CHAPTER - VI

PROCEDURAL LAW FOLLOWED BY THE JUDICIARY FOR
THE PROTECTION OF ENVIRONMENT

In the previous chapter the role of Judiciary in the protection of environment was studied. Various situations in which the Court gave its response to the problems and interpreted the relevant laws were noted. One particular aspect of the role of Judiciary in environment protection is the matter of procedural nature. In the beginning when remedies were afforded to the aggrieved persons the Courts of Common Law insisted upon the rule of personal injury. The jurisdiction of the Court being one which is concerned with the matter of redressing the individual harms naturally the Courts insisted upon the principle of personal action. The injured person alone could approach the court for relief and the court took cognizance of individual petitions based upon personal injury. In very limited cases particularly those in which nuisance was caused and the harm was suffered by the general public besides specific individuals the Court allowed action to be brought by a law enforcement official, preferably the Attorney General to maintain an action in respect of the public nature of the harm. But now under the present regime of law for environment protection there is scope for a modification to be made in the procedural aspect of the law allowing thereby actions on behalf of the society against the tort feasors. This is one particular area in which the
procedural law has made a lot of progress. In this particular matter the Courts in India have played a significant role. Therefore this aspect of the system of judicial protection in the research work has been designed to cover the procedural aspect of the law.

This chapter has the object of discussing the matters in which the procedural law has been modified and the persons at whose instance the remedies may be sought from the court for the protection of environment.

(i) Public Interest Litigation

As in England, in India also the procedural formalities were so rigid that the injured person alone could approach the court of law and seek a remedy. But the indulgence shown by the Common Law could be invoked in respect of certain wrongs even in India also on the analogy of the English principles of Common Law. But after independence tremendous change has come in which can be analysed as under:

Prior to 1980's only the aggrieved party could personally knock the doors of justice and seek remedy for has grievance but any other person who was not personally affected could not do so as a proxy for the victim of pollution or the party aggrieved by pollution. But around 1980, the Indian legal system, particularly in the field of Environmental Law, underwent a sea change in terms of discarding its moribund approach and charting out instead
new horizons of social justice. This period was characterized by not only administrative and legislative activism but also judicial activism.

The Supreme Court of India and the High Courts have entertained a lot of petitions presented before them in public interest. The litigation arising from such petitions, which is known as Public Interest Litigation or Class Action Litigation may arise before the Supreme Court under Article 32 of the Constitution or before the High Courts under Article 226 of the Constitution. In the exercise of their respective jurisdictions, these Constitutional Courts have issued various directions concerning environment as part of their overall writ jurisdiction and in that context they have developed a vast environmental jurisprudence. They have used Article 21 of the Constitution of India and expanded the meaning of the word 'Life' in that Article as including 'a right to healthy environment."

The first case of considerable importance is the case of Ratlam Municipality v. Vardhichand¹ where the Supreme Court gave directions for the removal of open drains and prevention of public excretion by the nearby slum dwellers. The matter had come before the Supreme Court by way of a criminal appeal. The Supreme Court had relied upon Article 47 which was in Part IV of the Constitution relating to Directive Principles of State Policy. That article refers to improvement of 'public health'. In its judgment the Supreme

¹ AIR 1980 SC 1622
Court gave several directions to the Ratlam Municipality for maintenance of 'Public Health'.

In Indian Council for Enviro-Legal action v. Union of India\(^2\) the Supreme Court felt that conditions in different parts of the country being better known to the State High Courts, the High Courts would be the appropriate forum to be moved for more effective implementation and monitoring of the anti-pollution laws.

However, the liberal use of Public Interest Litigation against assaults on the environment does not mean that the courts, even if it is tainted with bias, ill-will or intent to black mailing will entertain every allegation. This amounts to vexatious and frivolous litigation. When the primary purpose for filing a public interest litigation is not public interest, courts will not interfere. In Subhash Kumar v. State of Bihar\(^3\) the Supreme Court ruled that affected persons or even a group of social workers including journalists, could initiate public interest litigation for the enforcement of environmental rights, but such a litigation cannot be initiated at the instance of a person or person who had a bias or personal grudge or enmity.

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\(^2\) AIR 1996 SC 1446
\(^3\) AIR 1991 SC 420.
Way back in 1982 in a landmark judgment of the Supreme Court in S.P. Gupta v. Union of India⁴ the Supreme Court had elucidated the principle in the following words:

"... but we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration the court should not allow itself to be activised at the instance of such person and must reject his application at the threshold." This continues to be the guiding principle even today.

That judgment was followed in B.L. Wadhera v. Union of India⁵ and directions were issued to the Municipal Corporation of Old Delhi and New Delhi, for removal of garbage etc.

These directions were given by courts for disciplining the developmental processes, keeping in view the demands of ecological security and integrity. In one of the earlier cases, Rural Litigation Kendra.⁶

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⁴ AIR 1982 SC 1473
⁵ AIR 1996 SC 1969
⁶ AIR 1995 SC 652
In M. C. Mehta v. Union of India the Supreme Court dealt with a petition in public interest about pollution of river Ganga.

