, it could not be entrusted with the authority to represent victims who can represent themselves. Being joint tort-feasor, quantum of settlement agreed by UOI was hopelessly inadequate since it had vested interest in underestimation thereof.

Bhopal Act which granted immunity to TNC as part of settlement was invalid since damages awarded must correspond to relatively developed human rights jurisprudence in modern world more so when pitted against powerful TNC like UCC. They strongly brought to the notice of Supreme Court that although right to life and liberty included right to healthy environment free from hazardous pollutants, Bhopal Act and the Bhopal scheme drafted under Bhopal Act neither provided for environmental destruction nor the right to punitive and exemplary damages. It also failed to consider law of absolute liability for ultra hazardous activity laid down in Oleum Gas Leak Judgment. Further, quantum of damages suffered by victims against TNCs dealing with dangerous gases without proper security and other measures in
India and third world countries should be far greater in comparison to developed countries due to inadequate facilities for protection of health and property. Also UOI failed in its duty to sue UCIL.

Petitioners urged Supreme Court to establish a procedure to ensure that an independent judge with assistance of medical experts and assessors should adjudicate basis for determining categorization of individual claimant.

Respondent’s Contention

Conventional adversarial system would be completely inadequate to take care of victims’ interests against a TNC. UOI as dominus litis had right to conduct suit in best possible manner including the right to withdraw and enter into compromise.

Bhopal Act enabled victims to exercise their right to participate in proceedings. In fact, they participated before District Judge Bhopal as well as Madhya Pradesh High Court for interim compensation. They also participated in civil appeals before Supreme Court which were preferred in pursuance of Special Leave against High Court order granting interim compensation. When Supreme Court approved the settlement through its orders in February 1989, petitioners were present in the court and they neither objected to the settlement nor prayed to be heard. In case of a mass disaster, detailed procedure entailing notice, consultation, information exchange and consensus would have defeated the very objective of speedy remedy. Defining each individual’s right after careful scrutiny was not feasible. Consent in case of compromise in mass tort action could not be insisted as those who do not need immediate relief would not give it, jeopardizing entire process. Further, no one would be able to relate his injury to the lump sum figure. In any case, a non-participating individual victim unaware of various intricacies involved could not have contributed to settlement. Most victims gave their power of attorney. UOI had the broader vision of totality of claims as well as problems of individual plaintiffs.

If mere regulation of any activity would invite liability in case of mishap caused thereby, sovereign would have to abandon all regulatory functions. Thus, neither Central Government nor Government of Madhya Pradesh were liable as joint tortfeasors.
Impleading UCIL would have weakened the plea of multinational enterprise liability made on the basis of Oleum gas leak judgment.

Bhopal Act was valid and settlement approved by the Supreme Court is also valid. Bhopal act did not cover criminal liability.

**Judgment** *(Sabyasachi Mukherjee, CJ. delivered opinion with KN Saikia J. with which KN Singh J. concurred whereas S Ranganathan J. with AM Ahmadi J. gave partly dissenting opinion)*

Supreme Court declared Bhopal Act to be constitutionally valid. According to the court, victims constituted a distinct class by themselves sufficiently separate and identifiable to be entitled to special treatment. Further, the differentiation was based on a principle which had reasonable nexus with the aim intended to be achieved. Supreme Court found Bhopal Act to be reasonable in the light of various factors – plight of the impoverished, urgency of victims’ needs, presence of foreign contingency lawyers, settlement procedure in case of mass action in USA, strength of the foreign MNCs, nature of injuries and damages and limited yet significant right of participation of victims u/s 4. Court found no conceptual or jurisprudential inhibition in State taking over claims of victims on the basis of *parens patriae*. According to the court, Bhopal Act in itself was sufficient to vest rights of claimants in Central Government and needed no other theory, concept or any jurisprudential principle. It did not in any way circumscribe or abridge the victims’ rights except to the extent specified therein. Bhopal Act (by virtue of its construction, language, context or background) in no way restricted liability (joint or several) of UCC, UCIL, Indian Government or Madhya Pradesh Government. Further, it did not affect, abridge or modify criminal liability of any of the parties arising out of the Bhopal Gas Leak Disaster as the same was not its subject matter.

Court rejected the contention of conflict of interest on two grounds – firstly, although UTI and LIC, in which Central Government had some control, owned 22% shares in UCIL, Central Government itself owned no share therein. Secondly, Central Government was the only authority which could have represented victims effectively. Theoretically, it could have established another independent statutory body under its control to represent victims but not doing so did not affect the situation. Further, since government was merely representing victims and not judging the matter, there was no
question of violation of the principles of natural justice (i.e. no person can be a judge in its own cause). Debate in Lok Sabha and Rajya Sabha sufficiently indicated that government can be a claimant u/s 2 (c) of Bhopal Act.

Supreme Court ruled out the necessity of consent of all the victims as a condition precedent and found procedure u/s 4 as sufficiently fair in a representative mass tort action. However, Court acknowledged that victims at large did not have notice which was necessary. Through application of doctrine of necessity, Supreme Court rendered the contention of UOI, being liable as joint tort-feasor, redundant.

Applying the rule of constructive intuition to interpret Bhopal Act, Supreme Court held that since Bhopal Act substantially deprived victims of their right to sue UCC and enter into settlement with it, it should be read with an inherent obligation of granting immediate interim relief despite absence therein of any expression indicating the same.

Very significantly, Supreme Court disagreed with the yardstick provided in Oleum Gas Leak Case for determining quantum of compensation due to the reason that it would not be accepted as being in accordance with law at the international level.

Court found the existing data already disclosed as sufficient disclosure and any further disclosure of particulars forming basis of proposed settlement would have jeopardized future action. However, court found the settlement without notice as improper on the ground that justice has been done but not appeared to have been done to victims. But at the same time, Court also felt that setting aside the same and giving notice to victims for post decisional hearing while keeping it in abeyance in the process would fail interest of justice.

Supreme court directed issue of appropriate notification u/s 6 (3) of Bhopal Act authorizing Commissioner or other officers to exercise all or any of the powers of Central Government to enable victims to place before Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. Further, scheme categorisation done be Deputy Commissioner shall be appealable to an appropriate judicial authority and the Scheme shall be accordingly modified. Even the basis of categorization and actual categorization shall be judicially reviewable.
For the long run, Supreme Court suggested – formulation of legal principles for guidance of government in the course of permitting trade in materials and things having dangerous consequences with specific safeguards particularly involving MNCs trading in India; laying down norms and standards for government to follow before granting licences for running of industries dealing in potentially dangerous materials; scientific examination by appropriate agencies of law relating to damages and interim compensation; creation of a fund in anticipation by industries for paying damages in cases of future accidents; develop separate procedure for computing and paying damages avoiding delayed procedures; statutory fixation of basis of damages in case of accidents having regard to nature and consequences thereof and the paying capacity of parties involved; provision of deterrent or punitive damages, the basis whereof shall be by a proper expert committee or government.

Supreme Court regarded the attempts made to undermine its credibility as unfortunate, shaking public confidence in judicial process thereby.

\textit{KN Singh J.} concurred with the above judgment but made certain additional suggestions.\textsuperscript{86}

\textit{S Ranganathan J.} delivered partly dissenting opinion for himself and \textit{AM Ahmadi J.} They too found Bhopal Act to be constitutionally valid on various grounds – firstly, even if a single victim was not diligent in conducting his suit or compromise purely from his own individual viewpoint, it may affect interests of innumerable other victims. One such settlement with UCC by one set of claimants was imminent and timely governmental intervention through Bhopal Act averted it. Secondly, there was no complete displacement of victims by the Indian government. Although Indian government has conducted proceedings in India and in USA, other victims were permitted to take part therein along with it. One group of litigants rendered assistance

\textsuperscript{86} India having accepted UN Code of TNCs should take measures to incorporate its provisions in its legal framework and ensure its enforcement through machinery established for this purpose; liability of the affiliate only is inadequate, parent company should also be made liable for environmental damage as well as damage to human beings; TNCs should be made to agree to pay such damages as determined by statutory agencies without exposing victims to long drawn litigation and Parliament should constitute Special Tribunals for determining compensation to victims of industrial disasters appeal wherefrom should lie to SC on limited ground of questions of law and that too after depositing the amount so determined and such law should also provide for interim relief; and Government should create statutory ‘Industrial Disaster Fund’ of permanent nature wherein government as well as industries (both TNCs and domestic; public or private) contribute so that money could be readily available for providing immediate relief to victims. \textit{ibid 713-714.}
to trial judge in Bhopal. Thirdly, even complete displacement of victims by Indian Government through Bhopal Act would have justified it in larger public interest. Fourthly, victims could benefit through Bhopal Act from the legal expertise of Indian government. Fifthly, Sec. 3 and 4 of Bhopal Act together protected interests of both disabled and able victims who could have litigated themselves. Sixthly, outcomes of such intricate litigation could not have been fully anticipated and most of mass disaster cases would have ended in a compromise and settlement. Seventhly, UOI had interest in securing maximum compensation from UCC as it itself was affected and had claim independent of all other victims. Settlement only concluded claims against UCC and UCIL. Victim’s right to proceed against UOI, State of Madhya Pradesh or ministers and officers thereof was intact. Even as a joint tort-feasor, UOI has nothing to gain by settling for lower amount of compensation. On the contrary, it would have benefited by securing maximum amount of compensation so that its own liability as joint tort-feasor could be correspondingly reduced. Eighthly, settlement did not come as a surprise and it was clearly foreseeable. Attempts were being made towards settlement right from the lower court all the way to the Supreme Court. When settlement was approved in the Supreme Court, litigants neither objected to its inadequacy nor to ignorance of relevant considerations despite their presence in court. Ninthly, there was no failure of justice in the light of assurance to review (given through order dated 4 May 1989) regarding consideration of any aspect overlooked while finalizing terms of settlement. Lastly, post-decisional hearing on adequacy or otherwise of the quantum of compensation would not have served any purpose since the same could only be assessed at the stage when all claims had been processed and their aggregate was determined.

Although they felt that Supreme Court could have given more time gap (one day gap between stating terms of settlement and approval thereof) and more publicity to proposed settlement in newspapers, radio and television aimed at accommodating more views, Bhopal Act gave adequate opportunity to victims for being heard. They also made suggestions both at the domestic and international level.  

87 At the domestic level, they suggested need for a new statute altogether repealing or amending Fatal Accidents Act, 1855 incorporating – payment of fixed minimum compensation based on no fault liability pending final adjudication (on lines of Motor Vehicles Act); creation of specific forum empowered to grant interim relief; development of informal expeditious procedure to be followed by such forum; mandatory taking of compulsory insurance by industries engaged in hazardous activities;
Researcher’s Observations

The suggestions given by the Supreme Court regarding the need to amend Indian regulatory framework in the context of TNC clearly evidence the fact that the same was underdeveloped at the time of Bhopal Gas Leak Disaster to cope with the challenges presented in making TNCs accountable. It also shows that the reasons given by the US court for rejecting Indian claims on ground of *forum non conveniens* was not very sound.

*Union Carbide Corporation v Union of India* 88
(3 October 1991)

Factual Matrix

Review petitions u/A 137 and writ petitions u/A 32 were filed in Supreme Court against the judgment discussed above. UOI being party to settlement did not assail it on its own motion. But curiously, it supported petitioner’s challenge to the validity of settlement. 89

Petitioner’s Contention

Petitioners challenged settlement on all possible grounds - jurisdictionary, legal, humanitarian and public policy. They contended that scope and subject matter of appeals were merely in nature of appeals against an interlocutory order pertaining to interim compensation and hence limited, settlement could not finally dispose of the creation of ‘Industrial Disaster Fund’; insistence by Indian government on right to be informed of the nature of processes involved while granting licence to TNCs for establishing industry in India in order to take prompt action in case of accident. At the international front, they suggested need for acceptance of international code covering – agreement of foreign corporations to submit to jurisdiction of Indian courts regarding tortious acts whose liability should extend to their assets anywhere in the world instead of being merely confined to their assets or that of their affiliates in India; capability of execution of any decree, obtained in Indian Courts in compliance with due process, against foreign corporation, its affiliates and their assets without further procedural hurdles. ibid 729-730.


89 ‘At the outset, it requires to be noticed that Union of India which was a party to the settlement has not bestirred itself to assail the settlement on any motion of its own. However, Union of India while not assailing the factum of settlement has sought to support the petitioners’ challenge to the validity of the settlement. Learned Attorney General submitted that the factum of compromise or settlement recorded in the orders dated 14th & 15th of February, 1989 is not disputed by the Union of India. Learned Attorney-General also made it clear that the Union of India does not dispute the authority of the then Attorney General and the Advocate on record for the Union of India in the case to enter into a settlement. But, he submitted that this should not preclude the Union of India from pointing out circumstances in the case which, if accepted, would detract from the legal validity of the settlement.’ ibid 622.
main suits; pending criminal prosecution was a separate and distinct proceeding unconnected with the suit from interlocutory order in which appeals have arisen and so court did not have power to withdraw to itself these criminal proceedings and quash them; any settlement in absence of issuing notice to affected persons as required under Rule 3-B, Order XXIII of CPC was a nullity; termination of pending criminal proceedings through order dated 14 and 15 February 1989 was bad in law and needed to be reviewed and set aside because – if it was a case of permitting compounding of offences, Sec. 320 (9) CrPC was violated, if it was a case of withdrawal of prosecution u/s 321 CrPC, settled guiding principles of withdrawal of prosecutions were violated and if it was a case of quashing of proceedings u/s 482 CrPC, grounds of such quashing were absent; impugned orders, in effect and substance, amounted to conferment of immunity from criminal proceedings; grant of immunity being essentially a legislative function could not be done by judicial act and was opposed to public policy preventing investigation into a serious offence relating to gas disaster; public interest required criminal investigation not only to punish guilty but prevent its recurrence; part of consideration for settlement was stifling criminal prosecution making the consideration unlawful; ‘Fairness Hearing’ should have preceded approval of settlement award; settlement did not include certain heads of compensation like costs of medical surveillance of large section of people which though asymptomatic now might become symptomatic in future.

Besides, settlement award was also bad for various other reasons – non-incorporation of ‘re-opener clause’; no obligation to refund to UCC funds brought in by it; restitution was discretionary and while exercising discretion, regard should be had to interest of victims; in case of permitting restitution to UCC, it should be directed to act upon and effectuate its undertaking which formed basis of order of District Court of Bhopal vacating injunction against it; Bhopal Act mandated the issuance of notice to affected persons before finalising a settlement award which was denied by UOI before entering into settlement and also by Supreme Court before approving it making the settlement award void for non-compliance with principles of natural justice. Supreme Court judgment in Charanlal Sahu case that hearing was provided at review stage and was therefore sufficient compliance with principles of natural justice was mere obiter dicta; and settlement award should be set aside and original suit should be proceeded with on merits.
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Judgment (MN Venkatachaliah J. delivered opinion of the court with KN Singh J. and ND Ojha J. Ranganath Misra CJ. concurred with the same while AM Ahmadi J. partly dissented)

At the outset, Supreme Court regarded review proceeding as perhaps the last opportunity for it to verify its doubts and to undo justice that might have occurred. Therefore, it considered the whole issue going beyond legalism and as moral and humanitarian. Further, individual petitioners and petitioner organizations who sought review could not exhaustively represent interest of all the victims. They only represented a miniscule portion of the total number of people medically evaluated. Rest constituted great silent majority.

