SUPREME COURT OF INDIA

Union Carbide Corporation

Vs.

Union of India

(M.N. Venkatachalliah, Rangnath Misra CJ,

K.N. Singh, A.M. Ahmadi and N.D. Ojha JJ.)

03.10.1991

JUDGMENT

RANGANATH MISRA, CJ.

I entirely agree with my noble and learned Brother Venkatachaliah and hope and trust that the judgment he as produced is the epitaph on the litigation. I usually avoid multiple judgments but this seems to be a matter where something more than what is and in the main judgment perhaps should be said.

Early in the morning of December 3, 1984, one of the greatest industrial tragedies that history has recorded got clamped down on the otherwise quiet township of Bhopal, the capital of Madhya Pradesh. The incident was large in magni- tude - 2,600 people died instantaneously and suite a good number of the inhabitants of the town suffered from several ailments. In some cases the reaction manifested contempora- neously and in others the effect was to manifest itself much later.

Union Carbide Corporation ('UCC' for short), a multi- national one, has diverse and extensive

international opera- tions in countries like India, Canada, West Asia, the Far East, African countries, Latin America and Europe. It has a sister concern known as Union Carbide India Limited ('UCIL' for short). In the early hours of the 3rd of December, 1984, there was a massive escape of lethal gas from the MIC Stor- age Tank of the plant into the atmosphere which led to the calamity.

Several suits were filed in the United States of America for damages by the local representatives of the deceased and by many of the affected persons. The Union of India under the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985 took upon itself the right to sue for compensation on behalf of the affected parties and filed a suit for realisa- tion of compensation. The suits were consolidated and Judge Keenan by his order dated/.2th May, 1988, dismissed them on the ground of forum non conveniens subject, inter alia, to the following conditions:

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

2. Union Carbide shall agree to satisfy any judgment rendered against it in an Indian Court, and if appealable, upheld by any appel- late court in that country, whether such judgment and affirmance comport with the minimal requirements of due process.

The United States Court of Appeals for the Second Cir- cuit by its decision of January 14, 1987, upheld the first condition and in respect of the second one stated: "In requiring that UCC consent to enforceabil- ity of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiffs, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary, Under New York law, which governs actions brought in New York to enforce foreign judgments ...... foreign-country judgment that is final, con- clusive and enforceable where rendered must be recognised and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:

"1. The judgment was rendered under a system which does not provide impartial tribunals or procedures, compatible with the requirements of due process of law;

2. The foreign court did not have personal jurisdiction over the defendant".

Art. 53. Recognition of Foreign Country Money Judgments. Although 5304 further provides that

under certain specified conditions a foreign country judgment need not be recognized, none of these conditions would apply to the present cases except for the possibility of failure to provide UCC with sufficient notice of procedings or the exist- ence of fraud in obtaining the judgment, which do not presently exist but conceivably could occur in the future."

The Court rejected the plea advanced by UCC of breach of due process by non-observance of proper standards and ulti- mately stated:

"Any denial by the Indian Courts of due proc- ess can be raised by UCC as a defence to the plaintiffs' later attempt to enforce a result- ing judgment against UCC in this country." After Judge Keenan made the order of 12th of May, 1986, in September of that year Union of India in exercise of its power under the Act filed a suit in the District Court at Bhopal. In the plaint it was stated that death toll upto then was 2,660 and serious injuries had been suffered by several thousand persons and in all more than 5 lakh persons had sought damages upto then. But the extent and nature of the injuries or the aftereffect thereof suffered by victims of the disaster had not yet been fully ascertained though survey and scientific and medical studies had already been undertaken. The suit asked for a decree for damages for such amount as may be appropriate under the facts and the law and as may be determined by the Court so as to fully, fairly and finally compensate all persons and authorities who had suffered as a result of the disaster and were having claims against the UCC. It also asked for a decree for effective damages on an amount sufficient to deter the defendant and other multi-national corporations involved in business activities from committing wilful and malicious and wanton disregard of the rights and safety of the citizens of India. While the litigations were pending in the US Courts an offer of 350 million dollars had been made for settlement of the claim. When the dispute arising out of interim compensation ordered by the District Court of Bhopal came before the High Court, efforts for settlement were continued. When the High Court reduced the quantum of interim compensation from Rs. 350 crores to a sum of Rs. 250 crores, both UCC and Union of India challenged the decision of the High Court by filing special leave petitions. It is in these cases that the matter was settled by two orders dated 14th and 15th of February, 1989. On May 4, 1989, the Constitution Bench which had recorded the settlement proceeded to set out brief reasons on three aspects

"(a) How did this Court arrive at the sum of 470 million US dollars for an over-all settle- ment?