At Common Law, a Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharge such sewage into the river. In the instant case the petitioner had filed his petition for prevention of nuisance caused by the pollution of the River Ganga. No doubt, the petitioner was not a riparian owner. He was a person interested in protecting the lives of the people who make use of the water flowing in the River Ganga and his right to maintain the petition could not be disputed. The nuisance caused by the pollution of the River Ganga, the Court said, is a public nuisance, which is widespread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large. The petitioner was, therefore, entertained as a public interest litigation. The petitioner was entitled to move the Supreme Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the water Act.

It was observed that although Parliament and the State Legislature have enacted many laws imposing duties on the Central and State Boards

AIR 1988 SC 1115
and the Municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. On account of failure of authorities to obey the statutory duties for several years the water in the River Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the River near Kanpur city.

In Vincent v. Union of India \(^8\) a direction was sought in public interest for banning import, manufacture, sale and distribution of certain drugs as recommended by the Drugs Consultative Committee. In this case the Supreme Court did not think of referring the matter to an independent scientific body but left compelled to accept the Committee's Report. It said,

"Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping view the far-reaching implications of the total ban of certain medicines for which the petitioners has prayed, we must at the outset clearly indicate that a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters."

The Court felt that once the Experts had approved or disapproved the drugs, the Court will not go into the correctness of their decisions.

\(^{5}\) AIR 1987 SC 990
But in a later case, the Supreme Court made an effort to refer the issues to an independent committee of experts. In Dr. Shivrao v. Union of India\(^9\) The facts of the case were: 7500 cartons (200 MT) of Irish Butter were imported into India under the EEC Grants-in-Aid for Operation Flood Programme and supplied to greater Bombay. The use of the imported butter was challenged on the ground that the butter was contaminated by nuclear fallout. The Bombay High Court dismissed the Writ Petition relying on the report of the Atomic Energy Regulatory Board, a statutory body. The Report however referred to 'permissible limits'. Fortunately, when the matter came to the Supreme Court, the Court thought it desirable to appoint a committee of three experts to go into the correctness of the so-called 'permissible limits' and to give its report on the following question:

"Whether milk and dairy products and other food products containing man-made radio-nuclides within permissible levels by the Atomic Energy Regulatory Board on 27\(^{th}\) August, 1987 are safe and/or harmless for human consumption."

The Committee of Experts gave a Report stating that the 'permissible limits' laid down by the Atomic Energy Regulatory Board were arrived at after due consideration of ICRP limits for the General Population, that the said Board had, in fact, allowed a further safety margin and that the levels fixed

\(^9\) AIR 1988 SC 9533
were 'safe and harmless'. The Court accepted the Report of Experts and confirmed the dismissal of the writ petition.

In a like manner, in A.P. Pollution Control Board v. M.V. Nayudu the Supreme Court proceeded to have the claims of the party tested by experts. There the question was whether the industry was a 'hazardous' one and whether, in case it became operational, the chemical ingredients produced would sooner or later percolate into the substratum of the earth, get mixed up with the underground waters which flow into huge lakes which are the main sources of drinking water to two metro cities. The issue was whether the oil derivatives such as hydrogenated castor oil, 12-hydroxystearic acid, dehydrated castor oil, methylated 12 – HAS, DCO, fatty acids, and by-products like glycerine, spent bleaching earth, carbon and spent nickel catalyst would enter the underground water streams flowing into the water lakes. Nickel, which was part of the residue, it was common ground, would be poisonous, if it percolated into the lakes.

The industry filed a report of an expert which was accepted by the Appellate Authority constituted under Sec.28 of the Water Act, 1974 manned by a retired High Court Judge. The learned Judge, basing his decision on the opinion of a single scientist which was produced by the industry, came to the conclusion that if the industry became operational it would not pose any hazard to the drinking water. This decision was affirmed by the High Court in

10 (1992) 2 SCC 718.
writ jurisdiction under Article 226 of the Constitution of India. The High Court too simply went by the opinion of the Expert scientist which was produced by the industry. But the Supreme Court felt that the opinion of the scientist was not tested or scrutinized by any expert body and required it to be thoroughly examined. The Supreme Court sought expert advice from the National Environmental Appellate Authority (NEAA) which consisted of a retire judge of the Supreme Court and other Experts. The NEAA was permitted to take evidence and obtain technical help from other scientific institutions.

The NEAA visited the site, took oral evidence, examined various technical aspects and gave an elaborate report, containing vast scientific data, as to why the industry should not be permitted to operate. It also consulted the Central Ground water Board. The NEAA Report went against the industry. When the matter again came before the Supreme Court, the industry relied upon an earlier order of the AP Pollution Control Board that the industry could be permitted to function if certain safeguards were complied with. The industry sought a further opportunity on this limited contention. The Court then referred the matter to the University Department of Chemical Technology, Bombay, to be assisted by the National Geophysical Research Institute, Hyderabad (NGRI). This was done. The reports of these institutions contained an exhaustive discussion of the scientific data which they freshly procured.
The NGRI which is the highest scientific body on geology examined the flow of the underground water streams, and its final conclusion stated that "from results of multi-parameter investigations (i.e. field investigations, hydrogeological studies, geophysical investigations, electric receptivity investigation, magnetic survey and tracer studies) carried out in the areas, is that hydraulic connectivity exists across the dolerite dyke located between Choudergudi and Sirsilmukhi facilitating the groundwater movement. ... In the post-monsoon scenario, the groundwater table will go up and thereby may result in more groundwater flow across the dyke. The NGRI stated that there was sufficient scope for poisonous residual substitutes like Nickel percolating underground and reaching the drinking water sources.