Court acknowledged that the suit involved complex questions regarding basis of UCC’s liability as also of assessment of quantum of compensation in a mass tort action. Court also took due notice of the fact that UCC seriously contested the basis of its alleged liability which was yet to be completely established and would only be established if the matter went for trial. The world over, tort actions have resulted in settlements only.

With regard to criminal proceedings, Supreme Court held that Sec. 320, 321 or 482 CrPC in isolation or even together did not exhaust its power u/A 142 of Indian Constitution regarding quashing of criminal proceedings on the ground that statutory provisions can never override constitutional provisions. Supreme Court deprecated the shifting stand of UOI in this regard which may lead of miscarriage of justice. According to the court, UOI which filed memorandum of 15 February 1989 should not have raised plea of want of jurisdiction now. Government may have many varied considerations for withdrawing of prosecution but the same must be indicated. Government failed to show any specific ground for withdrawal of prosecutions. Accordingly, court set aside quashing and termination of criminal proceedings brought about by orders dated 14 and 15 February 1989. Further, imposition of condition that no future prosecutions shall be entertained did not confer any immunity but merely reiterated consequences of such termination of pending prosecutions. Court also held that the doctrine of stifling prosecution was inapplicable to a situation where dropping of criminal proceedings was a motive of entering into agreement and not its consideration. Court found it inconceivable that UOI while being under threat
of prosecution, compelled UCC to pay $ 470 million or any part thereof as consideration for stifling prosecution. Settlement did not violate Sec. 23 or 24 of Indian Contract Act and no part of its consideration was unlawful.

Supreme Court held that right of being heard was required under Bhopal Act but it did not necessarily mandate a procedure like a ‘Fairness Hearing’ of USA as a condition precedent to a compromise that UOI may reach. So, it did not find the settlement to be vitiated by absence of ‘Fairness Hearing’.

Court found the settlement fund to be sufficient for providing just compensation. In case the same was found to be inadequate to compensate all the victims, those left uncompensated shall be compensated by UOI (being a welfare state). Accordingly, court let the settlement orders undisturbed. Court also did not answer the question of applicability of absolute liability principle laid down in the Oleum Gas Leak judgment since that latter was confined to liability of offending enterprise and did not deal with determination of liability of holding company for the torts of its subsidiaries. However, court held that Bhopal Act read with its scheme did not leave any scope for applying Oleum Gas Leak judgment on the ground that tortfeasor had notionally substituted for all practical purposes and will exhaust the liability of UCC and UCIL through settlement fund in accordance with settlement order. Any deficiency had to be met by UOI not in the capacity as joint tortfeasor but in its capacity as welfare state.

Supreme Court held that Art. 139-A was not intended to dilute existing wide powers u/A 136 and 142. Despite noticing that Rule 3-B CPC was not satisfied, Supreme Court did not declare settlement award void in Charanlal Sahu case. This judgment is not mere obiter but conclusive on the issue. Even if right of affected persons to be heard before court approving settlement order is assumed, the same does not emanate from Rule 3-B of Order XXIII CPC.

Court also issued directions regarding provisions of medical surveillance and treatment.

*Ranganath Misra, CJ:* While concurring with the judgment, he was intrigued by the shifting stand of UOI which sponsored the settlement at the first place while also supporting those who had asked for review, without filing petition itself. He pointed
towards tirade in media against the Supreme Court on two counts – compounding of criminal cases and grossly low quantum of compensation. According to him while the first ground was answered through the judgment itself, answer to second ground lay in the fact that principle laid down in Oleum Gas Leak judgment was mere *obiter dicta* and no compensation eventually could be awarded for the failure of Supreme Court in deciding the question whether Shriram fell in the meaning of State u/A 12 and could be subjected to proceedings u/A 32. Also, decree in Bhopal suit would have been money decree and the same would have been subjected to US law which permitted the defence of due process to be raised in the court. Had the compensation been awarded on the basis of Oleum Gas Leak judgment (which was different from the accepted basis under US law), decree so granted would have been non-executable in US. He further pointed out that people favouring judgment on merits seemed to be misguided about the exact legal situation - Had the matter been argued on merits, Bhopal court would have perhaps taken 8-10 years to decide the same. Appeal to High Court and further appeal to SC would have taken another 10 years totaling around 20 years for final adjudication (despite the same being expedited). Being a foreign judgment, it would have needed execution in US and applicable law would have been that the New York Court invoking ‘due process’ clause which would have taken another minimum 8-10 years. Therefore, relief would have come for the victims at the earliest by 2010. At the end of it all, had the US courts decided that strict liability was foreign to US jurisprudence and contrary to US public policy, decree would not have been executed in US apart from Indian assets of UCIL, leaving no scope for satisfaction of decree.

He passionately expressed his frustration in the following words:

Judges of this Court are men and their hearts also bleed when calamities like the Bhopal gas leak incident occur. Under the constitutional discipline determination of disputes has been left to the hierarchical system of Courts and this Court at its apex has the highest concern to ensure that Rule of Law works effectively and the cause of justice in no way suffers. To have a decree after struggling for a quarter of a century with the apprehension that the decree may be ultimately found not to be executable would certainly not have been a situation which this Court could countenance.⁹₀

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⁹₀ *ibid* 609.
AM Ahmadi J. in his partly dissenting opinion expressed disbelief that people having interest in the review of settlement award were unaware about hearing in Charanlal Sahu case despite the same being widely reported in media leading to scathing criticism of Supreme Court. He pointed towards narrow scope of inquiry under review petitions in the light of court’s observations in Charanlal Sahu case. Court could not have altered, varied or modified terms of settlement order without the express consent of contracting parties. If it were to find that terms of settlement to be inadequate, it would have refused to give approval to the settlement award and turn it into a decree. It could not have unilaterally imposed any additional liability on any of contracting parties. If, on the other hand, it were to find the settlement adequate if would have converted the same into its decree. Further, scope of review petition could not be different at the post-hearing stage and accordingly, court could not have imposed any additional financial obligations even at this stage without the express consent of concerned party. He disagreed with majority judgment which has imposed burden on UOI to meet any shortfall on the mere apprehension of any deficiency. Such burden would eventually fall on Indian taxpayer. Moreover, such a burden could not be imposed in absence of any definite finding that UOI was liable in tort or acted negligently in entering into settlement. Liability of UOI as tort-feasor could only be fixed through separate proceeding, not in the review petition. In case court concluded the settlement to be inadequate, correct course of action would have been to leave parties to work out a fresh settlement or go to trial in pending suit. He too found the shifting stand of UOI, in first entering into a court assisted settlement and later supporting review petitioners without seeking court’s leave to withdraw from the settlement on permissible grounds or itself filing a review petition, thoroughly surprising.

**Researcher’s Observation**

a) UCC argument that Oleum Gas leak judgment altered the law having UCC in mind and that too even before the present case could reach the court was incorrect. The principle laid down in the judgment is as much applicable to an Indian corporation as to a TNC and makes no distinction between an Indian and foreign corporation. In fact, it has subsequently been applied (discussed hereinafter) by the Supreme Court on Indian corporations in relation to environmental damage. Further, a major disaster of the scale of Bhopal Gas
Tragedy would and should invariably weigh in the mind of any responsible apex court in any part of the world, more so due to the technical defences taken by the UCC itself.

b) Definition of the term ‘claim’ u/s 2 (b) of Bhopal Act did not include any claim for environmental damage which was shocking.\(^\text{91}\) If it was a deliberate omission, it was shocking and if the same was inadvertent lapse, it was all the more shocking. How was it possible for the government which become signatory to Stockholm conference in the previous decade and which had already enacted Water Act and Air Act, not to include claim for environmental damage. Silence of the Supreme Court in this regard was inexplicable despite petitioner’s specific contention that the same should be so included. This crucial exclusion is a scathing statement on the state of Indian judicial process itself towards its sensitivities to environmental degradation prevailing at that time. UCC should have volunteered to get it included as a responsible TNC rather than busying itself in bargaining for lesser amount of settlement.

c) Nature of UCC as a TNC weighed heavily in the mind of Supreme Court. It referred to the might of TNCs time and again, particularly in developing countries when pitted against poor and illiterate victims and consequences it may lead to. UCC hired the best lawyers available in India to defend itself.\(^\text{92}\)

d) If Bhopal like unfortunate incident involving TNC were to happen in India again, Supreme Court in an attempt to justify settlement order has intentionally or unintentionally created a precedent through its judgments in

\(^{91}\) Sec. 2 (b) of Bhopal Act defined the term ‘claim’ as ‘any loss of life or personal injury; damage to property; expenses for containing disaster; loss of business of employment; has been or is likely to be connected with disaster’.

\(^{92}\) Fali S. Nariman who represented UCC expressed his view in the following words: ‘It is now more than fifteen years since that case was argued by me in the Supreme Court of India. I must confess that when I first read Justice Sheth’s judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution Bench of the Supreme Court. I had submitted that it was illogical. But as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action – they have to wait for years in a three-tier system before they can establish and obtain a final executable decree for damages.’ He further quoted the following comments of Lord Chancellor of England: ‘And very angry I was with the decision; but have lived long enough to find out that one may be very angry and very wrong!’ Fali S. Nariman, \textit{Before Memory Fades... An Autobiography} (12th reprint, Hay House India 2015) 218-219.

When questioned by noted Indian journalist Karan Thapar, he stated: ‘Well, let me put it this way, If I had to live my life all over again, as a lawyer, and the brief came to me and I had foreknowledge of everything that later came in, I would certainly not have accepted the civil liability case which I did. ‘It was not a case, it was a tragedy’: Nariman \textit{The Hindu} (27 June 2010) <http://www.thehindu.com/opinion/interview/lsquoIt-was-not-a-case-it-was-a-tragedy-Nariman/article16270169.ece> accessed 21 May 2017.
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favour of settlement through bargaining and negotiation. This is more so in the light of the fact that establishing subsidiary companies have emerged as a preferred mode of foreign investment for TNCs in India facilitated by Companies Act 2013.

Another crucial development took place in 1994 when UCC sold its entire stake in UCIL to McLeod Russel India Ltd of Calcutta, a tea planter, which renamed it as Eveready Industries India Ltd (EIIL).  

Keshub Mahindra v State of M.P.  
(13 September 1996)

Factual Matrix

After the gas leak in Bhopal, Police suo motu registered a case u/304-A IPC indicting twelve accused. Five employees (Accused No. 5-9) of factory were arrested and kept in police custody. Case was transferred to CBI on 6 December 1984. CBI leveled charges u/s 304 Part II, 324, 326, 429 of IPC. Accused No. 1-3 were arrested on 7 December 1984 and Accused No. 1 was released on the same day. Supreme Court quashed all criminal proceedings by its orders dated 14 February 1989 and 15 February 1989 leading to termination of proceedings pending in the committal court. But it restored criminal proceedings by its review order dated 3 October 1991. As a result, case was committed to Court of Session by order dated 30 April 1992. The same was registered as Sessions Trial Case No. 237 of 1992. Accused No. 1, 10 and 11 were absconding but trial proceeded against remaining Accused No. 2 to 9 and 12. Prosecution requested Session Court to frame appropriate charges against the accused persons. 9th Additional Sessions Judge, Bhopal passed order on 8 April 1993 framing charges against accused. Aggrieved by the framing of charges, all accused filed criminal revision applications u/s 397 and 482 of CrPC before Madhya Pradesh High Court.


94 (1996) 6 SCC 129. (Bench comprising AM Ahmadi, CJ. and SB Majmudar, J.).

95 Accused No. 1 – Warren Anderson (Chairman, UCC); Accused No. 2 – Keshub Mahindra (Chairman, UCIL); Accused No. 3 – V.P. Gokhale (Managing Director, UCIL); Accused No. 4 – Kishore Kamdar (Vice President and Incharge of A.P. Division, UCIL); Accused No. 5 – J. Mukund (Works Manager, Bhopal Plant); Accused No. 6. – Dr. R.B. Roy Choudhary (Assistant Works Manager, A.P. Division, UCIL at Bhopal); Accused No. 7 – S.P. Choudhary (Production Manager, Bhopal Plant); Accused No. 8 – K.V. Shetty (Plant Superintendent, Bhopal Plant); Accused No. 9 – S.I. Qureshi (Production Assistant, Bhopal Plant); Accused No. 10 – UCC; Accused No. 11 – Union Carbide (Eastern) Inc., Hong Kong; Accused No. 12 – UCIL; Out of the above accused persons, accused Nos. 5, 6, 7, 8 and 9 were stationed at Bhopal and were incharge of the Bhopal Plant itself.
Court which dismissed the applications while upholding the charges. Aggrieved by the above judgment, accused filed Special Leave Petition (SLP) in Supreme Court.

**Appellant’s Contention**

Contents of charge-sheet and the supporting material did not even *prima facie* indicate at that stage of the trial that accused were guilty u/s 304 Part II of IPC (culpable homicide not amounting to murder). They had not done any act with the knowledge that they were likely by such act to cause death. On the same basis, they could not be charged with voluntarily causing hurt u/s 326 or voluntarily causing hurt by dangerous means u/s 324 or committing mischief by killing, poisoning or maiming any animal u/s 429 of IPC. Accused No. 2, 3, 4 in particular were stationed in Bombay and were not concerned with day-to-day functioning of Bhopal plant. Accordingly, they cannot be charged u/s 35 of IPC in absence of any evidence of their having any criminal knowledge regarding the disaster. No charge could be framed u/s 304-A of IPC since prosecution has not alleged at this stage any proximate act of negligence on the part of the accused which resulted into the accidental disaster.

**Prosecution’s Contention**

Sufficient material was produced before the court in support of charge-sheet which clearly indicated that all the accused concerned shared common criminal knowledge about the potential danger of escape of MIC due to defective plant which was operated under their control and supervision at Bhopal as well as operational shortcomings detected by the expert Vardarajan Committee constituted by Indian Government for this purpose. Report of Scientific and Industrial research team clearly indicated that the disaster was caused by the defects found in the running of Bhopal plant at the relevant time. In any case, court was not concerned, at that stage of the trial, with the truth or falsity of the allegations made. Only point of inquiry for the court at such stage of the trial was to look into the *prima facie* nature of allegations supporting these charges and if there was any material which *prima facie* indicated that accused concerned were liable to be prosecuted for the charges with which they are indicted, court should permit the trial to proceed instead of nipping the same in the bud.
Supreme Court allowed the appeal quashing these charges. The jurisdiction of the court u/s 482 of CrPC at this stage of trial was limited to deciding whether charges framed were legally sustainable on the basis of material available. It had no jurisdiction to go into the merits of the allegations as that would be undertaken when the trial proceeds.