(b) Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable?

(c) Why did the Court not pronounce on certain important legal questions of far-reaching importance said to arise in the appeals as to the principles of liability of monolithics, economically entrenched multi- national companies operating with inherently dangerous technologies in the developing countries of the third world - ques- tions said to be of great contemporary relevance to

the democracies of the third- world?"

The Court indicated that considerations of excellence and niceties of legal principles were greatly overshadowed by the pressing problems of very survival of a large number of victims. The Court also took into account the law's proverbial delays. In paragraph 31 of its order the Consti- tution Bench said:

As to the remaining question, it has been said that many vital juristic princi- ples of great contemporary relevance to the Third World generally, and to India in partic- ular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of lost opportunity to this apex Court to give the law the new direction of new vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal limits to be envisaged by the vital interests of the protection of the constitutional right of the citizenry, and of the environment, on the permissibilities of such ultra-hazardous tech- nologies and to prescribe absolute and deter- rent standards of liability if harm is caused by such enterprises. The prospects of exploi- tation of cheap labour and of captive-markets, it is said, induces multi-nationals to enter into the developing countries for such econom- ic-exploitation and that this was eminently an appropriate case for a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contem- porary relevance."

The Bhopal gas leak matter has been heard in this Court by four different Constitution Benches. The first Bench consisted of Pathak, CJ, Venkataramiah, Misra, Venkatachali- ah and Ojha, JJ. The hearing continued for 24 days. The challenge to the validity of the Act was heard by a differ- ent Bench consisting of Mukharji, C J, Singh, Ranganathan, Ahmadi and Saikia, JJ. where the hearing continued for 27 days. The review proceedings wherein challenge was to the settlement were then taken up for hearing by a Constitution Bench presided over by Mukharji, CJ with Misra, Singh, Venkatachaliah and Ojha, JJ. as the other members. This continued for 18 days. It is unfortunate that Mukharji, CJ. passed away soon after the judgment had been reserved and that necessitated a rehearing. The matters were re-heard at the earliest opportunity and this further hearing took 19 days. Perhaps this litigation is unique from several angles and this feature is an added one to be particularly noted. The validity of the Act has been upheld and three separate but concurring judgments have been delivered. At the final hearing of these matters long arguments founded upon certain varying observations of the learned Judges constituting the vires Bench in their respective decisions were advanced and some of them have been noticed in the judgment of my learned brother.

In the main judgment now being delivered special atten- tion has been devoted to the conduct of Union of India in sponsoring the settlement in February, 1989, and then asking for a review of the decision based upon certain develop- ments. Union of India as rightly indicated is a legal entity and has been given by the Constitution the right to sue and the liability of being sued. Under our

jurisprudence a litigating party is not entitled to withdraw from a settle- ment by choice. Union of India has not filed a petition for review but has supported the stand of others who have asked for review. The technical limitations of review have not been invoked in this case by the Court and all aspects have been permitted to be placed before the Court for its consid- eration.