On the basis of the above Reports, the Supreme Court set aside the judgment of the High Court and order of the Authority given under Section 28 of the Water Act and refused permission for the industry to operate.\textsuperscript{11}

This case is a clear example of the benefit of scientific investigation. If this scientific investigation was not done, the life of millions of citizens in the twin cities of Hyderabad and Secunderabad would have been endangered. The 'Precautionary Principle' clearly applied here. Because the Appellate Authority and the High Court did not have the benefit of the opinion of any scientific bodies to test the correctness of the report of the single scientist whose report alone was there available to the Appellate Authority and the

\textsuperscript{11} \textit{AP Pollution Control Board v. M. V. Nayudu. (2001) 2 SCC 62}
High Court, the decision went in favour of the Industry. But, as the Supreme Court had the benefit of the reports of these institutions, it could arrive at a different conclusion.

(ii) Development Projects and the Problem of Protecting the Environment:

One of the major irrigation projects in the country relating to construction of Dam on Narmada River came up for consideration in Narmada Bachao Andolan v. Union of India. In this case there was a final award by the Tribunal constituted under the Inter-State Water Disputes Act, 1956 published on 12.12.1979. The Dam was to be of the height of 2455 feet. The Tribunal gave its directions regarding submergence, land acquisition and rehabilitation of displaced persons. It stipulated that no submergence of area should take place unless the oustees were rehabilitated. The Tribunal allocated the utilizable water stream to four States. The Narmada Control Authority was directed to be constituted for the implementation of the Award. Eight years later on 24.6.1987 the Ministry of Environment and Forests granted 'Environmental clearance' to the Sardar Sarovar Project subject to the following conditions:

\[12 (2000) 10 SCC 664.\]
i. The Narmada Control Authority will ensure that environmental safeguards are planned, and implemented pari passu with progress of work on the project;

ii. Detailed surveys/studies will be carried out as per the scheduled proposed.

iii. The rehabilitation plans which have to be drawn up should be completed ahead of the filling up of the reservoir.

Initially, a letter of B.D. Sharma was treated as a PIL and a direction was given on 20.9.1991 by the Supreme Court to constitute a committee to monitor the rehabilitation of oustees. But in April 1994, seven years after the Ministry gave its clearance—the Narmada Bachao Andolan filed a Writ Petition to stop the construction of the Dam and prayed for not opening the sluices.

The Supreme Court called for various reports. The construction was halted in May 1995 and the case was finally decided in the year 2000.\textsuperscript{13}

The project involved construction of a network of over 3000 large and small dams. The three learned Judges were unanimous that the Public Interest Litigation of April 1994 was belated and could not be allowed to seek

\textsuperscript{13} Narmada Bachao Andolan v. Union of India (2001) 10 SCC 664
to stop the project itself. Two learned Judges found that Environmental Impact Assessment Notification under the Rules made under the Environment (Protection Act), 1986 was issued much later on 27.1.1994 and was not retrospective and applicable for the purpose of grant of clearance by the Ministry earlier on 24.6.1987.

The clearance given on 24.6.1987 in fact required that the Narmada Control Authority could ensure that ‘environmental safeguard measures’ be taken and therefore the project did not require any further environmental impact assessment to be done.

Adverting to the Precautionary Principle laid down in Vellore Citizens Welfare Forum v. Union of India and distinguishing A.P.Pollution Control Board v. M.V. Nayudu the Supreme Court said that the Precautionary Principle and the Burden of Proof rule would apply to a polluting project or industry where the extent of damage likely to be inflicted, is not known. But where the effect on ecology or environment on account of the setting up of an industry is known, what has to be seen is whether the environment is likely to suffer, and if so, what mitigative steps have to be taken to efface the same. Merely because there will be a change in the environment is no reason to presume that there will be ecological disaster. Once the effect of the project is known, the principle of sustainable development would come into play and that will ensure that mitigative steps are taken to preserve the ecological balance.
The Court said, Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation. In the present case, the dam is not comparable to a nuclear establishment or to a polluting industry. No doubt, the construction of a dam would result in the change of environment but it will not be correct to presume that the construction of a large dam like this will result in an ecological disaster. India has an experience of 40 years in construction of dams. Those projects did not lead to environmental disasters but have resulted in upgradation of ecology. On the above reasoning, two learned Judges (out of three) felt that inasmuch as rehabilitation was provided by the Award, there was no violation of Article 21.