Even if entire material was taken on record and assumed to be true, it did not even prima facie justify framing charge u/s 304 Part II IPC only on mere ground that operation of Bhopal Plant on that night caused deaths of so many human beings and cattle. Mere act of running a plant as per permission granted by authorities was not a criminal act. Mere act of storing extremely toxic and hazardous MIC in Tank No. 610 even if Bhopal plant was defective did not even prima facie indicate that accused had knowledge that they were likely to cause death of human beings. Prosecution had not suggested and could not suggest that accused had the intention to kill any human being while operating Bhopal plant. Since no charge could be framed for lack of knowledge on the part of accused u/s 304 Part II, by the same reasoning, no charge can be framed u/s 35, 324, 326, 425, and 429 of IPC for those accused who were not actually concerned with running of Bhopal Plant.

However, in order to avoid multiplicity of proceedings, court exercised its powers u/a 142 of Indian Constitution and permitted counsels of both the parties to argue on the point if the charges u/s 304-A were made out. It held that the above reasoning invoked charges u/s 304-A of IPC since the material on record before the court at least prima facie showed that accused were guilty of rash or negligent acts not amounting to culpable homicide and by that act caused death of a large number of persons. Material showed that the working of Bhopal Plant suffered from not only structural defects but also from operational defects resulting into the disaster.

Accused No. 5, 6, 7, 8 and 9 were in actual charge of running Bhopal plant must face trial for charge u/s 304-A of IPC since the material prima facie indicated their culpability in running a defective plant having many operational defects and in being prima facie guilty of illegal omissions to take safety measures in running such a limping plant on that fateful night, resulting into disaster.
Court held that Accused No. 2, 3, 4 and 12 being at the helm of the affairs must face the charge u/s 304-A of IPC for the alleged negligence and rashness of their subordinates who actually operated Bhopal Plant on fateful night. Further, Sec. 35 would also prima facie be attracted against them since their acts became criminal due to their sharing common knowledge about the defective running of Bhopal Plant by the remaining accused who represented them on the spot and who had to carry out their directions. Accordingly, court approved farming of charges against - Accused No. 2, 3, 4 and 12 u/s 304-A read with 35 of IPC; and Accused No. 5, 6, 7, 8 and 9 u/s 304-A of IPC. However, court left the question of framing of charges u/s 336, 337 and 338 with or without the aid of Sec. 35 of IPC to be determined by the Trial Court itself in absence of arguments on the point by the counsels.

Review petitions were jointly filed by Bhopal Gas Peedit Thaharsh Sahyog Samiti (BGPSSS), Bhopal Gas Peedit Mahila Udyog Sangathan (BGPMUS) and Bhopal Group for Information and Action (BGIA) against the above judgment. Neither CBI nor State of Madhya Pradesh questioned the judgment or filed any review petition u/A 137 of Constitution. Court dismissed review petitions on 10 March 1997. Prosecution of accused u/s 304A, 336, 337, 338 read with Sec. 35 IPC were accordingly continued.

In 1998, Madhya Pradesh government, which owned and had leased the property to EIIL took another significant decision. It cancelled the lease taking over the facility assuming all responsibility for the site, including the completion of any additional remediation work.\(^{96}\)

But in 1999, a significant development took place which was bound to have long term ramifications in future. Dow Chemical (Dow) agreed to buy Union Carbide for US $ 11.6 billion making it one of the largest chemical company in the world with combined annual assets of US $ 28.4 billion.\(^{97}\) UCC’s shares ceased to be traded from that day and all UCC shares became shares of Dow with UCC shareholders getting 1.611 Dow shares for each 1 UCC share held. This acquisition made Union Carbide a wholly owned subsidiary of Dow Chemical.\(^{98}\) However, Dow declared that it did not

\(^{96}\) Mehta (n 93).


\(^{98}\) ibid.
acquire UCC’s liabilities regarding Bhopal since they were settled by the terms of 1989 settlement order.

In the meanwhile, prosecution continued in Bhopal District Court and the judgment came in 2010.99 Chief Judicial Magistrate Mohan P Tiwari convicted all the seven accused u/s 304-A and 35 of IPC and sentenced them for two years of imprisonment and fine of ₹ one lakh each; imprisonment of 3 months and fine of ₹ 250 each u/s 336 of IPC; imprisonment of 6 months and fine of ₹ 500 each u/s 337 and 35 of IPC; imprisonment of 1 year and fine of ₹ 1000 each u/s 338 and 35 of IPC. In case of default, an additional imprisonment of 6 months was also awarded. All sentences were to run concurrently. Judge felt that showing sympathy to accused (who all had excellent qualifications and suffered from old age accompanied by various diseases) would waste sacrifices of victims and accordingly decided against extending probation. However, offences being bailable, they were later released on bail. Further, corporate criminal liability was imposed on UCIL in the form of fine of ₹ 5 lakh u/s 304A, ₹ 250 u/s 336, and ₹ 500 u/s 337 and 35 and ₹ 1000 u/s 338 and 35 of IPC respectively.

Judgment caused furore as activists felt that the punishment awarded, though maximum under the concerned provision, were too low having regard the suffering caused. The then UPA Government responded by reconstituting the existing100 Group of Ministers (GOM) on 9 June 2010.101 Its recommendations102 paved the way for two curative petitions to be filed in the Supreme Court – one for enhancing the amount of

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100 First Group of Ministers (GOM) headed by Human Resource Minister Mr. Arjun Singh (Chief Minister of Madhya Pradesh at the time of Gas leak in Bhopal) was constituted in 2005. It did not make any substantial recommendations. See Armin Rosencranz and Sairam Bhat, ‘Requirements of Justice’ (2010) Vol. 45 (46) EPW 14, 15.
102 Its recommendations included – substantial enhancement of compensation for victims, filing curative petition in Supreme Court on dilution of charges, making fresh request to extradite Mr. Warren Anderson, constructing a memorial at the UCC plant, separate remediation proposal to dispose toxic waste at the contaminated site in addition to recharging the ground water and soil and taking over Bhopal Memorial Hospital and allotting ₹ 230 crore for its upgradation. See Swaraj Thapa and Maneesh Chhibber, ‘Bhopal victims could get ₹ 1,320-cr relief’ The Financial Express (23 June 2010) <http://www.financialexpress.com/archive/bhopal-victims-could-get-rs-1320-cr-relief/636687/> accessed 23 May 2017.
compensation for the victims and the other for dilution of criminal charges against the accused.

**Curative Petition for Enhanced Compensation**

Indian Government filed curative petition in Supreme Court on 3 December 2010 seeking enhanced compensation for victims.\(^{103}\) It made UCC; Dow; McLeod Russel India, Kolkata; and Eveready Industries, Kolkata as respondents.\(^{104}\) It contended that additional compensation of ₹ 675.96 crore under various categories had become due and payable in 1989 which when claimed in 2010 and adjusted for devaluation of rupee, interest rate, purchasing power parity and the inflation index, amounts to ₹ 5,786.07 crore.\(^{105}\) Besides, ₹ 1,743.15 crore for relief and rehabilitation undertaken by Madhya Pradesh Government due to the tort committed by UCIL, UCC and other respondents, must be reimbursed according to polluter pays principle.\(^{106}\) Further, petition also claimed ₹ 315.7 crore towards measures for remediing environmental degradation caused by the respondents.\(^{107}\) Impugned judgments did not consider impact of Bhopal Gas Leak Disaster on environment and the consequential degradation leading to reworking of figures arrived in the settlement.\(^{108}\) Thus, the settlement earlier approved by Supreme Court was based on incorrect and wrong assumption of facts and data.\(^{109}\) Supreme Court while granting approval to settlement order had itself indicated its willingness to review, in case the presumptions on which it was based were to prove wrong. Contrary to the normal procedure of hearing in chamber, a five-judge Bench (comprising SH Kapadia CJI, Altamas Kabir, RV Raveendran, B Sudershan Reddy and Aftab Alam, JJ.) after a brief discussion in the CJI's Chamber, decided to post the matter for hearing in open court.\(^{110}\) NGOs working for gas victims welcomed the admission of petition by Supreme Court. But at the same time, they disputed figures relating to death and

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104 ibid.
105 ibid.
106 ibid.
107 ibid.
108 ibid.
110 Venkatesan (n 103).
extent of injuries as underestimation. Recently, UCC has moved Supreme Court challenging permission granted to victims’ organisations to intervene in the curative petition on the ground that they were neither parties to the original civil suit in Bhopal nor they were parties to the review petition in the Supreme Court wherein the settlement was affirmed.\footnote{Utkarsh Anand, ‘Bhopal Gas Tragedy: No private party can claim damages, Union Carbide tells SC’ \textit{The Indian Express} (10 August 2016) <http://indianexpress.com/article/india/india-news-india/bhopal-gas-tragedy-no-private-party-can-claim-damages-supreme-court-union-carbide-corporation-2928766/> accessed 24 May 2017.} UCC contended that if they were dissatisfied by any of the orders, they have to appear only through UOI and cannot be given independent rights to carry proceedings as private parties.\footnote{Ibid.} Final judgment on curative petition is still awaited.

\textbf{Curative Petition against Dilution of Criminal Charge}


\textit{Factual Matrix}

In response to mounting pressure in media, CBI filed curative petition before Supreme Court seeking re-examination of its judgment delivered in 1996.

\textit{Contentions}

CBI pointed to the Supreme Court that it had committed serious error in ignoring material which was adequate for making out \textit{prima facie} case u/s 304 (Part II) of IPC. Such a finding by the court had barred Magistrate from exercising his judicial power u/s 323 of IPC of altering charge or committing case to Court of Session in the light of evidence adduced during trial. It had caused “perpetuation of irremediable injustice” necessitating filing of curative petitions.

\textit{Judgment}

Supreme Court took note of the fact that neither CBI nor Madhya Pradesh Government filed any review petition u/A 137 of Constitution. On the contrary, it persisted with the prosecution of the accused for the last 14 years. Further, on 26 April 2010, BGPSS and BGPMUS jointly filed a petition (after conclusion of defence
evidence as well of oral arguments by Senior Public Prosecutor) u/s 216 CrPC seeking enhancement of charge to Sec. 304 (Part II) IPC. CBI did not support this application and the same was rejected on same day by the CJM. This order was also not challenged u/s 397, 399 or 482 IPC. Accordingly, CJM convicted accused sentencing them to imprisonment of two years.

Madhya Pradesh Government filed criminal appeal on 29 June 2010 before the Court of Session seeking enhancement of sentences under the existing charges. Same day, Madhya Pradesh Government also filed Criminal Revision Application before the Court of Session u/s 397 CrPC to challenge alleged failure of CJM to enhance charges to Sec. 304 (Part II) IPC in exercise of his jurisdiction u/s 216 CrPC and to commit trial to Sessions u/s 323 CrPC and inter alia praying for a direction to enhance charges and commit. CBI filed Criminal Appeal before Court of Session on 29 July 2010 for enhancement of sentences under existing charges. After filing curative petitions on 2 August 2010, CBI filed criminal revision on 23 August 2010.

Supreme Court held that its decision cannot be read in such a manner so as to nullify express statutory provisions and 1996 judgment was no exception to this principle. Its findings were based on evidence gathered till that stage. Judgment in no way fettered exercise of jurisdiction by a competent court. If at all the Magistrate has mistakenly fettered in exercising its jurisdiction due to misreading of its judgment, the same can be corrected by appellate/revisional court for which petitions are pending. Court dismissed curative petitions in presence of any satisfactory explanation for filing such petition after 14 years and also not meeting any ground within the parameters laid out by Rupa Ashok Hurra v Ashok Hurra\textsuperscript{114} case.

**Clean Up of Contaminated Site**

Besides the above issues, cleanup of contaminated site has also increasingly engaged the attention of judiciary and has proved highly vexed as discussed hereinafter.

Madhya Pradesh Government asked EIIL to clean up the contaminated site.\textsuperscript{115} It refused on the ground that the contaminated site was surrendered to State authorities

\textsuperscript{114} 2002 (4) SCC 388.

in 1998 claiming no further responsibilities. Thereafter, governments (both at the Centre and the state) remained dormant only to be awakened in 2002 when United States District Court for the Southern District of New York agreed to consider claim for site remediation subject to cooperation of Indian Government. Indian Government expressed its willingness to cooperate in any such remediation as and when ordered by US District Court while clarifying that CPCB will monitor compliance with its norms, UCC will bear entire financial cost thereof as well as being responsible for any loss caused in the process.

In 2004, Mr. Alok Pratap Singh filed PIL in Madhya Pradesh High Court seeking directions to make Dow clean up the gas leak site. Dow contended that in the light of final settlement of UCC with UOI and the consequential discharge of the former of any subsequent responsibility, it cannot be held liable at all. In June 2005, Madhya Pradesh Pollution Control Board (MPPCB) initiated the process of removal of toxic waste under orders of Madhya Pradesh High Court. However, the same was discontinued following the constitution of a task force by the High Court. The task force in turn set up a Technical Subcommittee (TSC) for suggesting measures for waste disposal. In its second meeting, held on 26 August 2006, TSC unanimously recommended that the only fair, ethical, proper, legal and desirable solution to the problem was for the Indian Government to ask Dow to take all the waste out of the country without creating any health hazard for anyone. In case Dow refused, Government should on the one hand, freeze the assets of Dow and all its subsidiaries and associated companies and on the other hand should incinerate the waste but in a totally transparent manner taking civil society and people into confidence.

Central government also sought Court’s direction to make Dow Chemical deposit ₹ 100 crore in advance for environmental remediation and restoration on the basis of

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116 ibid.
117 ibid.
118 ibid.
119 ibid.
120 TSC included P.D. Meena (Chairman, MPPCB); D.D. Basu (Senior Scientist, CPCB); Tapan Chakrabarty (Director Grade Scientist, NEERI); A. Krishna Reddy (Deputy Director of the Indian Institute of Chemical Technology); and K.P. Nyati (Head, Environment Management Division, CII). It also co-opted two renowned scientists as members, in compliance with the High Court direction – P.M. Bhargava (Centre for Cellular and Molecular Biology, Hyderabad) and J.P. Gupta (DG, Gujarat Energy Research and Management Institute). See V Venkatesan, ‘Toxic legacy’ (2007) Vol. 24 (02) Frontline <http://www.frontline.in/static/html/fl2402/stories/20070209001704300.htm> accessed 25 May 2017.
121 ibid.
122 ibid.
Rule 16 of the Hazardous Waste (Management & Handling) Rules 1989. However, Madhya Pradesh High Court felt that waste removal needed urgent consideration deferring the issue of fixing responsibility for remediying site.  