It is interesting to note that there has been no final adjudication in a mass tort action anywhere. The several instances which counsel for the parties placed before us were cases where compensation had been paid by consent or where settlement was reached either directly or through a circuitous process. Such an alternate procedure has been adopted over the years on account of the fact that trial in a case of this type would be protracted and may not yield any social benefit. Assessment of compensation in cases of this type has generally been by a rough and ready process. In fact, every assessment of compensation to some extent is by such process and the concept of just compensation is an attempt to approximate compensation to the loss suffered. We have pointed out in our order of May 4, 1989, that the estimate in the very nature of things cannot share the accuracy of an adju- dication'. I would humbly add that even an adjudication would only be an attempt at approximation. This Court did take into account while accepting the settlement the fact that though a substantial period of time had elapsed the victim were without relief. For quite some time the number of claim. In courts or before the authori- ties under the Act was not very appreciable. Perhaps an inference was drawn from the figures that the subsequent additions were to be viewed differently. I do not intend to indicate that the claims filed later are frivolous particu- larly on account of the fact that there are contentions and some prima facie materials to show that the iII-effects of exposure to MIC could manifest late. The nature of injuries suffered or the effect of exposure are not the same or similar; therefore, from the mere number no final opinion could be reached about the sufficiency of the quantum. The Act provides for a Fund into which the decretal sum has to be credited. The statute contemplates of a procedure for quantification of individual entitlement of compensation and as and when compensation becomes payable it is to be met out of the Fund. The fact that the Union of India has taken over the right to sue on behalf of all the victims indicates that if there is a shortfall in the Fund perhaps it would be the liability of Union of India to meet the same. Some of the observations of the vires Bench support this view. The genuine claimants thus have no legitimate grievance to make as long as compensation statutorily quantified is available to them because the source from which the compensation comes into the Fund is not of significant relevance to the claim- ant.

When the settlement was reached a group of social activ- ists, the Press and even others claiming to be trustees of society came forward to question it. For some time what appeared to be a tirade was carried on by the media against the Court. Some people claiming to speak on behalf of the social Think Tank in meetings disparaged the Court. Some of the innocent victims were even brought into the Court prem- ises to shout slogans at the apex institution. Some respon- sible citizens oblivious of their own role in the matter carried on mud-slinging.

The main foundation of the challenge was two- fold:

(i) The criminal cases could not have been compounded or quashed and immunity against criminal action could not be granted; and (ii) the quantum of compensation settled was grossly low.

So far as the first aspect is concerned. the main judg- ment squarely deals with it and nothing more need be said. As far as the second aspect goes, the argument has been that the principle enunciated by this Court in M.C Mehta v. Union of India, [1987] 1 SCC 395 should have been adopted. The rule in Rylands v. Fletcher [1868] 3 House of Lords 330 has been the universally accepted authority in the matter of determining compensation in tort cases of this type. Ameri- can jurisprudence writers have approved the ratio of that decision and American Courts too have followed the 'decision as a precedent. This Court in paragraph 31 of the Mehta judgment said:

"The Rule of Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non- natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury's Laws of Eng- land, vol. 45, para 1305. Considerable case law has de- veloped in England as to what is natural and what is non- natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parame- ters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry as part of the developmental programme, 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 the context of a totally different kind of rule which was evolved in the context of a totally dif- ferent 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. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous activities or the rule laid down in Rylands v. Fletcher as developed in England recognises certain limitations and excep tions, we in India must hold back our hands and not venture to evolve a new principle of

liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazard- ous or inherently dangerous industries which are concommi- tant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liabili- ty merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a haz- ardous 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 commu- nity 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, 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. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit the law must presume that such permission is conditional on the enter- prise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inher- ently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such haz- ardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dan- gers and to provide warning against potential hazards. We would there fore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm re- sults to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity result- ing, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule of Rylands v. Fletcher."

In M.C. Mehta's case no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of "State" in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said essentially obiter. The extracted part of the conservation from M.C. Mehta's case perhaps is a good guideline for working out compensa- tion in the cases to which the ratio is intended to apply. The statement of the law ex-facie makes a departure from the accepted legal position in Rylands v. Fletcher. We have not been shown any binding precedent from the American Supreme Court where the ratio of M. C. Mehta's decision has in terms been applied. In fact Bhagwati, CJ clearly indicates in the judgment that his view is a departure from the law applica- ble to the western countries.