The Court issued directions as to allotment of land to oustees. There was no need to have another authority to monitor rehabilitation. The Narmada Control Authority itself could do this. Its decision could be reviewed by the Review Committee. (One of the three Judges however felt that Environmental Impact Assessment was necessary and the construction work should stop till such assessment was made).

While dealing with the construction of a hotel in Goa for a sea beach resort, the Supreme Court in Goa Foundation v. Diksha Holdings Ltd. \(^\text{14}\) held that economic development had to be maintained. The permission granted by the State Government was based upon a proper consideration of the Coastal

\(^{14}\) (2001) 2 SCC 97.
Regulation Zone notification dated 19.2.1991 issued by the Ministry of Environment and Forests, Government of India under Sections 3 (1) and 3 (2) (v) of the Environment Project Act, 1986 and Rule 5 (3) (d) of the Rules and approved by the Coastal Zone Management Plan of the State of Goa. The plot of land allotted to the Hotel fell within an area earmarked as settlement (beach/resort) by notification of the Governor of Goa under the Goa, Daman and Diu Town and Country Planning Act, 1974 and situated in Category Coastal Regulation Zone III.

In N. D. Jayal v. Union of India the Supreme Court considered the issues arising out of the construction of Tehri Dam; one of the important issues in this case related to environment impact assessment, rehabilitation and the Court gave suitable directions in this regard.

(iii) The Bhopal Gas Leak Case:

This was the most unfortunate industrial disaster that had occurred in our country it had far reaching implications on the social, economic and political conditions of the people of our country. On the night of December, 2, 1984 the most tragic industrial disaster in history occurred in the city of Bhopal. Located there was chemical plant owned and operated by Union Carbide India Limited (UCIL). The plant, situated in the northern sector of the city, had numerous hutments adjacent to it on its southern side which were occupied by impoverished squatters. UCIL manufactured the pesticides Serin
and Temik at the Bhopal plant at the request of and with the approval of the government of India. UCIL was incorporated under Indian law in 1984. 50, 99 of its stock is owned by the defendant Union Carbide Corporation, a New York Corporation. Methyl isocyanate (MIC), a highly toxic gas, is an ingredient in the production of both Serin and Temik. On the night of the tragedy, MIC leaked from the plant in substantial quantities. The prevailing winds on the early morning of December 3, 1984 were from north-west to south-east. They blew the deadly gas into the over populated huts and the most densely occupied parts of the city. The results were horrendous. Over 2,000,000 people suffered injuries and more than 2000 people died due to the leak.

What had happened was that on the 2\textsuperscript{nd} and 3\textsuperscript{rd} of December 1984 a noxious gas had leaked from a plant of the Union Carbide India Ltd. situated in Bhopal. It was a highly noxious and abnormally dangerous gas, and the unit from which it had leaked was a plant belonging to a subsidiary of the Union Carbide Corporation of USA. The event was of an unprecedented nature both from the point of view of its nature and effect. It resulted in loss of life and damage to property on an extensive scale. Victims of the disaster who had managed to survive are still suffering from adverse effects and the further complications which may arise in their cases in course of time cannot be fully visualized even at this stage. The Central Government and the Government of Madhya Pradesh and various agencies had to incur expenditure on a large scale for containing the disaster and mitigating or otherwise coping with the
effects of the disaster. Government was anxious to ensure that the interests of the victims of the disaster were fully protected and that the claims for compensation or damages for loss of life or personal injuries or in respect of other matters arising out of or connected with disaster are processed speedily, effectively, equitably and to the best advantage of the claimants.

On December 7, 1984 the first law suit was filed by American lawyers in the United States on behalf of thousands of Indians. Thereafter, 144 additional actions commenced in Federal Courts in the U.S.A. The actions have all been joined and assigned to this Court. The individual federal complaints have been superseded by a consolidated complaint filed on June 28, 1985. The Indian Government on March 29, 1985 enacted the Bhopal Act (Act 21 of 1985), providing that the Government of India has the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with this Court setting forth claims for relief similar to those in the consolidated complaint of June 28, 1985.

The legal position was examined carefully with reference to the laws obtaining in the United States of America and in our country and in the light of the examination it was felt that special provisions should be made for processing the claims. Accordingly, the President promulgated on the 20th day of February, 1985, the Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985 to confer powers on the Central Government to represent
the claimants and take all necessary steps for the processing of the claims. The Ordinance also provided for the appointment of a Commissioner for the welfare of the victims of the disaster and for the formulation of a Scheme to provide for various matters necessary for processing of the claims and for the utilization by way of disbursal or otherwise of amounts received in satisfaction of the claims.

In pursuance of the decision taken by the Union of India, a Bill was introduced in Parliament which when enacted became the Bhopal Gas Leak Disaster (Processing of claims) Act, 1985.

This Act conferred certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental there to.

In this Act, unless the context otherwise requires-

(a) “Bhopal gas leak disaster” or “disaster” meant the occurrence on the 2nd and 3rd days of December, 1984, which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the Union Carbide India Limited, a subsidiary of the Union Carbide Corporation, U.S.A) and which resulted in loss of life and damage to property on an extensive scale;
(b) "Claim" meant:-

i. a claim, arising out of, or connected with, the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered;

ii. a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be, sustained;

iii. a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster;

iv. any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster:

Section 3 of the Act empowered the Central Government to represent the claimants: It provided that:

(1) Subject to the other provisions of this Act, the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is
entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.