High Court directed the Centre and the state to incinerate toxic waste at Pithampur (Dhar district of Madhya Pradesh) after testing it. However, it could not be done owing to stiff opposition from NGOs on the ground that such incineration would harm environment and health of the people of Pithampur. Thereafter, High Court directed it to be incinerated in Ankleshwar in Gujarat. Again due to protests from NGOs in Gujarat, Gujarat government petitioned Supreme Court to review decision. Supreme Court later directed the incineration to be done at the Defence Research Development Organisation (DRDO) facility near Nagpur (Maharashtra). Again due to protest of NGOs in Maharashtra, Maharashtra Government expressed its inability. Thereafter, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ, a German company) sent a proposal for incineration of 350 metric tonnes of packaged chemical waste for a payment of ₹ 25 crore in four phases - first two months for surveying and sampling of waste; next four months for making a project plan and purchasing requisite material; next three months for air lifting waste to Germany and its incineration there. It will not be violative of ‘Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989’ since India lack adequate technical facilities for incineration of such toxic waste. However, on 19 September 2012, it withdrew its proposal via a communication to Mr. P Chidambaram citing protests by environmental groups in Germany fearing beginning of toxic trade

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123 Venkatesan (n 115).
124 ibid.
126 ibid.
127 ibid.
128 ibid.
129 ibid.
130 ibid.
131 “GIZ offers customised solutions to complex challenges. We are an experienced service provider and assist the German Government in achieving its objectives in the field of international cooperation. We offer demand-driven, tailor-made and effective services for sustainable development.’ See About GIZ <https://www.giz.de/en/html/about_giz.html> accessed 26 May 2017.
tourism to Germany. Thereafter, Union Ministry of Environment and Forests (MoEF) filed an SLP in Supreme Court challenging a Madhya Pradesh High Court order demanding appearance of principal secretary of MoEF before it. On 4 April 2012, Supreme Court (Division Bench comprising of G.S. Singhvi and Sudhansu Jyoti Mukhopadhyaya JJ.) directed Madhya Pradesh government, Madhya Pradesh Pollution Control Board (MPPCB) and CPCB to dispose the waste in Pithampur waste treatment storage and disposal facility (TSDF).

The then Environment Minister Mr. Anil Madhav Dave in a written reply informed the Lok Sabha that the trial incineration of 10 tonnes of actual UCIL waste (out of approximately 336 tonnes) was undertaken by Ramky Private Ltd. at common hazardous waste treatment, storage and disposal facility (TSDF) in Pithampur in Indore during 13-18 August 2015 under the supervision of the CPCB, MPPCB and the environment ministry. All the monitored parameters of the incinerated waste complied with the prescribed parameters of common hazardous waste incinerator (under schedule II of the Environment Protection Rules 1986). Government was committed to incinerate the remaining waste through tender route – the entire exercise was expected to cost approximately ₹ 500 crore.

Apart from GIZ, one more initiative deserves mention in this regard. Ratan Tata (Chairman, Tata Group and a trusted name in corporate philanthropy in India) as Chairman of the National Investment Commission, proposed twice (once to P. Chidambaram, the then Finance Minister in 2006 and later to Montek Singh Ahluwalia, the then Deputy Chairman, Planning Commission) the idea of creating a

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137 ibid.
fund for remediation of the Bhopal site for which he offered to take a lead in finding likeminded corporate houses who may contribute. However, he clarified that his suggestion was completely independent of the case pending in the court. His purpose behind the suggestion was to facilitate Dow Chemical to invest in India. This is a classical example of volunteering to do CSR but the problem was it had the implication of exonerating TNC (Dow Chemical) of its legal liability and hence would result in violation of polluter pays principle.

In another twist, recently, Dow Chemical and DuPont have announced their merger plan which will create a behemoth entity (DowDuPont) worth $130 billion. However, the plant has got stuck with EU’s antitrust regulator for non-submission of important information demanded of them. This merger will further complicate the matter with regard to cleaning of Bhopal site. It is noteworthy that while TNCs involved continue to devise merger strategies aimed at improving their efficiency and thereby profits, they have nothing to offer to victims of contaminated site at Bhopal in terms of clean up. In the meanwhile, they also continue to claim themselves as being the most CSR compliant.

**Researcher’s Observation**

Bhopal Gas Disaster is a classical instance of victimization at the hands of many instrumentalities and the right to clean and healthy environment has turned out to be the worst casualty. Disaster has continuously tested every organ of governance regarding their respective obligations to redress the grievances of victims in the last more than three decades. It has shown serious shortcomings in the Indian Legal System and the manner in which they are exploited by the parties leading to further victimization. Besides, it has also tested the efficacy of extra-territorial jurisdiction of US courts under ATCA to redress grievances of victims. Significantly, it has also exposed the shallowness in approach of three leading TNCs (UCC, Dow and Dupont) towards the plight of victims amidst their tall claims of being environmentally sustainable and socially responsible.

139 Venkatesan (n 120).
140 ibid.
a) Judgment came nearly 3 years after the Bhopal gas leak disaster wherein Supreme Court itself was confronting the intricate nature of fixing the liability of a foreign corporation. This was second gas leak case involving a private corporation – first involving TNC and second involving Indian corporation. Fortunately, latter did not result in massive loss of life, property and environment in comparison to the former. Court, in its very first order, expressed its consciousness of the gravity of the issues involved. It issued interim directions through first two orders while hearing of detailed arguments was deferred for later date. Issues presented before the court had unprecedented jurisprudential significance for the Indian legal system as a whole. It provided a golden opportunity to the court to catch the bull by its horns in the form of holding a private corporation accountable as a State which it unfortunately failed to seize. Detailed consideration was needed then and there instead of leaving it for the future. In a way, court decided to wait for another such disaster to occur. One wonders what more was needed to decide. Since CJI was himself heading the bench, court should have explored and innovated a mechanism facilitating detailed hearing even on the first issue.

b) While court ducked the first issue for paucity of time and resultant inadequacy of detailed arguments, on the second issue, it was prepared to carve out an entirely new principle of absolute liability. On the one hand, court showed the wisdom of laying down the new jurisprudential principle of absolute liability of enterprise modifying the English rule of strict liability having regard to Indian conditions, whereas on the other, court did not have sufficient time to decide the first issue. The justification given by the court in support of developing new jurisprudence for the second issue applies equally (if not more) for deciding the first issue as well.

c) The two leading TNCs (UCC and Dow) were involved in the disaster (Third leading TNC – DuPont will enter the arena after the completion of merger

142 These questions which have been raised by the petitioner are questions of the greatest importance particularly since, following upon the leakage of MIC gas from the Union Carbide Plant in Bhopal, lawyers, judges and jurists are considerably exercised as to what controls, whether by way of relocation or by way of installation of adequate safety devices, need to be imposed on Corporations employing hazardous technology and producing toxic or dangerous substances and if any liquid or gas escapes which is injurious to the workmen and the people living in the surrounding areas, on account of negligence or otherwise, what is the extent of liability of such Corporations and what remedies can be devised for enforcing such liability with a view to securing payment of damages to the persons affected by such leakage of liquid or gas.’ M. C. Mehta (n 63) 178.
between Dow and DuPont). Former disowned its subsidiary (UCIL) accepting no liability towards compensating victims on all possible technicality of holding-subsidiary relationship under corporate law. It extracted its way out by paying a lump sum amount to Indian Government – which did not involve environmental damage as its component. The latter failed to accept any liability to clean up the contaminated site in order to protect victims from ongoing pollution. Such a stand is a clear violation of polluter pays principle particularly when it acquired UCC having knowledge that site is yet to be cleaned up and people are suffering thereby. Due diligence undertaken in pre-acquisition stage must have disclosed that environmental damage has not being factored in the settlement award. In the light of existence of contaminated site, such award might be reopened and if such disclosures were not made, due diligence undertaken by it for acquiring UCC seems far from being adequate. And if it has taken risk knowing this situation, it must bear the consequence as an investor. In any case, the fact of non-inclusion of environmental damage in determination of settlement award was in public domain and may be easily gathered from even a mere plain reading of various judgments of Supreme Court discussed above. Therefore, it needed no due diligence of any kind to discover the same. Dow’s argument in this regard is hyper-technical. However, in the era of CSR, adoption of such an argument on the part of a TNC is unfortunate, to say the least. When Supreme Court approved the settlement through its order, it was not possible for it to foresee the future suffering. No compensation was sought for environmental damage. When such damage still persist in full public glare and is well recorded, acknowledged and accepted, such stand cannot be taken by a TNC which claims to adhere to international standards for CSR including environmental responsibility. Further, such questionable stand stares Dow in its face. It created a situation in which a TNC comply with Sec. 135 of CA 2013 spending huge amount on CSR activities but fails to clean up the contaminated site. Recurrence of such unfortunate situation cannot be ruled out in future. Such a situation raises serious questions about the credibility and futility of the entire CSR framework creating a win-win situation for the TNC involved. While TNC will not clean up the site yet it will continue to make tall claims about its CSR activities. In this way, both UCC and Dow have violated right
to clean and healthy environment by their conduct. However, at the same time, they have posted on their website detailed version of various arguments raised against them and how much socially responsible they have been!\textsuperscript{143} They also claim to be absolutely committed to environmental sustainability in their business.\textsuperscript{144} On the contrary, nothing of that sort is readily available in the form of the version of Indian Government although certain NGOs have presented their arguments which are not so well classified. After merger of Dow with DuPont, another TNC will enter the fray but going by their erstwhile approach, its approach is also expected to be no different.

d) Approach of Indian Government does not show any farsightedness but is merely a knee-jerk reaction. Despite being democratic, it has failed Indian Constitution and thereby Indian people. It assumed the role of \textit{parens petriae} from the very initial stage. However, it never showed the vision required of someone acting as parent of her people. It did not contest liability of UCC on merits in the court. It negotiated a settlement where environment damage was not factored in and the amount thereof also could have been higher. Even Supreme Court expressed amazement when it did not object to the settlement award but sided with the petitioner who challenged the award. Its manner of compensating victims out of that amount left much to be desired. It continued to drag its feet regarding remediating the contaminated site and taking no action against Dow. In absence of Dow cleaning up, it should have cleaned up the contaminated site to protect Indian people from resultant pollution and recover the cost thereof from Dow instead of doing it as a result of directions from Supreme Court. It had sufficient time to develop incineration capacity to take care of the waste. All its actions including filing of both the curative petitions were not part of any thoughtful strategy but in response to public pressure becoming unbearable. At the foreign front, it failed to ensure presence of Mr. Warren Anderson before the Bhopal District Court to face trial till his death leaving only Indian directors and managers of UCIL to face trial and


\textsuperscript{144} For Dow See generally <http://www.dow.com/en-us/science-and-sustainability> accessed 27 May 2017. Interestingly, Dow has launched 2025 Sustainability Goals of which valuing nature is one of the three pillars. See <http://www.dow.com/friends/sustainability-goals/> accessed 27 May 2017. UCC being wholly owned subsidiary of Dow, these Goals are also equally applicable to it.
consequential punishment. Governance standards are pathetic if people have to come to the streets in protest at the expense of their daily vocation to make government do what it should have done on its own. Government did not even agree to boycott London Olympics on the ground of Dow being one of the eleven Worldwide Olympic Partners.

e) Indian Supreme Court, despite its pro-poor avatar through PIL, shirked from developing jurisprudence on liability of TNCs. It also did not accept the argument regarding inclusion of environment damage as one of the considerations in determining the amount of settlement while approving the settlement award through its order. That too, in spite of the fact that it has held right to clean and healthy environment as integral part of right to life u/A 21 of Indian Constitution. Two and a half decades later, it is hearing a curative petition for enhancing the quantum of compensation wherein environment is one of the crucial yet hitherto ignored factor. It is to be seen whether Supreme Court gives meaning to right to clean and healthy environment by actually enforcing it. Further, its judgments have created a precedent for future settlements in the wake of such disasters. Indeed, it confronted an extraordinary situation of unprecedented proportions before it but that required it to innovate and rise to the occasion.

f) Bhopal Gas Disaster also exemplifies the perseverance of NGOs working for the rights of the victims. Whatever little could have been achieved is largely due to their efforts. They explored and are still exploring all the avenues possibly available for redressing the grievance of victims in Indian legal system as well as even in US legal system. Their efforts represent the strength of Indian democracy.

6.5.3 Environmental Damage involving Jyoti Chemicals

Indian companies running chemical industries posed a serious threat to the environment of the entire Bichhri village in Rajasthan.

Factual Matrix

Hindustan Agro Chemicals (4th respondent) started producing certain chemicals like Oleum and Single Super Phosphate. Silver Chemicals (5th Respondent and sister concern of Hindustan Agro Chemicals) and Jyoti Chemicals (8th Respondent) were involved in manufacture of ‘H’ acid which gave rise to enormous quantities of highly toxic effluents – particularly iron based and gypsum based sludge. All the factories of Respondents No. 4 to 8 were located in one complex in Bichhri village and were regulated by same group of individuals. Untreated waste was thrown in open in and around the complex. Toxic substances percolated into earth, polluted aquifers and sub-terrain supply of water. Water in wells and streams became dark and dirty and thus unfit for human or even cattle consumption as well as irrigation. Soil became unfit for cultivation (primary source of livelihood for villagers). All this caused disease, death and disaster in Bichhri. Despite Minister’s assurance in the Parliament, no action was taken leading to revolt in Bichhri. District Magistrate imposed Sec. 144 CrPC and Silver Chemicals was closed down in January 1989. Jyoti Chemicals too stopped manufacturing ‘H’ acid since January 1989. Nevertheless, the consequences of their actions persisted in the form of damage to environment. A PIL was filed in Supreme Court u/A 32 of Indian Constitution.

Petitioner’s Contention

Respondents industries should be closed down immediately in the light of their proven culpability as indicated in various reports.

Respondent’s (No. 4-8) Contention

Being private corporate bodies, they were not ‘State’ u/A 12 of Indian Constitution. Therefore, writ petition could not lie against them u/A 32 of Indian Constitution. They further argued that Supreme Court regarded the absolute liability principle enunciated in Oleum Gas leak case as obiter dicta in Bhopal Gas leak Disaster review petition.


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Blaming them for pollution was inappropriate since Hindustan Zinc Ltd. was in existence and discharging toxic untreated effluents in Bichhri well before their establishment. Rajasthan Pollution Control Board (RPCB) adopted hostile attitude towards them from the very beginning. Therefore, Reports submitted at its instance were doubtful, more so when they were not given opportunity to cross-examine experts. Further, they cooperated with Supreme Court in carrying out all its directions. However, Central and State authorities discriminated against them by singling them out while taking no action against nearly 70 other industries in India engaged in manufacturing ‘H’ acid. Directions given for disposal of sludge were comparatively harsh for them.

They denied the allegation that sludge was still lying around within and outside their complex and toxic wastes were still flowing through and leaching the sludge, creating highly dangerous situation thereby. Further, since their industries were established before the amendment of Sec. 25 of Water Act, prior consent for their establishment was not required. They also pointed towards the need to establish environmental courts empowered to deal with such cases.

UOI’s Contention

UOI argued for the need to take urgent appropriate directions to mitigate and remedy situation as shown in expert reports.

RPCB’s Contention

It denied allegations of malafides and hostile intent. It admitted that despite best efforts, it was not able to eradicate pollution in the area and asked for stringent orders for remedying the disastrous situation in Bichhri.

Judgment

Supreme Court held that failure of UOI, Rajasthan Government and RPCB in performing their statutory duties had resulted in violation of Right to life of the villagers of Bichhri u/A 21 of Indian Constitution. It regarded absolute liability principle laid down in Oleum Gas Leak judgment not as obiter dicta but by far the most appropriate one and binding, being delivered by a larger bench. Court held Respondents No. 4-8 as absolutely liable to compensate the harm caused by them.
According to Supreme Court, even if it was assumed (for argument sake) that it cannot award damages against respondents, still it can very well direct Central Government to determine and recover cost of remedial measures from respondents.

Further, repeated orders were necessitated by respondents’ repeated violations instead of RPCB’s hostility. Reports of NEERI, Central Team (comprising experts from MoEF) and RPCB were submitted on court’s instructions and their members were experts in their respective fields and were under no obligation to RPCB or industry. Reports clearly showed presence of huge quantities of sludge still lying around either in form of mounds or placed in depressions, or spread over contiguous areas and covered with local soil to conceal its existence. As per the reports, another part of the sludge (‘mother liquor’) had become unfortunately invisible due to it being either flowed out or percolated into soil leaving its dangerous effects on soil and underground water. Therefore, these reports could not be questioned after such a late stage of proceedings.

Court found respondents alone to be responsible for all the damage to soil and underground water in the area. Court regarded them as rogue industries and ordered closure of all their plants and factories located in Bichhri. Their reopening would be subject to their compliance with directions and obtaining all requisite permissions and consents from relevant authorities. Court directed Central Government to determine amount needed for carrying out remedial measures including removal of sludge and recover the same form the Respondents. Court also recommended establishment of environment courts.

**Researcher’s Observations**

Although the case does not involve any TNC, significance of the judgment lies in Court’s acceptance of the validity of absolute liability principle. It paved the way for application of this principle by Indian judiciary in other subsequent cases relating to violation of right to clean and healthy environment. This principle offers the scope for distinguishing TNCs and Indian corporations in fixation of quantum of compensation since the former is likely of have more capacity and resources at its command than the latter.
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6.5.4 Environmental Damage involving Coca Cola

Coca Cola Company (Coca Cola) was incorporated in US. It came to India in the year 1956. FERA 1974 capped foreign equity participation at 40%. Refusing compliance therewith, Coca Cola like few other leading TNCs exited from India during 1970s. With the adoption of NEP of 1991, CoCa Cola made a comeback on 24 October 1993 through an alliance with Parle (acquiring its brands like Thums Up etc. and gaining access to its nationwide bottling and distribution infrastructure). Presently Coca Cola system is structured around two companies in India namely – Coca-Cola India Pvt. Ltd. (a wholly-owned subsidiary of Coca-Cola, USA) and Hindustan Coca-Cola Beverages Pvt. Ltd. (HCCBPL). Figure 1 depicts their interrelationship –

(HCCBPL) runs 24 bottling plants across India covering nearly 5% of bottling operations for the Coca-Cola System in India. It is part of Coca Cola’s Bottling

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Investments Group (BIG)\textsuperscript{150} and is engaged in manufacture, package, sale and distribution of beverages under the trademarks of Coca-Cola.

\textit{Perumatty Grama Panchayat v State of Kerala}\textsuperscript{151} (16 December 2003)

\textit{Factual Matrix}

HCCBPL was having its factory in Moolathara in Perumatty Grama Panchayat (Panchayat), a drought prone area. It took licence from the Panchayat on 27 January 2000 and began commercial production using electric power up to 2600 HP in March 2000. They also took licence under Factories Act and clearance from Kerala Pollution Control Board. It used to extract its main raw material (i.e. water) from underground through bore-wells.

Taking cognizance of objections raised by local people due to excessive extraction of ground water and thereby causing acute water scarcity in the area, Panchayat, through a resolution, refused to renew HCCBPL’s licence in public interest on 7 April 2003. It issued notice to HCCBPL u/s 240 of Kerala Panchayat Raj Act, 1994 and Rules thereof on 9 April 2003. HCCBPL filed reply on 30 April 2003 denying the allegations and stating that the factory was being run in conformity with statutory permissions. On 12 May 2003, Panchayat cancelled HCCBPL’s licence and directed it to stop functioning from 17 May 2003. HCCBPL appealed against the decision in Kerala High Court which directed it to approach appropriate authority under available statutory remedy while maintaining \textit{status quo} till such authority decides the matter. Accordingly, HCCBPL moved Government in appeal.

Government directed Panchayat to form a team of experts from the Departments of Ground Water and Public Health and the State Pollution Control Board for conducting a detailed investigation into the allegations. Panchayat was asked to decide the issue of cancellation of licence on the basis of outcome of such an investigation and till then granted stay against Panchayat decision.


\textsuperscript{151} 2004 (1) KLT 731. (K Balakrishnan Nair, J.).
Aggrieved by the above judgment, Panchayat filed Writ Petition before Single Judge of the Kerala High Court.

**Issue**

Whether the decision of Grama Panchayat to cancel licence of HCCBPL’s factory on the ground of excessive extraction of ground water was legal and Government’s interference therein through its decision in appellate jurisdiction was sustainable?

**Panchayat’s Contention**

Panchayat was authorized to preserve water resources u/s 218 of Kerala Panchayat Act and its third schedule read with Sec. 166. Government did not have power to direct Panchayat to entrust investigation to a particular agency. Panchayat could undertake independent investigation if Government does not raise audit objection and HCCBPL cooperate.

**Government’s Contention**

Government’s decision was taken with the objective of balancing the people’s concern regarding environment on the one hand and interest of industrialization of the State on the other.

**HCCBPL’s Contention**

Panchayat being a quasi judicial authority lacked *locus standi* to challenge appellate order of Government. Further, Government’s order, being a consensus order, challenging the same was improper. Panchayat’s original order being non-speaking was a nullity. Even the show cause notice issued did not give any particulars, materials or reports. In the light of the reports, allegations of excessive extraction of ground water were baseless. Permission for digging bore-wells was neither required to be taken at the time of establishing factory nor even at present owing to absence of any law regulating the same and Kerala Ground Water (Control and Regulation) Act 2002 was yet to be enforced.

**Judgment**

Materials submitted by HCCBPL clearly show extraction and use of substantial quantity of ground water. However, Panchayat decision to close down the factory was
unauthorized and accordingly court upheld government’s order to the extent of interfering with closure of factory. Court invoked doctrine of public trust and relied on judgments of Supreme Court stating that right to clean air and unpolluted water constitute part of right to life u/A 21 of Constitution to conclude the Panchayat and State were duty bound to protect ground water from excessive extraction even in absence of any law regulating the same. Court went to extent of holding that even if experts suggest that extraction to the existing level were harmless, it should not be permitted since underground water belong to public and therefore such Government could not permit such huge extraction. Further, if HCCBPL was permitted, other land owners were also to be permitted such huge extraction which will lead to drying up of such source.

Court directed – HCCBPL to stop water extraction after one month and find alternative source thereof during such period; Panchayat to renew licence and not interfere with HCCBPL’s functioning if it meets its water requirement from other source; Panchayat, with assistance of Ground water Department, to fix quantity of water that a land owner of 34 acres of land could extract and permit only such quantity of water to HCCBPL.

A significant development took place in 2004. ‘Supreme Court Monitoring Committee on Hazardous Wastes’ constituted by the Supreme Court in Research Foundation for Science, Technology and Natural Resource Policy v Union of India152 found, after visiting the area, waste dumping by HCCBPL outside its premises. CPCB too found that HCCBPL supplied sludge containing heavy metals to farmers as fertilizer and ordered closure of factory till it undertook treatment of sludge under Hazardous Waste Rules.153

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Hindustan Coca-Cola Beverages (P) Ltd. v Perumatty Grama Panchayat\textsuperscript{154} (7 April 2005)

Factual Matrix

Both HCCBPL and Panchayat got aggrieved by the judgment discussed above. HCCBPL filed writ petition challenging certain observations likely to affect its normal manufacturing and sales activities. Panchayat also filed writ petition objecting to certain findings which it found to be against its interests.

HCCBPL’s Contention

High Court’s Judgment and the directions through it were illogical. It was yet to be established if there was excessive extraction. Moreover, a person is the owner of underground water of his land. Further, finding alternative sources of water was an impossible condition leaving closure as the only consequence. Other local authority would not permit drawing water from its jurisdiction for utilization by other distantly situated industry for the same reason as the person was not permitted to extract underground water from his own land, making such extraction illegal.

Panchayat’s Contention

Panchayat had nothing against HCCBPL which has been source of direct and indirect employment to people. If apprehensions of environmental pollution were addressed, it had no objection to the operations of HCCBPL.

Judgment

Unless prohibited by statute, a person has right to extract water from his property and accordingly the court disapproved the conclusion that extraction of water was illegal. Panchayat could not prevent owner from extracting water under Kerala Panchayat Raj Act, 1994. Further, final report of the Expert Committee was comprehensive and concluded that rainfall deficit was the most significant factor contributing to water scarcity in the region. Unregulated extraction of underground water even during such water scarcity further aggravated the already stressed situation. Conclusions of Interim report that even when extraction of underground water was stopped during March 2004, falling water level trend continued, negated the contention of excessive

\textsuperscript{154} 2005 (2) KLT 554. (Division Bench comprising M Ramachandran and KP Balachandran, JJ.)
extraction leading to water scarcity. Panchayat was unjustified in rejecting renewal of licence without making a scientific assessment. Further, it had no legal authority to cancel licence for stated reasons.

Court directed Panchayat to consider HCCBPL’s application for renewal if filed within two weeks. HCCBPL in turn would inform Panchayat about licences issued to it under Factories Act and clearance form Kerala Pollution Control Board. Panchayat would grant licence upon fulfillment of twin conditions mentioned above. Thereafter, enquiring about details of machineries installed including bore-wells would be beyond its jurisdiction and would fall under enforcement officers of Factories Act. Court imposed upon HCCBPL, restriction on extraction of a maximum of 5 lakh litres of water per day having regard to average rainfall in the region without any right to accumulation in case of non-user per day. Panhayat had jurisdiction to undertake inspection about compliance with such limit though without interfering or inconveniencing HCCBPL.

In absence of any representations from others (except workmen who alleged Panchayat arm-twisting HCCBPL unnecessarily) claiming to represent general public, court suo motu directed HCCBPL to involve as an essential duty, under Panchayat’s supervision, in community development programmes for people residing in locality particularly regarding health and supply of drinking water. Reasonable water drawn should be utilized for benefit of general public which court directed must commence from 30 June 2005.

In May 2009, Kerala Government constituted a fourteen member High Powered Committee (HPC) (headed by Additional Chief Secretary K Jayakumar and comprising legal experts, a retired district judge, agricultural scientists, environmentalists and health and ground water experts) to assess the ‘socio-economic damage’ allegedly caused by ‘exploitation’ of ground water by the factory of HCCBPL.\(^\text{155}\) Its report, submitted in March 2010, found that HCCBPL had extracted excessive underground water and damaged farming and environment by dumping solid waste.\(^\text{156}\) It recommended a compensation of ₹216.26 crore from HCCBPL for the ‘multi-sectoral’ loss (i.e. ₹84.16 crore – agricultural loss, ₹62 crore – pollution of


\(^{156}\) ibid.
water resources, ₹ 20 crore – cost of providing water, ₹ 30 crore – health damage, ₹
20 crore – wage loss and opportunity cost) during functioning of its factory (1999-
2004) and setting up of a Tribunal to redress victims’ grievance. However, HCCBPL had rejected the report on the ground that HPC was appointed on unproven
assumption that it had caused damage.

Kerala Assembly unanimously passed without discussion, the Plachimada Coca Cola Victims Relief and Compensation Claims Special Tribunal Bill on 24 February 2011 in order to compensate the victims of the environmental damage done by HCCBPL. The Bill proposed to constitute a three member Tribunal for adjudicating disputes and provide compensation by entertaining original applications from affected people by applying principles of sustainable development, precautionary principle and the pollutant pays principle. Bill also empowered Tribunal to transfer cases involving local residents arising out of violations of laws relating to environment, air and water involving HCCBPL as a party which were pending before different courts and other authorities excluding High Court or Supreme Court. Bill conferred upon Tribunal all the powers and authority of a civil court.

HCCBPL expressed disappointment over flawed process followed for passing of such a Bill. It termed the Bill as ‘devoid of facts, scientific data or any input’ from it. No opportunity was ever afforded to HCCBPL of presenting facts, engaging in dialogue around this issue or sharing independent data before tabling or approving it.

The Bill was sent to Union Ministry for Home Affairs for Presidential Assent in April 2011. Ministry of Law and Justice in consultation with the Solicitor General of India opined that its provisions were in direct conflict with that of NGT Act. Further, State Assembly lacked legislative competence to enact a law for constituting a tribunal to adjudicate the matters arising out of the violations of the law executed by Parliament under Article 253 of the Constitution, subject matter of which did not fall

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157 ibid.
under the subject matter specified in List-II or List-III of the seventh schedule.\textsuperscript{161} On 1 February 2016, President declined to give assent to the Bill without assigning any reason.\textsuperscript{162}

Five SLPs (three by Panchayat and one each by the Kerala Government and the KSPCB) were filed at the Supreme Court.\textsuperscript{163} Meanwhile HCCBPL plant continued to be shut since March 2004.\textsuperscript{164} Coca Cola is not alone in this regard. Its global competitor Pepsico is also facing protests against running of its plants due to water scarcity.\textsuperscript{165}

Interestingly, HCCBPL informed the Supreme Court that it does not intend to commence manufacturing operations at its Plachimada plant.\textsuperscript{166} Coca Cola relinquished its licence in this manner.\textsuperscript{167} Consequently, Supreme Court (Bench comprising Rohinton Fali Nariman and Sanjay Kishan Kaul, JJ.) disposed appeals as infructuous through its order on 13 July 2017.\textsuperscript{168} This ended nearly 12 year long litigation.\textsuperscript{169} But the issue of compensation for the damage caused for environmental damage still remains to be resolved for the benefit of the victims.