It also provided that the provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceedings have been instituted in or before any Court or other authority (whether within or outside India) before the commencement of this Act:

Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any Court or other authority outside India, the Central Government shall represent, and act in place of, or along with such claimant, if such Court or other authority so permit.

By Section 5 of the Act the Central Government acquired quasi judicial powers. Section 5 read as follows: (1) For the purpose of discharging its functions under this Act, the Central Government shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely-

a) Summoning and enforcing the attendance of any person from any part of India and examining him on oath;
b) Requiring the discovery and production of any document;
c) Receiving evidence on affidavits;
d) Requisitioning any public record or copy thereof from any Court or office;

e) Issuing commissions for the examination of witnesses or documents;

f) Any other matter which the Central Government may, by notification in
the Official Gazette, specify.

The Act waived the limitation period. Section 8 provided as follows:

(1) In computing, under the Limitation Act, 1963 or any other law for the
time being in force, the period of limitation for the purpose of instituting
a suit or other proceeding for the enforcement of a claim, any period
after the date on which such claim is registered under, and in accordance with, the provisions of the Scheme shall be excluded.

(2) The Act also empowered the Government to frame a scheme. Section 9 said: (1) The Central Government shall, for carrying into effect the purposes of this Act, frame by notification in the Official Gazette a Scheme as soon as may be after the commencement of this Act.

Initially cases for compensation against union Carbide Corporation
were filed in the Courts of the United States of America. 145 actions had all been joined and assigned by the Judicial penal on Multi district Litigation to the southern district of New York by order of February 6, 1985. By its order
dated May 12, 1986, the Court dismissed the consolidated case on the
ground of Forum Non Conveniens under certain conditions.\(^1^5\)

Plaintiffs argued that Indian Courts do not offer an adequate forum for
this litigation by virtue of the relative ‘procedural and discovery deficiencies
which would thwart the victims quest for” justice. It was held that the plaintiffs’
preliminary concern, regarding defendant's amenability to process in the
alternative forum, is more than sufficiently men in the instant case. Union
Carbide has unequivocally acknowledged that it is subject to jurisdiction of the
Courts of India. Union Carbide is definitely amenable to process in India.

Plaintiffs contended that Indian legal institutions still reflect their
colonial origins, in terms of the lack of broad-based legislative activity,
inaccessibility of legal information and legal services, burdensome Court filing
fees and limited innovativeness with reference to legal practice and education.
But it was held that the examples cited by defendant's experts suggest a
developed and independent judiciary. Plaintiffs present no evidence to bolster
their contention that the “Indian legal system has not sufficiently emerged from
its colonial heritage to display the innovativeness which the Bhopal litigation
would demand. Their claim in this regard is not compelling.'

\(^{1^5}\) United States District Court, Southern District of New York MDL Docket No. 626. Misc. No. 21-38
(JFK) 85 CIV. 2696 (JFK) In re: Union Carbide Gas Leak Disaster at Bhopal, India.
It was submitted that there is the problem of delay and backlog in Indian Courts. Considerable delay is caused by the tendency of the Courts in India to avoid the decision of all the matters in issue in a suit on the ground that the suit could be disposed of on a preliminary point. It was also urged that the backlog is a result to Indian Procedural law, which allows for adjournments in mid-hearing, and for multiple interlocutory and final appeals. It was held that while delays in the Indian legal system are a fact of judicial life in the proposed alternative forum, there is no reason to assume that the Bhopal litigation will be treated in ordinary fashion. The Bhopal Act permits the cases to be treated "speedily, effectively, equitably and to the best advantage of the claimants'. This Court is persuaded, by the example of the Bhopal Act itself and other cases where special measures to expedite were taken by the Indian judiciary, that the most significant, urgent and extensive litigation ever to arise from a single event could be handled through special judicial accommodation in India, if required.

The plaintiffs contended that the Indian legal system lacks the wherewithal to allow it "to deal effectively and expeditiously" with the issues raised in this law suit. India lacks codified tort law, has little reported case law in the tort field to serve as precedent, and has no tort law relating to disputes arising out of complex product or design liability. Indian pre-trial discovery is inadequate and third-party witnesses need not submit to discovery. Since no class action procedure exists in India expeditious litigation of the Bhopal suits would be impossible. A judgment rendered by an Indian
Court cannot be enforced in the United States without resort to further extensive litigation and conversely, Indian law provides res judicata effect to foreign judgment and precludes plaintiffs from bringing a suit on the same cause of action in India. These contentions were repelled by observing as follows. The Indian bar appears more than capable of shouldering the litigation if it should be transferred to India. In fact, filing fees have been waived for claimants in India of tort, their elements, the theories of liability, defences, respondent superior, the theories of damages are all familiar. Pursuant to its equitable powers, the Court directs that the defendant consent to submit to the broad discovery afforded by the United States Federal Rules of Civil Procedure if or when an Indian Court sits in judgment or presides over pre-trial proceedings in the Bhopal litigation. Order 1, rule 10 (2) of the Indian Code of Civil Procedure allows the Court to add additional parties if the presence of those parties is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit. The broad provision of inherent powers to aid the ends of justice, as codified at Section 151 of the Indian Code of Civil Procedure would prevent an ultimate miscarriage of justice in the area of impleader. Order 1 rule 8 of the Indian Code of Civil Procedure provides a mechanism for representative suits where there are numerous persons having the same interest in one suit. It does not appear that the representative suit is expressly limited to pre-existing groups. The lack of contingency fees is not an insurmountable barrier to filing claims in India, as demonstrated by the fact that more than 4000 suits have been filed by the victims of the Bhopal gas leak in India
In conclusion, Mr. John F. Keeman, the Judge who decided the case said:

“It is difficult to imagine how a greater tragedy could occur to a peace time population than the deadly gas leak in Bhopal on the night of December 2-3, 1984. The survivors of the dead victims, the injured and others who suffered, or may in the future suffer due to the disaster, are entitled to compensation. This Court is firmly convinced that the Indian legal system is in a far better position than the American Courts to determine the cause of the tragic event and thereby fix liability further; the Indian Courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims. The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India. All of the private interest factors described in Piper and Gilbert weight heavily forwards dismissal of this case on the grounds forum non convenience.

The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps, Indian regulations were ignored or contravened. India may with to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The
Indian interests far outweigh the interests of the citizens of the United States in the litigation.

Plaintiffs, including the Union of India, argued that the Courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialisation to meet the emerging needs of a democratic people.

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.
Therefore, the consolidated case was dismissed on the grounds of forum non convenience under the following conditions:

1. Union Carbide shall consent to submit to the jurisdiction of the Courts of India and shall continue to waive defences based upon the statute of limitations;

2. Union Carbide shall agree to satisfy any judgment rendered by an Indian Court, and if applicable, upheld by an appellate Court in that country, where such judgment and affirmance conform with the minimal requirements of due process;

3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

The Union of India also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection. This settlement received the imprimatur of the Supreme Court in its order dated February 14 and 15, 1989 The reasons for the orders were stated by the Court on May 4, 1989 The present review petitions under Article 137 and writ petitions under Article 32 of the constitution of India raised

16 1989 (1) SCC 647.
17 1989 (3) SCC 38.
certain fundamental issues as the constitutionality, legal validity, propriety and fairness and conscionability of the settlement of the claims of the victims. Allowing the review petitions in part and dismissing the writ petitions the Supreme Court held that under Article 142 (1) of the constitution, the Court had the necessary jurisdiction and power to do so.

To the extent power of withdrawal and transfer of cases to the Apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Article 136 and 142(1), the power under Article 139A must be held not to exhaust the power of withdrawal and transfer. Article 149A enables the litigants to approach the Apex Court for transfer of proceedings if the conditions envisaged in that article are satisfied. Article 139A was not intended, nor does it operate, to whittle down the existing wide powers under Articles 136 and 142.

Article 136 is worded in the widest terms possible. it vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing of appeals by granting special leave against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the power can be exercised in spite of the limitations under the specific provisions for appeal contained in the constitution or other laws. The powers given by Article 136 are, however, in the nature of special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court. The purpose
constitutional plenitude of the powers of the Apex Court to ensure due and proper administration of justice is intended to be coextensive in each case with the needs of justice of a given case and to meeting any exigency.

The expression 'cause or matter' in Article 142 (1) is very wide covering almost every kind of proceedings in Court. Any limited interpretation of the expression "cause or matter" having regard to the wide and sweeping powers under Article 136 which Article 142 (1) seeks to effectuate, limiting it only to the short compass of the actual dispute before the court and not to what might necessarily and reasonably be connected with or related to such matter in such a way that their withdrawal to the Apex Court would enable the Court to do complete justice', would stultify the very wide constitutional powers.

The contention that the settlement is void for non-compliance with the requirements of Order 23 rule 3B, CPC is rejected.

In view of Section 112 Civil Procedure Code, the Supreme Court's power under Article 136 is not affected by rule 3B of Order 23 of the Code. Under Order 32 of the Supreme Court rules, made under Article 145, Order 23 rule 3-B of the Code is not one of the rules expressly invoked and made applicable. The Sahu case did not lay down that provisions of Order 23 rule 3-B CPC, proprio vigore apply. It held that the principles of natural justice underlying the said provisions were not excluded. The Court in that case did
not say that the settlement was, for that reason, void. In Sahu decision the obligation under Section 4 of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 to give notice is primarily on the Union of India. Incidentally there are certain observations implying an opportunity of being heard also before the Court. Even assuming that the right of the affected persons of being heard is also available at a stage where a settlement is placed before the Court for its acceptance, such a right is not referable to and does not stem from, rule 3B of Order 23 CPC. The pronouncement in Sahu case as to what the consequences of non-compliance are is conclusive as the law of the case. It is not open to the court to say whether such a conclusion is right or wrong. These findings cannot be put aside as mere obiter.