\textsuperscript{161} ibid.
\textsuperscript{164} Coke has also shut down its plants in Mehdishan (Varansi, Uttar Pradesh); Kaladera (Jaipur, Rajasthan); Visakhapatnam (Andhra Pradesh) and Byrnihat (Meghalaya). Investigation by NGT are underway for discharging effluents into a pond behind its plant at Hapur (Uttar Pradesh) See Coke shuts Rajasthan unit, halts work at 2 plants. See ‘Coke shuts Rajasthan unit, halts work at 2 plants’ The Hindu Business Line (11 February 2016) <http://www.thehindubusinessline.com/companies/coca-cola-suspends-manufacturing-at-3-plants-in-india/article8222104.ece> accessed 29 May 2017.
\textsuperscript{168} Will Not Restart the Plachimada Plant (n 166).
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Researcher’s Observation

It is interesting to note that Kerala High Court directed HCCBPL to engage in community development programmes for people residing in locality – an activity very similar to the ones listed in Schedule-VII of Companies Act 2013. Government too found itself in a fix since its attempts to find optimum balance between conflicting environmental interests and industrial interests failed to deliver lasting solutions. It is remarkable that Grama Panchayat (lowermost democratically elected institution in India) has asserted its right to protect water resources under its jurisdiction against one of the most powerful TNC of the world. And significantly, it has shown the perseverance of contesting the matter all the way up to the Supreme Court. The manner in which HCCBPL has suddenly decided not to conduct manufacturing activity in Plachimada plant thereby relinquishing its licence, can be hailed as a victory of Grama Panchayat in its fight against Coca Cola. Also, it shows that a strong federal constitutional machinery through Panchayati Raj institutions and the grass root level awareness and struggle can prove to be the best safeguard for environmental protection. It is a vindication of strengthening grass root level democratic institutions and the role they can potentially play in environmental protection even if pitted against the mightiest TNCs. However, if the plant was in fact responsible for environmental damage, battle is still far from being over. Coca Cola should be made to pay compensation to victims of such environmental damage on the basis of polluter pays principle. This will go a long way in instilling sense of confidence in the minds of the people in judicial system.

At a more general level, Beverage industry is water intensive. Therefore, Bottling plants established by Coca Cola and Pepsico (another leading TNC in the industry at the international level) are facing protests in India due to apprehension of environmental damage. Only a sincere CSR on their part focused at environmental restoration can make their business economically and environmentally sustainable.

6.5.5 Environmental Damage involving POSCO

POSCO was established on 1 April 1968 in South Korea. Its products are shipped to over 60 countries around the globe. It has been ranked 1st as the World’s Most Admired Companies (Metals), ranked 20th as Sustainable Company by World Economic Forum, 100th in terms of business scales by Fortune Global and ‘No.1
International steel company’ by World Steel Dynamics.\textsuperscript{170} It established POSCO-India Pvt. Ltd. as its whole owned subsidiary in 2005 to promote investment in steel in India whose role was expanded to act as the regional headquarter and in 2015, its nature and role has been further extended to represent POSCO group affiliates (shown below) in India.\textsuperscript{171}

\textbf{India Affiliates}\textsuperscript{172}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{posco_india_affiliates.png}
\caption{POS Co India Affiliates}
\end{figure}

\textit{Prafulla Samantray v Union of India}\textsuperscript{173}

(30 March 2012)

\textbf{Factual Matrix}

A Memorandum of understanding (MoU) was entered into between POSCO and Government of Odisha (formerly known as Orissa) on 22 June 2005 for setting up an integrated steel plant with total capacity of 12 million tonnes per annum (with 4 million tonnes in first phase) at Paradip in Jagatshinhpur district of Odisha with estimated investment of ₹ 51,000 crore (nearly $ 12 million) with following components – integrated steel plant with captive power plant project at Kujang, near


\textsuperscript{171} ibid.


Paradip; captive port at Jatadhar in Jagatsinhpur; Mining project; and integrated township and water supply infrastructure.

MoEF granted Environmental Clearances (ECs) for steel-cum-captive power plant and captive minor port on 15 May 2007 and 19 July 2007 respectively. It granted Stage-I clearance for forest land diversion on 28 September 2008 and final clearance on 29 December 2009 which was made conditional on 8 January 2010 to settlement of rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FCA). Odisha Government informed MoEF that neither tribal people nor traditional forest dwellers resided in forest area being acquired by POSCO. MoEF and Ministry of Tribal Affairs jointly constituted a committee under the Chairmanship of Dr. NC Saxena and Dr. Devendra Pandey to study implementation of the FCA from sustainable forest management perspective. Committee reported non-compliance thereof on 4 August 2010. Consequently, MoEF directed Odisha Government to stop transferring forest land till satisfactory compliance with the FCA. Due to complaints against the project, UOI constituted a four member Review Committee under chairmanship of Ms. Meena Gupta on 8 July 2010 whose ToR was modified next month. Commission submitted two separate reports – one by three members (Dr. Urmila Pingle, Dr. Devendra Pandey and Dr. V Suresh) and other by Ms. Meena Gupta, to MoEF on 18 October 2010.\textsuperscript{174} Three statutory bodies of MoEF considered the above reports namely – Forest Advisory Committee (for diversion of forest land); Expert Appraisal Committee (EAC) for Industry (for the captive power-cum-steel plant); and Expert Appraisal Committee (EAC) for Infrastructure (for the captive minor port). Based on such consideration, MoEF issued final order on 31 January 2011 granting EC subject to 28 additional conditions for steel-cum-captive power plant, 32 additional conditions for captive minor port and specific assurance from Odisha Government about compliance with FCA for diversion of 1253 hectares of forest land.\textsuperscript{175}

Appeal was filed u/s 18 (1) read with Sec. 14 (1) and Sec. 16 (h) of NGT Act 2010 challenging final order of MOEF.


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**Issue**

1) Whether Public Hearing (PH) was properly conducted in accordance with the prescribed procedure as applicable at the relevant point of time and validity thereof?

2) Whether MoEF was right in accepting Review report submitted by Ms. Meena Gupta and rejecting the majority report thereof?

**Appellant’s Contention**

Appellants pointed out many lacunae regarding PH – PH was conducted at the time when UOI was still to examine rapid EIA Report for accuracy and comprehensiveness; Odisha State Pollution Control Board (OSPCB) conducted PH at a distance from the site resulting in low participation of people; separate PH was not conducted for two components of the project; deficiency in rapid EIA report and its non-availability to people in advance. All these issues were not adequately deliberated despite being mandated under EIA notification 2016. Conclusions of District Magistrate (DM), though contrary to public views, were not considered by EAC. Majority report of Review Committee recommending fresh PH was ignored.

Regarding the second issue, appellant pointed out that the report submitted by Ms. Meena Gupta was one sided and an eye wash; she being party to process of granting EC for the project in the capacity of Secretary to MoEF, should not have been included in the Review Committee and her report therefore suffered from departmental bias.

**Respondent’s Contention**

Review committee looked at video recording of PH and the points raised therein and was satisfied by the clarifications given in response by M/s POSCO India Pvt. Ltd. thereto. Proposal was recommended to EC only after due deliberations and subject to environmental safeguards.

**Judgment**

Regarding the first issue NGT found no substantial flaw in conducting PH in accordance with the relevant notification.
Although the report submitted by Ms. Meena Gupta appeared to NGT to be balanced, it was not taken into consideration in full. Nevertheless, it found clear departmental bias aimed at defending her previous acts resulting into violations of principles of natural justice vitiating entire review process. On the other hand, majority report exceeded its ToR in suggesting cancellation of ECs.

NGT expressed dissatisfaction with casual approach shown by Government in granting approval to biggest FDI investment proposal of its time without undertaking any comprehensive scientific study regarding its possible environmental impacts. It accordingly issued various directions – final order of MoEF to remain suspended till completion of fresh review of project in the light of apprehension expressed in both the reports of Review Committee; constitution of new review committee for this purpose by engaging specialists in the field for better appreciation of environmental issues; fixation of timelines for compliance with stipulations in ECs and establishment of special committee to monitor progress and compliance on regular intervals; MoEF should require projects requiring huge quantity of water to develop its own resource facility instead of using or diverting water meant for drinking or irrigation purposes; MoEF should develop clear guidelines for projects involving components as integral part of the main industry like the present one, to apply for single EC alone; MoEF should conduct study on Strategic Environmental Assessment for establishing ports along the coastline of Odisha having regard to biodiversity, associate risks etc.; and policy decision by MoEF that for large projects like POSCO (wherein MoUs signed for large capacities requiring upscaling within few years) EIA should be undertaken right from the beginning for full capacity and EC be granted accordingly.

In furtherance of the directions mentioned above, MoEF constituted a panel which submitted its report to MoEF which granted clearance to project again in 2014. However, the same was challenged again for having violated the terms laid down by NGT while directing re-examination.

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On 8 April 2016, POSCO submitted to NGT that it will be unable to do any work and project cannot proceed further since land has still not being handed over to them and its environmental clearance is valid only up to 19 July 2017. In case it plans to take advantage of the environment clearance and complete the project, it would inform the applicant and NGT. MOEF affirmed this submission. NGT held the application to be infructuous in the light of the above submission and applicant could revive its application upon receiving information by POSCO of their desire to carry the project further on the basis of EC. Above submissions marked the end of POSCO’s biggest FDI project in India. POSCO has written to Odisha government expressing its desire to surrender land allotted for the project.

Researcher’s Observation

TNCs are leading players in FDI across the world. POSCO’s project was one such instance in India though planned in an ecologically sensitive area. It is unfortunate that after nearly a decade, it has to withdraw the project. Nevertheless, NGT has rightly expressed dissatisfaction over the casual manner in which government granted environmental clearances under various laws meant for enforcing right to clean and healthy environment. It also point towards the miserable state of ‘ease of doing business’ in India in particular context of mega investment projects. However, NGT’s repeated interventions point towards the success of establishing such an institution. Further, mega investment projects by TNCs are politically sensitive as well. Since they invariably involve home and host states, such frustrating experience of TNCs can jeopardize the prospect of host state as an attractive investment destinations vis-à-vis India.

178 Prafulla Samantray v Union of India Appeal No. 16 of 2014 (8 April 2016), Bench comprising [Swatanter Kumar (Chairperson), MS Nambiar (Judicial Member), Dr. DK Agarwal (Expert Member) and Prof. AR Yousuf (Expert Member)] <https://d2391rlg4hwclhcloudfront.net/downloads/praffula_samantra_vs_uoi__ors___2012__pdf> accessed 1 June 2017.

179 ibid.

180 ibid.


182 Indian Prime Minister Dr. Manmohan Singh while pitching for South Korean businessmen to invest in green technologies in India stated ‘Our processes can be slow but there are effective mechanisms for resolution of problems and differences and a strong rule of law.’ He further stated ‘The government is keen to move forward with the Posco project and there is some progress in this regard. I believe that India is a stable and profitable long-term investment opportunity’. See ‘PM Manmohan Singh invites Korean investments in solar, nuclear sectors’ The Times of India (26 March 2012) <http://timesofindia.indiatimes.com/india/PM-Mannohman-Singh-invites-Korean-investments-in-solar-nuclear-sectors/articleshow/12411492.cms> accessed 2 June 2017.
its competitors. Although, mega investment projects bring manifold benefits to the country but such benefits cease to contribute towards sustainable development if done at the expense of right to clean and healthy environment rendering their overall value questionable.

6.5.6 Environmental Damage involving Vedanta Resources Plc.

Vedanta Resources Plc. is a leading diversified natural resources (Zinc, Lead, Silver, Copper, Iron Ore, Aluminium, Power, and Oil & Gas) TNC (incorporated and registered in England) having operations across four continents. Vedanta Limited (changed name of Sesa Sterlite) is its Indian subsidiary. Like its holding, it is engaged in the business of producing oil & gas, zinc - lead - silver, copper, iron ore, aluminium and commercial power and has presence across India, South Africa, Namibia, Australia and Ireland.\[183\]

**Orissa Mining Corporation v Ministry of Environment & Forest\[184\]**

(18 April 2013)

**Factual Matrix**

M/s Sterlite sought Environmental Clearance (EC) of MoEF on 19 March 2003 for establishing an Alumina Refinery Project (ARP) in Lanjigarh Tehsil of District Kalahandi claiming that no forest land was involved within an area of 10 kms. MoEF granted EC on 22 September 2004 on 1 million tone per annum capacity of refinery along with 75 MW coal based CPPP at Lanjigarh on 720 hectare land, by delinking it with mining project.

On 28 February 2005, Odisha Government forwarded a proposal to MoEF for diverting 660.749 ha of forest land for Bauxite Mining Project (BMP) to Orissa Mining Corporation (OMC) in Kalahandi and Rayagada districts. Central Empowered Committee (CEC) informed MoEF on 2 March 2005 not to decide the proposal till its examination by CEC.


Vedanta approached Supreme Court seeking direction to MOEF to decide the application for forest clearance for BMP. CEC objected on various grounds – total dependence of refinery on mining of bauxite from Niyamgiri Hills, Lanjigarh (only vital wildlife habitat whose part comprised elephant corridor); obstruction with wildlife sanctuary as well as with habitat of Dongaria Kondha tribes.

Supreme Court directed MoEF on 3 March 2006 to submit a report in this regard after consulting experts/organizations. MoEF appointed Central Mining Planning and Design Institute (CMPDI), Ranchi to study social impact and Wildlife Institute of India (WII), Dehradun to study bio-diversity impact. They submitted their report on 20 October 2006 and 14 June 2006 respectively. FAC considered both the reports on 27 October 2006 and approved OMC’s proposal for diversion of 660.749 ha. of forest land for the mining of bauxite in Kalahandi and Rayagada Districts subject to the conditions laid down by WII.

Odisha government highlighted abject poverty, lack of basic infrastructure facilities and lack of proper housing, hospitals, schools etc. in tribal areas of both the districts.

Supreme Court while dismissing application of M/s VAL showed willingness to consider granting of clearance to project provided M/s SIIL, State of Odisha and OMC agreed to the modalities imposed by it in the form of rehabilitation package. Supreme Court clarified that it was not against the project in principle and justified the imposition of modalities as an attempt to protect nature and sub-serve development. Upon unconditional acceptance of such modalities by them, Supreme Court granted clearance to diversion of 660.749 ha of forest land to undertake bauxite mining on Niyamgiri Hills in Lanjigarh. Court directed MoEF to grant approval as per law.

MoEF granted EC to OMC on 28 April 2009 subject to various conditions including forestry clearance. Odisha Government forwarded final proposal to MoEF on 10 August 2009 informing about compliance by user agency with all conditions stipulated by MoEF.

On 4 November 2009, FAC recommended that it will consider final clearance only after determination of community rights on forest land and completion of process of establishing such rights under FRA. It constituted a three member Team (consisting of
Dr. Usha Ramanathan and two others) on 1 January 2010. It submitted three individual reports to MoEF on 25 February 2010 after carrying out on site inspection during January and February 2010. While not against the project, it recommended an in-depth study of implementation of FRA.

On 16 April 2010, FAC recommended constitution of Special Committee under the Ministry of Tribal Affairs. Accordingly, MoEF constituted a four member Committee under the Chairmanship of Dr. Naresh Saxena to look into settlement of rights of Forest Dwellers and Primitive Tribal Groups under FRA and project’s impact on wildlife and biodiversity. It submitted its report on 16 October 2010.

Odisha Government filed written objections on 17 August 2010 and sought opportunity of hearing from MoEF before it takes final decision thereon. However, MoEF placed the report before Forest Advisory Committee (FAC) for consideration on 20 August 2010. FAC applied precautionary principle to recommend temporary withdrawal of in-principle Stage-I approval in order to avoid irreparable damage to affected people. It also recommended that Odisha Government be heard before taking final decision.