However, in relation to the proceedings and decisions of superior Courts of unlimited jurisdiction, imputation of nullity is not quite appropriate. They decide all questions of their own jurisdiction. Order of such Court is either irregular or regular.

The contention that the Court had no jurisdiction to quash the criminal proceedings in exercise of power under Article 142 (1) is rejected. But, in the particular facts and circumstances, it is held that the quashing of the criminal proceedings was not justified.

The power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 Cr.
P. C. or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the Court on which conferment of powers limited in some appropriate way is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. The prohibition on the power under Article 142 should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. In exercising powers under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex court will take not of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

There is some justification to say that statutory prohibition against compounding of certain class of serious offences, in which larger social interest and social security are involved, is based on broader and fundamental
considerations of public policy. But all statutory prohibitions need not necessarily partake of this quality. The attack on the power of the Apex Court to quash the criminal proceedings under Article 142 (1) is ill-conceived. But the justification for its exercise is another matter.

However, the proposition that State is the dominus litis in criminal case, is not an absolute one. The society for its orderly and peaceful development is interested in the punishment of the offender and if the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated.

But whether on the merits there were justifiable grounds to quash the criminal proceedings is a different matter. It is really not so much a question of the existence of the power as one of justification for its exercise. A prosecution is not quashed for no other reason than that the Court has the power to do so. The withdrawal must be justified on grounds and principles recognized as proper and relevant. There is no indication as to the grounds and criteria justifying the withdrawal of the prosecution. The considerations that guide the exercise of power of withdrawal by Government could be and are many and varied. Government must indicate what those considerations are in the matter of power to withdraw prosecution. The "broad ends of public justice may well include appropriate social, economic and political purposes"
in the present case, no such endeavour was made. Even the stand of the Union of India has not been consistent. It is a matter of importance that offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated. The shifting stand of the Union of India on the point should not by itself lead to any miscarriage of justice. Thus no specific ground or grounds for withdrawal of the prosecutions have been set out at that stage the quashing of the prosecutions requires to be set aside.

Grant of blanket criminal immunity is a legislative function. There is no power or jurisdiction in Court to confer immunity for criminal prosecution and punishment. Grant of immunity to a particular person or persons may amount to a preferential treatment volatize of the equality clause.

However, the Court's direction that future criminal proceedings shall not be instituted or proceeded with must be understood as a concomitant and a logical consequence of the decision to withdraw the pending prosecutions. In that context, the stipulation that no future prosecutions shall be entertained may not amount to conferment of any immunity but only to a reiteration of the consequences of such termination of pending prosecutions. Thus understood any appeal to the principle as to the power to confer criminal immunity becomes inapposite in this case.

The orders dated February 14/15, 1989 in so far as they seek to prohibit future criminal proceedings are held not to amount to a conferment of
criminal immunity but are held to be merely consequential to the quashing of the criminal proceedings. Now that quashing is reviewed, this part of the order is also set aside.

Even though the Union of India was a consenting party to the settlement recorded by the Court, it cannot be precluded from urging a plea as to invalidity or nullity of the settlement on ground of public policy.

A contract whose object is opposed to public policy is invalid and it is not any the less so by reason alone of the fact that the unlawful terms are embodied in a consensual decree. The essence of the doctrine of stifling of prosecution is that no private person should be allowed to take the administration of criminal justice out of the hands of the Judges and place it in his own hands. The consequences of the doctrine of stifling of prosecution follow where a "person sets the machinery of the criminal law into action" on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy.

The distinction between the "motive" for entering into agreement and the "consideration" for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into an agreement and not its consideration the doctrine of stifling of prosecution is
not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for an agreement to satisfy that liability.

In this case the main thrust of petitioners' argument of unlawfulness of consideration is that the dropping of criminal charges in future were part of the consideration for the offer of 470 million US dollars by the UCC and as the offences involved in the charges were of public nature and non-compoundable, the consideration for the agreement was stifling of prosecution and, therefore, unlawful. But it is inconceivable that Union of India would, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof as consideration for stifling of the prosecution. Thus the doctrine of stifling of prosecution is not attracted in the present case. The arrangement which purported to terminate the criminal cases was one of a purported withdrawal not forbidden by any law but one which was clearly enabled. Whether valid grounds to permit such withdrawal existed or not is another matter.