After considering FAC’s recommendations and Saxena Committee report, MoEF rejected Stage-II forest clearance for OMC and Sterlite bauxite mining project on Niyamgiri Hills in districts of Lanjigarh, Kalahandi and Rayagada on 24 August 2010 on various grounds namely – violation of rights of tribal groups including Primitive Tribal Groups and Dalit population through their exclusion by project proponents by narrow application of the term ‘project affected people’; beginning of work by M/s VAL on six fold expansion (from 1 Mtpa to 6 Mtpa) of project without taking EC in violation of EPA 1986; M/s SAAL wrongly mentioned in its application seeking EC from MoEF that the project did not involve forest land and project site did not have any reserve forest within 10 kms radius; challenge to project for the first time ever by Dongaria Kondhs’s directly before NEAA; repeated violations of FCA adversely impacting ecology and biodiversity; and massive incriminating evidence unearthed since order of Supreme Court dated 8 August 2008. Consequently, EC also became inoperable.

OMC approached Supreme Court seeking writ of Certiorari to quash MoEF’s rejection order.
Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India

Issue

Whether the order passed by MoEF rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa was legal?

Petitioner’s Contention

Since MoEF had itself granted Stage I clearance and Orissa Government has informed it about compliance, there is no impediment in granting Stage-II clearance. Findings of Saxena Committee as well as FAC were untenable and had nothing to do with Bauxite Mining Project (BMP). Saxena Committee was constituted aiming at cancelling Stage-I clearance in compliance with judgment of Supreme Court. Further, since review petition for claims under FRA was already rejected by Supreme Court, the same could not be raised again.

Odisha Government’s Contention

Since ARP was independent of BMP, Saxena Committee’s findings relating to ARP could not become relevant criteria for BMP. Proposed mining area had no human habitation and individual habitation rights as well as Community Forest Resource Rights for all villages located on hill slope had already been settled. FRA was not concerned with religious or spiritual rights protected u/A 25 and 26 of Indian Constitution. FRA had not taken away ownership of Odisha Government over minerals and deposits beneath the forests and accordingly, neither Gram Sabha nor Tribals could claim any ownership rights over them.

SAAL’s Contention

MoEF had confused the ARP with BMP. Issues relating to refinery’s expansion had nothing to do with BMP. Grounds cited by MoEF in support of its decision rejecting Stage-II cancellation were raised before Supreme Court in Vedanta and Sterlite cases after which MoEF had granted Stage-I clearance in compliance whereof SPV (OMC and Sterlite) finished various works.
**Chapter 6: Right to Clean & Healthy Environment vis-à-vis Transnational Corporations: Judicial Approach in India**

**UOI’s Contention**

Relying upon Sterlite judgment, it pointed out that while granting clearance for diversion of 660.749 ha of forest land to undertake bauxite mining in Niyamgiri hills, Supreme Court left it to MoEF to grant its approval in accordance with law. Though MoEF had granted Stage-I clearance, it was still open to it to examine compliance with conditions stipulated with such grant. Further, permitting mining in Niyamgiri hills would rob Dongaria Kondh of their rights of grazing and the collection of mineral forest and customary right to worship the mountains in exercise of their traditional rights.

**Applicants’ Contention**

Permitting mining in Niyamgiri would destroy 7 sq. Km. of undisturbed forest land on top of mountain on which identity of Dongaria Kondh rested.

**Judgment**

Supreme Court observed that ARP and BMP were interdependent and inseparably linked together so that any wrong done by one will reflect on the other and become relevant consideration for rejection of Stage-II clearance. However, court did not finally decide this issue.

Supreme Court analysed the constitutional scheme meant for protection of scheduled tribes (STs) and referred to various international conventions for the protection of indigenous tribes and also went into details of the entire scheme of the FRA. It held that the issue of whether STs and TFDs like Dongaria Kondh, Kutia Kandha and others have any religious rights i.e. rights of worship over Niyamgiri hills (referred as Nimagiri) near Hundaljali, which is the hill top known as Niyam-Raja, required consideration by Gram Sabha which could as well examine whether proposed mining area (Niyama Danger, 10 km away from Peak) would affect the abode of Niyam-Raja in any manner whatsoever. If the answer was affirmative, their rights needed protection. This aspect had not been placed for consideration of Gram Sabha. It also gave freedom to Gram Sabha to consider all the community, individual as well as cultural and religious claims over and above the ones already received from Rayagada and Kalahandi districts. Odisha Government and Ministry of Tribal Affairs of the Indian Government were directed to assist Gram Sabha in settlement of such claims.
Court directed MoEF to take final decision on grant of Stage-II clearance only after proceedings before Gram Sabha determining such claims were concluded. Such proceedings were directed to be attended by judicial officer of the rank of District Judge nominated by Chief Justice of Odisha High Court who will also sign on minutes thereof certifying that such proceedings were conducted independently and completely uninfluenced either by project proponents or Central Government or State Government. It also directed ARP to rectify alleged violations of conditions of EC granted by MoEF.

Odisha Government organized gram sabha between 18 July and 19 August 2013 in 12 villages (inhabited by Dongaria Kondh and Kutia Kondh tribes) falling in the mining zone. All of them unanimously voted against bauxite mining from Niyamgiri hills. Consequently, MoEF withdrew permission for mining and Odisha Government scrapped the same. However, Odisha Government filed interlocutory application through OMC in Supreme Court on 25 February 2016 seeking reconvening of gram sabhas in the Niyamgiri hills to reconsider mining in Niyamgiri. Supreme Court refused to entertain its plea without hearing all the affected and interested stakeholders, including tribals and 12 Gram Sabhas. Supreme Court rejected the same on 6 May 2016 asking the petitioner to challenge the same by approaching appropriate forum.

**Researcher’s Observation**

Tribal people depend on nature (particularly forests) for their survival and sustenance. Forests, mountains, rivers etc. are integral part of their culture and religion and hence constitute their identity. At the same time, forests constitute a vital and non-separable part of our natural ecosystem. Therefore, extinction of forests or diversion of forest land for industrial purposes may create existential crisis for tribal people and also result in violation of right to clean and healthy environment. Parliamentary legislative
endeavours coupled with constitutional guarantees adequately reflect the acknowledgment of this relationship.

_Niyamraja_ on the _Niyamgiri_ hills was deity worshipped by _Dongaria Kondh_ and _Kutia Kondh_ tribes as part of their culture. Mining on that site would have resulted in loss of their religious faith, culture and identity. Site selection by the company should have taken this fact into consideration at the first place. MoEF too was not impressed by compliance of the company with the directions stipulated by it to the EC. FRA compliance was lop sided and the same was adequately detailed in the Saxena Committee Report. Very prudently, Supreme Court left the question to be decided by the Gram sabha of those tribal villages which were likely to be affected by the mining project.

It also indicate the court’s acknowledgment of the fact that even a democratically elected government may not act according to the wishes of the project affected tribal people. After all who better than tribal people can decide the issue of what is integral to their cultural and religious identity. The fact that Odisha Government approached Supreme Court again for reconsideration of the issue again speaks volumes about competitive pressures being faced by state governments in India regarding foreign investments.

Unanimous vote against the project by all the twelve Gram Sabha selected for this purpose is indicative of the conviction amongst the tribal people regarding anticipated threat to their cultural and religious identity. Vote also exemplifies true democracy at grass root level. The whole process is a true success story of the efficacy of laws enacted by Parliament and well interpreted by Supreme Court in letter and spirit wherein decision making was taken to grass root level.

As a CSR compliant corporation, Vedanta Resources Plc. should not have selected such a culturally as well as ecologically sensitive site for mining. Right to clean and healthy environment was impliedly enforced in this entire process.
6.5.7 Environmental Damage involving Monsanto

Monsanto is a leading TNC based in USA and engaged in the business of ‘sustainable agriculture’.\textsuperscript{188} It has established Monsanto India Limited (MIL) as its subsidiary in India for more than last six decades and is the only publicly listed Monsanto entity outside USA.\textsuperscript{189} Maharashtra Hybrid Seeds Co. Ltd. (Mahyco), founded in 1964, entered into a joint venture with Monsanto to release India’s first GM crop (Bt Cotton).\textsuperscript{190} Mahyco Monsanto Biotech Ltd. (MMBL) is a 50:50 joint venture between Mahyco and Monsanto Holdings Pvt. Ltd. that has sub-licensed the Bollgard II and Bollgard technologies to 28 Indian seed companies.\textsuperscript{191}

\textit{Aruna Rodrigues v Union of India}\textsuperscript{192}  
(10 May 2012)

\textit{Factual Matrix}

A PIL was filed u/A 32 of Indian Constitution to bring to the attention of the Supreme Court creation of a grave and hazardous situation affecting both environment and health by release of Genetically modified Organisms (GMOs) into the environment without proper scientific examination of their biosafety concerns. Petitioner’s objective was to establish a protocol that will maintain scientific examination of all relevant aspects of biosafety before release of GMOs. Petitioner sought court’s direction to UOI not to allow any release of GMOs into environment by way of import, manufacture, use or any other manner. Further, court was requested to prescribe protocol and submitting all GMOs to them and framing of relevant rules by UOI and implementation thereof.

On 1 May 2006, Supreme Court directed that field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (GEAC). Apprehending indiscriminate approvals by GEAC, petitioner filed interim application praying for stopping field trials of all GM products anywhere and everywhere.

\textsuperscript{190} 50 Years of Excellence <http://www.mahyco.com/meetmahyco/timeline> accessed 4 June 2017.
\textsuperscript{192} (2012) 5 SCC 331. (Three Judge Bench comprising SH Kapadia CJI, AK Patnaik and Swatanter Kumar, JJ.).
On 8 May 2007, Supreme Court lifted the moratorium on open field trials subject to certain stipulated conditions. It further directed GEAC to ensure maintenance of distance of at least 200 metres between the trial fields and other fields cultivating the same crop during the course of performing field trials. On 8 April 2008, it directed the compliance with specific protocol of Level of Detection of 0.01%.

Supreme Court declined to direct stoppage of field trials. Nevertheless, it directed GEAC on 22 September 2009 to withhold approvals till the issue of further directions after hearing all concerned parties.

More applications were filed in 2011 praying imposition of absolute ban on GMOs in India and appointment of Expert Committee to advise on these issues. They drew court’s attention to the decision of Indian Government to impose a complete ban on Bt Brinjal. Further, petitioners annexed minutes of meeting of MoEF conducted on 15 March 2011 suggesting composition of Expert Committee and its ToR.

**Joint Prayer**

All the parties agreed on the constitution of Expert Committee and its ToR as suggested in the above-mentioned meeting and jointly prayed for its implementation.

**Order**

Supreme Court passed consent order constituting six member Technical Expert Committee (TEC) comprising Prof. VL Chopra, Dr. Imran Siddiqui, Prof. PS Ramakrishnan, Dr. PC Chauhan, Prof. PC Kesavan and Dr. B Sivakumar. Its ToR *inter alia* included reviewing and recommending regarding - nature of sequencing of risk assessment (environment and health safety) studies that should be undertaken for all GM crops before their release into environment; sequencing of these tests in order to specify the point at which environmental release through Open Field Trials can be permitted; proper evaluation of the genetically engineered crop/plants is scientifically tenable in the green house conditions and possibility of replication of the conditions for testing under different agro ecological regions and seasons in greenhouse; adequacy of specific conditions imposed by the regulatory agencies for Open Field Trials and required additional measures/safeguards to prevent potential risks to the environment; feasibility of prescribing validated protocols and active testing for contamination at a level that would preclude any escaped material from causing an
adverse effect on the environment; professional expertise and state-of-art testing facilities of institutions/laboratories in India to conduct various bio safety tests and ways to strengthen it and in case of their non-existence, suggest establishment of independent testing laboratory/institution. Court directed TEC to submit report within three months.

In its Report, TFC found major gaps in regulatory system and accordingly made detailed recommendations regarding – establishing secretariat with dedicated scientists having expertise in biosafety in collaboration with Norwegian GM regulatory body since single committee (GEAC or RCGM) doing all evaluations is insufficient; regulatory bodies should be located in MoEF (environmental safety) and Ministry of Health and Family Welfare (MoHFW) (healthy safety) and members whereof should be free from conflict of interest; designation and certification of sites for field trials establishing mechanism for their monitoring, restricted access, material disposal etc; no trial to be conducted on leased land so as to avoid its subsequent use for other purposes; site in company’s premises to be used only if the same is permanently owned by the applicant; and undertaking risk assessment at early stage with sustainability as one of the dimensions to be included therein.

It is interesting that TFC is not alone in expressing dissatisfaction with existing regulatory framework for GM products. On 7 August 2012, 37th report of Committee on Agriculture also reached similar conclusion.193

Another significant development took place in 2010. Mahyco approached GEAC seeking approval for Bt Brinjal. Appreciating the ‘important policy implication at the national level’ GEAC referred the matter to the government for final decision. After conducting an elaborate consultation process with various stakeholders involved, the

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193 Committee pointed towards the need of overhauling even reframing of regulatory mechanism for GMOs in the interest of bio-safety, environmental safety etc. It recommended an all encompassing umbrella legislation on bio-safety focused on ensuring bio-safety, environmental protection, biodiversity, human and livestock health, instead of a biotechnology regulatory legislation and a corresponding statutory Bio-safety authority. And the same should precede facilitative benevolence for industry. It further recommended that all research activities on transgenic crops should be carried out only in containment and ongoing field trials in all states should be discontinued forthwith. It also recommended labeling of GM products regulatory framework whereof should be issued soon. See for details Cultivation of Genetically Modified Food Crops – Prospects And Effects 37th Report, Committee on Agriculture (2011-2012), (Fifteenth Lok Sabha), Ministry of Agriculture (Department of Agriculture and Cooperation) (9 August 2012) Lok Sabha Secretariat, New Delhi <http://164.100.47.193/lsscommittee/Agriculture/15_Agriculture_37.pdf> accessed 5 June 2017.
then Minister of Environment and Forests (Mr. Jairam Ramesh) applied precautionary principle to impose a moratorium on the release of Bt Brinjal for an indefinite period.\textsuperscript{194} Moratorium period was expected to be utilized for putting in place adequate regulatory framework for GM food and thereby to gain public trust and confidence.\textsuperscript{195} Health aspects relating to GM food was to be ensured through labelling thereof as GM Food whereas more important environmental impacts will be taken care of through the Biotechnology Regulatory Authority of India (BRAI) Bill pending in Parliament.\textsuperscript{196}

Ms. Jayanti Natarajan who followed Mr. Jairam Ramesh as Minister for Environment and Forest kept clearances of GM food on hold since the matter was \textit{sub judice}. However, Dr. M Veerappa Moily, who replaced her as Minister for Environment and Forest, permitted 200 successful gene modification trials for rice, wheat, maize, castor, cotton after taking charge.\textsuperscript{197} Indian government submitted before the Supreme Court during the course of the PIL that not granting permission to GM Food will jeopardize nation’s food security.\textsuperscript{198} Political ramifications of any decision may be gauged by the fact that BJP electoral agenda in 2014 promised that no GM seed will be allowed for cultivation in absence of full scientific data on long term effects on soil, production, and biological impacts on consumers.\textsuperscript{199} Present government is yet to take a decision on field trials of GM crops on hold.\textsuperscript{200} On 3 February 2016, Supreme Court sought reply of Indian Government on a contempt petition for allegedly allowing field trials of GM crops in violation of its earlier orders.\textsuperscript{201} However, recently GEAC has cleared the genetically modified (GM) Mustard developed by

\textsuperscript{195} ibid.
\textsuperscript{196} ibid.
\textsuperscript{197} Neha Sethi, ‘Veerappa Moily approves trials of genetically modified crops’ \textit{Livemint} (28 February 2014) <http://www.livemint.com/Politics/xhXZNCGHVDq0wRz0oF4CI/Veerappa-Moily-approves-trials-of-genetically-modified-crop.html> accessed 5 June 2017.
\textsuperscript{200} Sethi and Mohan (n 198).
Delhi University’s Centre for Genetic Manipulation of Crop Plants (CGMCP) for commercial cultivation and recommended its approval to the environment ministry. In another interesting development, Indian Government issued price controls on GM cotton in 2015. In May 2016, it issued another notification on licensing guidelines for GM cotton seeds wherein it capped royalty for the new genetically modified (GM) traits at 10 per cent of the maximum sale price of BT cotton seeds for the first five years and thereafter to reduce by 10 per cent of initial value every year. There will be no royalty in case of GM technology loosing its efficacy. It also capped upfront fee for the new GM trait at ₹ 25 lakh to be paid in two equal annual instalments. In protest against the decision, Monsanto withdrew its application seeking approval for its latest variety of Bt Cotton (Bollgard II Bollgard II Roundup Ready Flex technology) uncertainty in the business and regulatory environment.

Meanwhile at the global level Bayer acquired Monsanto in 2016 through a $ 66 billion takeover (as a largest all-cash transaction on record) to be completed by the end of 2017. The acquisition is expected to help new company control over more than 25% of the world's supply of seeds and pesticides.

Researcher’s Observation

Supreme Court is ill equipped to decide the issues it confronts in the above-mentioned proceedings before it. It has itself admitted this limitation. Nevertheless, it is monitoring the progress towards putting in place an independent, transparent and

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205 ibid.
206 ibid.
competent regulatory framework for GM products and playing its role through issuing directions, as and when necessary. Final outcome is eagerly awaited. Had the Indian Government responsibly played its role, no one would have felt the need to approach Supreme Court at the first place. The efficacy of existing regulatory framework may be assessed by the fact that although Supreme Court is engaged in shaping the new regulatory framework by plugging the existing shortcomings, Indian Government permitted Bt Cotton nearly two decades back in 2004. Supreme Court is also conscious of the fact that absolute ban on GM crops is not a feasible solution and the technology deserves a chance to prove itself but certainly not at the expense of environmental protection.

Monsanto being the leading TNC, sought permission for commercial release of Bt Cotton knowing fully well the weaknesses in the regulatory framework for GM products prevailing in India. One wonders why it applied for permission for commercial release of Bt Brinjal when the matter regarding permission granted to Bt Cotton was under challenge and still *sub judice* before the court. As a socially responsible TNC, it could have waited for the outcome of the court proceedings. More so, when the aim of the petitioner was not objecting to GM crops *per se* but establishing independent, transparent regulatory system in order to effectively regulate adverse impacts of GM including environmental damage. Given the prevailing situation, one fails to understand the urgency on the part of Monsanto. It could have waited till requisite statutes were passed and independent laboratories are established or otherwise arranged taking into considerations the genuine concerns of people. Such an approach on the part of Monsanto could have reflected its adherence to precautionary principle and enabled it to earn more trust amongst Indian people.

Threat of Monsanto to Indian government declining to introduce new varieties of Bt cotton belies sincerity of its intent regarding addressing the problem of food shortage and security through GM crops in developing countries.

**6.6 Indian Experience of International Investment Arbitration Awards**

In addition to the above judgments, international Investment arbitral awards have gained crucial significance with the adoption of NEP in 1991. Therefore, it is no
surprise that India’s experience with international investment arbitration began in the initial days of adoption of NEP itself.

**Dabhol Power Project involving Enron Corporation**

Enron Corporation entered into an MoU with Maharashtra State Electricity Board (MSEB) in June 1992 resulting into establishment of Dabhol Power Company (DPC) for power generation in Maharashtra (largest foreign investment at that time)\(^ {210}\). Enron held 80% whereas General Electric (GE) and Bechtel held 10% equity respectively in DPC.\(^ {211}\) MSEB became the sole purchaser of power generated by DPC. While Government of Maharashtra issued a guarantee, Government of India issued a counter-guarantee to DPC.\(^ {212}\) Overseas Private Investment Corporation (OPIC, US government agency created to promote US private investment in developing countries) provided $160 million in funding to DPC and also entered into political risk insurance contracts with each parties.\(^ {213}\) New government came to power in the State and it undertook review of the project. As a result, MSEB directed DPC in August 1995 to ‘cease construction and abandon project’.\(^ {214}\) DPC responded by commencing international arbitration in London. MSEB challenged the jurisdiction of Arbitration tribunal and also filed suit in Bombay High Court.\(^ {215}\) However, they entered into a revised agreement on 23 February 1996 leading to DPC withdrawing arbitration proceedings and MSEB dropping suit.\(^ {216}\) By May 1999, Phase-I of the project was completed and entered into commercial service.\(^ {217}\) After nearly 18 months of operation, dispute between MSEB and DPC re-emerged with former making defaults in payment to the latter.\(^ {218}\) MSEB rescinded Power Purchase Agreement (PPA) with DPC on 23 May 2001.\(^ {219}\) This left DPC in crisis as there was no purchaser of power generated by it. DPC invoked counter guarantee of Indian Government but it refused to pay on the ground of it not being unconditional.\(^ {220}\)

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\(^{211}\) ibid 915.

\(^{212}\) ibid.

\(^{213}\) ibid 916.

\(^{214}\) ibid 917.

\(^{215}\) ibid 918.

\(^{216}\) ibid.

\(^{217}\) ibid.

\(^{218}\) ibid 920.

\(^{219}\) ibid.

\(^{220}\) ibid.
Delhi High Court issued injunctions against DPC pursuing arbitration against Maharashtra Government for guarantee and against Indian Government for counter guarantee respectively.\textsuperscript{221} Mauritius based subsidiaries of GE and Bechtel, challenged such orders on the ground of violations of India-Mauritius BIT.\textsuperscript{222} However, dispute was settled through mutual agreement before the issue of ITA award. Certain media reports point towards Indian Government was required to pay nearly around $1 billion (precise amount unknown) to Enron.\textsuperscript{223}

After nearly two decades of adoption of NEP, the following case alarmed the Indian government once again.

\textit{White Industries Australia Limited (Claimant) and The Republic of India (Respondent)}\textsuperscript{224}

\textit{(30 November 2011)}

White Industries entered into a contract with Coal India for supply of equipment and development of a coal mine at Piparwar, India. Former was to be paid approximately A$ 206.6 million. Dispute arose between the parties on the issue of entitlement of White Industries to the bonuses and/or that of Coal India to penalty payments. Majority of the arbitrators (Justice Reddy dissenting) held that White Industries was entitled to award of A$ 4.08 million.

On 6 September 2002, Coal India approached Calcutta High Court to set aside award under Indian Arbitration and Conciliation Act 1996. Calcutta High Court granted leave to apply. On 11 September 2002, White Industries approached Delhi High Court to enforce the award. However, Coal India informed Delhi High Court about its application in Calcutta High Court. White Industries approached Supreme Court on 24 October 2002 for transfer of this application from Calcutta High Court to Delhi High Court. It also approached Calcutta High Court to stay the proceedings. Supreme Court stayed the proceedings in Calcutta High Court. White Industries withdrew petition on indication of Supreme Court that it was inclined to dismiss the petition. On 10 March 2003, White approach Calcutta High Court for rejection of Coal India’s

\textsuperscript{221} ibid 923.


application. It also approached Delhi High Court for dismissal of right of Coal India to file objections and reply. A single Judge of Calcutta High Court rejected application to set aside award. Appeal before Division Bench was also rejected by Calcutta High Court on 7 May 2004. White Industries appealed again before Supreme Court whose two judge bench referred it to three judge bench on 16 January 2008. While matter was pending White Industries initiated arbitration proceedings again India for breach of various provisions of BIT on the ground of delay in enforcement of arbitral award.

Tribunal held that although there was no delay in set aside application but inability of the Supreme Court to hear the jurisdictional claim amounts to definite delay.\(^{225}\) Award was based on MFN provision in India-Australia BIT through which India-Kuwait BIT was relied upon.

On 30 November 2011, an ITA Award in *White Industries v Republic of India* directed Indian Government to pay – A$ 4,085,180 (payable under the Award); US$ 84,000 (for the fees and expenses of the arbitrators in the ICC arbitration); A$ 500,000 (for White's costs in the ICC arbitration); and A$ 86,249.82 (for its witness fees and expenses), together with interest thereon at the rate of 8 % per annum from 24 March 1998 till the date of payment.\(^{226}\)

Seriousness of the threats may be gauged by the fact that many TNCs have issued notices to Indian Government under different BITs - Vodafone, Nokia, Cairn Energy and Vedanta relating to amendment to Tax laws; Telenor, Siestema in response to Supreme Court judgment in *Centre for Public Interest Litigation v Union of India*\(^{227}\) holding the allocation of 2G spectrum as arbitrary and hence unconstitutional.

Although none of the above-mentioned disputes involved violation of right to clean and healthy environment by a TNCs, but they clearly highlight approach of tribunals towards Indian judicial process. These arbitration disputes also indicate the brazen manner in which they are prepared to invoke international arbitration proceedings against India entailing payment of hefty amount of compensation by the Indian government.

\(^{225}\) ibid 119.
\(^{226}\) ibid 140.
\(^{227}\) (2012) 3 SCC 1.
Consequently, India has taken safeguards in Final Model Indian BIT 2015 (as discussed in Chapter-4). India has learnt from her bitter experience as well as that of other nations. She has sought to protect right to clean and healthy environment through incorporation of provisions pertaining to environmental protection and CSR.

6.7 Chapter Conclusion

India of 2017 is not the same as of 1984 when Bhopal Gas Disaster took place. Parliament has enacted new legislations to plug the loopholes existing at that time. But more significantly, NEP 1991 has gradually transformed virtually all aspects of law and policy relating to companies in India. However, TNCs doing business in India has found stronger protection in the form of BITs entered into by Indian Government with other nations (for encouraging foreign investment) particularly post 1991. Although in none of the select judgment analysed above, any TNC has invoked any BIT in their favour till now, nevertheless India has bitter experience of TNCs invoking them in international investment arbitration in their favour in the recent past. Further, as pointed out in the second chapter, TNCs have invoked BITs in other countries to challenge measures taken by host states within their jurisdiction aimed at environmental protection. Such option is always available and in anticipation thereof, Indian government has drafted Model BIT containing clauses aimed at protecting right to clean and healthy environment and is engaged in negotiating its existing BITs with other nations.228

The first four cases selected for analysis above, namely – UCC (now Dow), Coca Cola, POSCO and Vedanta Resources Plc. share one common characteristic. In all of them, TNCs concerned have made industrial investment in their core business areas not directly but through their subsidiaries either themselves or through joint ventures involving local partners. The last case of Monsanto however, is less about industrial investment but more about transfer of technology through joint venture.

As the above analysis has shown, all cases except Monsanto involved inappropriate selection of site by the TNCs for their industrial investment from the viewpoint of environment, raising concerns about violation of right to clean and healthy

environment. Such a blunder in selection of site was highly unexpected going by the enormous experience possessed by these TNCs of doing business across the globe.

Legislative and bureaucratic inertia on environmental issues at times owing to vested interest, corruption or need for foreign investment can only be tackled through Judiciary. It deserves credit for its role in granting recognition to right to clean and healthy environment as integral part of Right to life u/A 21 and thereby enforcing the same through Art. 32 of Indian Constitution. This recognition and enforceability by the apex court laid the foundation for development of rich environmental jurisprudence in India. Further, prospect of further enrichment of environmental jurisprudence is brightened with the establishment of NGT as is evident from some of its judgments involving corporations including TNCs. Regarding violation of right to clean and healthy environment involving TNCs, role of Supreme Court in case involving Vedanta and that of NGT in case involving POSCO has proved to be decisive and sealed the fate of the project itself. However, Supreme Court being the appellate authority for NGT, the very efficacy of the latter will depend on the cooperation between the two. Role of Supreme Court in case involving UCC invited sharp criticism from various quarters. Nevertheless, it became instrumental in triggering far-reaching legislative enactments by Parliament. Further, outcome of pending curative petition is eagerly awaited and positive judgment favouring enhancement of compensation by including environmental damage therein will go a long way in undoing more than three decades of its environmental insensitiveness. Barring Coke and POSCO, all others matters are sub judice before Supreme Court awaiting final outcome. Going by its own judgments in recent past and also the rich environmental jurisprudence that has already come into existence in India, it is expected that its verdict either ways will shape environmental jurisprudence in most acutely controversial context i.e. involving TNCs.

Role of Central Government as well as State Governments involved in all these cases present a governance paradox prevailing across the world by the host states. While they compete with each other for greater foreign investment and transfer of technology, yet being democratic, can ill afford to ignore the concern of their own

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229 "Thus in the field of administration of enviro-justice, the Supreme Court of India has stood tallest not only before the other two organs of the ‘State’ – the Legislature and the Executive – but also, before its other counterparts, age-old or young, in the developed and developing countries.” Jariwala (n 24).
people regarding their right to clean and healthy environment. Further, they have to also uphold their commitments made at the international level in various conventions etc pertaining to environment. It is not unusual therefore to find different ministries taking different positions. Striking the optimum balance between industrial development and environmental protection through ensuring adherence to sustainable development continue to be elusive.

Grass root level democratic institutions (i.e. Panchayat in case of Coca Cola and Gram Sabha in case of Vendanta) have played decisive role in raising the concerns which should have been taken care of by the democratically elected representative state and central government as well as by TNCs themselves through CSR.

In all the cases discussed above, NGOs have played vital role in generating public awareness about the adverse impacts on environment. They have played pivotal role in success of PIL movement in India as they took such causes to the Supreme Court and High Court. Though not a magic solution too all environmental problems, it provides ‘a kind of chemotherapy for the carcinogenic body politic’. Despite existence of several environmental laws in India to protect various components of environment, PIL continue to be an attractive option resorted to by environmental activists to seek redressal of violation of right to clean and healthy environment and Judiciary continue to be receptive to admitting them depending upon facts and circumstances of each case. In fact, PIL to High Court and Supreme Court need to be further strengthened to compel pollution control and other environmental authorities and other administrative authorities to do their statutory authorities. In fact, NGO’s have spearheaded the campaign against the irresponsible conduct of TNCs and repeatedly knocked the doors of Supreme Court as well as High Court to access environmental justice by seeking enforcement of the right to clean and healthy environment, although with mixed outcomes. They have also put pressure on Parliament through their well conceived persistent agitations to enact laws for environmental protection whose application have come into limelight in the cases discussed above.

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