The settlement must, of course, be an informed one. But it will be an error to require its quantum to be coextensive with the suit claim or what, if the plaintiffs full y succeeded, they would be entitled to expect.
The "Fairness Hearing" in a certified class of action is a concept in the United States for which a provision is available under rule 23 of US Federal Rules of Procedure. The right of the victims read into Section 4 of the Bhopal Gas Leak Disaster (Processing of Claims) Act to express their views on a proposed settlement does not contribute to a position analogous to that in the United States in which fairness hearings are imperative. Section 4 to which the right is traceable merely enjoins Government of India to have 'due regard' to the views expressed by victims. The power of the Union of India under the Act to enter into a compromise is not necessarily confined to a situation where suit has come to be instituted by it on behalf of the victims. Statute enables the Union of India to enter into a compromise even without such a suit. Right of being heard read into Section 4 and subject to which its constitutionality has been upheld in Sahu case subjects the Union of India to a corresponding obligation. But that obligation does not envisage or compel a procedure like a "Fairness Hearing" as a condition precedent to a compromise that Union of India may reach, as the situations in which it may do so are not necessarily confined to a suit. Therefore, the settlement is not vitiated by reason alone of want of a 'Fairness Hearing" procedure preceding it. Likewise, the settlement is non vitiated by reason of the absence of a "re-opener" clause built into it.

In personal injury actions the possibility of the future aggravation of the condition and of consequent aggravation of damages are taken into account in the assessment of damages. The estimate of damages in that sense is a very delicate exercise requiring evaluation of many criteria some of which may
border on the imponderable. Generally speaking actions for damages are
limited by the general doctrine of remoteness and mitigation of damages. But
the hazards of assessment of once and for all damages in personal injury
actions lie in many yet inchoate factors requiring to be assessed. It is in this
context Court must look at the 'very proper refusal of the Courts to sacrifice
physically injured plaintiffs on the altar of the certainty principle'. The
likelihood of future complications though they may mean more assessment or
evaluation of mere chances are also put into the scales in quantifying
damages. This principle may take care of the victims who have manifest
symptoms. But there must be provision in the settlement for medical
surveillance costs and compensation for those who are presently wholly
asymptomatic and have no material to support a present claim but may
become symptomatic after a drawn out of latency period.

In this connection the following findings are recorded and directions
issued:

(a) For an expeditious disposal of the claims a time bound consideration
and determination of the claims are necessary.

(b) In the matter of administration and disbursement of the compensation,
amounts determined, the guidelines contained in the judgment of the
Gujarat High court in Muijibhai V. United India Insurance Co.¹⁸ are
required to be taken into account and, wherever apposite, applied.

Union of India is also directed to examine whether an appropriate scheme under the Unit Trust of India Act could be evolved for the benefit of the Bhopal victims.

(c) For a period of eight years facilities for medical surveillance of the population of the Bhopal exposed to MIC should be provided by periodical medical check-up. For this purpose a hospital with at least 500 beds strength, with the best of equipment and facilities should be established. The facilities shall be provided free of cost to the victims at least for a period of eight years from now. The State Government shall provide suitable land free of cost.

(d) In respect of the population of the affected wards (excluding those who have filed claim), Government of India shall take out an appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently asymptomatic and filed no claims for compensation, might become symptomatic in future and those latter-born children who might manifest congenital or pre-natal MIC related afflictions. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one lakh persons. The premium shall be paid out of the settlement fund.

(e) On humanitarian consideration and in fulfillment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for
the establishment and equipment of a hospital, and its operational expenses for a period of eight years.

Restitution is an equitable principle and is subject to the discretion of the Court. Section 144, Code of Civil Procedure, embodying the doctrine of restitution does not confer any new substantive right to the party not already obtaining under the general law. The section merely regulates the power of the Court in that behalf. But, in the present case, Section 144 CPC does not in terms apply. There is always an inherent jurisdiction to order restitution a fortiorari where a party has acted on the faith of an order of the Court. A litigant should not go back with the impression that the judicial process so operated as to weaken his position and whatever it did on the faith of the Court’s order operated to its disadvantage. It is the duty of the Court to ensure that no litigant goes back with a feeling that he was prejudiced by an act which he did on the faith of the court’s order. Both on principle and authority it becomes the duty of the Court as much moral s it is legal to order refund and restitution of the amount to the UCC if the settlement is set aside. Strictly speaking no restitution in the sense that any funds obtained and appropriated by the Union of India requiring to be paid back arises. The funds brought in by the UCC are deposited in the Reserve Bank of India and remain under this Court’s control and jurisdiction.
In Charan Lal Sahu Vs Union of India19 the Supreme Court not only held that there was no compliance with the principles of natural justice but also held that the result of the non-compliance should not be a mechanical invalidation. The Court suggested curatives. The Court was not only sitting in judicial review of legislation; but was a Court of construction also, for, it is upon proper construction of the provision, questions of constitutionality come to be decided. The Court was considering the scope and content of the obligations to afford a hearing implicit in Section 4 of the Act. It cannot be said to have gone beyond the pale of the enquiry when it considered the further question as to be different ways in which that obligation could be complied with or satisfied. The Court expressly held that non-compliance with the obligation to issue notices did not by such reason alone, in the circumstances of the case, vitiate the settlement, and that the affected persons may avail themselves of an opportunity of being heard in the course of the review petitions. It is not proper to isolate and render apart the two implications and held the suggested curative as a mere obiter.

(iv)Recent controversy about the problem of Relief to victims of Bhopal Gas Disaster

The most disappointing aspect of the whole controversy is that the victims could not get the relief they were assured of. More than 28 years are over since the tragic incident had occurred but nothing has happened. All the