We are not concerned in the present case as to whether the ratio of M.C. Mehta should be applied to

cases of the type referred to in it in India. We have to remain cognizant of the fact that the Indian assets of UCC through UCIL are around Rs.100 crores or so. For any decree in excess of that amount, execution has to be taken in the United States and one has to remember the observation of the U.S. Court of Appeals that the defence of due process would be available to be raised in the execution proceedings. The decree to be obtained in the Bhopal suit would have been a money decree and it would have been subject to the law referred to in the judgment of the U.S. Court of Appeals. If the compensation is determined on the basis of strict liability--a foundation different from the accepted basis in the United States -- the decree would be open to attack and may not be executa- ble.

If the litigation was to go on on merits in the Bhopal Court it would have perhaps taken at least 8 to 10 years; an appeal to the High Court and a further appeal to this Court would have taken in all around another spell of 10 years with steps for expedition taken. We can, therefore, fairly assume that litigation in India would have taken around 20 years to reach finality. From 1986, the year when the suit was instituted, that would have taken us to the beginning of the next century and then steps would have been made for its execution in the United States. On the basis that it was a foreign judgment, the law applicable to the New York Court should have been applicable and the 'due process' clause would have become relevant. That litigation in the minimum would have taken some 8-10 years to be finalised. Thus, relief would have been available to the victims at the earliest around 2010. In the event the U.S. Courts would have been of the view that strict liability was foreign to the American jurisprudence and contrary to U.S. public policy, the decree would not have been executed in the United States and apart from the Indian assets of UCIL, there would have been no scope for satisfaction of the decree. What was said by this Court in Municipal Council, Ratlam v. Vardichand & Ors., [1981] 1 SCR 97 may be usefully recalled:

"Admirable though it may be, it is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent.

This "beautiful" system is frequently a lux- ury; it tends to give a high quality of jus- tice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims."

We had then thought that the Bhopal dispute came within the last category and now we endorse it.

When dealing with this case this Court has always taken a pragmatic approach. The oft-quoted saying of the great American Judge that 'life is not logic but experience' has been remembered. Judges of this Court are men and their hearts also bleed when calamities like the Bhopal gas leak incident occur. Under the constitutional discipline determi- nation 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 strug-

gling 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.

In the order of May 4, 1989, this Court had clearly indicated that it is our obligation to uphold the rights of the citizens and to bring to them a judicial fitment as available in accordance with the laws. There have been several instances where this Court has gone out of its way to evolve principles and make directions which would meet the demands of justice in a given situation. This, however, is not an occasion when such an experiment could have been undertaken to formulate the Mehta principle of strict li- ability at the eventual risk of ultimately losing the legal battle.

Those who have clamoured for a judgment on merit were perhaps not alive to this aspect of the matter. If they were and yet so clamoured, they are not true representatives of the cause of the victims, and if they are not, they were certainly misleading the poor victims. It may be right that some people challenging the settlement who have come before the Court are the real victims. I assume that they are innocent and unaware of the rigmarole of the legal process. They have been led into a situation without appreciating their own interest. This would not be the first instance where people with nothing as stake have traded in the misery of others.

This Court is entitled under the constitutional scheme to certain freedom of operation. It would be wrong to assume that there is an element of judicial arrogance in the act of the Court when it proceeds to act in a pragmatic way to protect the victims. It must be conceded that the citizens are equally entitled to speak in support of their rights. I am prepared to assume, nay, concede, that public activists should also be permitted to espouse the cause of the poor citizens but there must be a limit set to such activity and nothing perhaps should be done which would affect the digni- ty of the Court and bring down the serviceability of the institution to the people at large. Those who are acquainted with jurisprudence and enjoy social privilege as men educat- ed in law owe an obligation to the community of educating it properly and allowing the judicial process to continue unsoiled. Lord Simonds in Shaw v. Director of Public Prosecu- tions, (1981) 2 All E.R. 447 said:

"I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State." Let us remember what had once been said in a different context:

"It depends upon the present age whether this great national institution shall descend to our children in its masculine majesty to protect the people and fulfil their great expectations."

Let us also remember what Prof. Harry Jones in the Efficacy of Law has said:

"There are many mansions in the house of Jurisprudence, and I would not be little any one's perspective on law in society, provided only. that he does not insist that his is the only perspective that gives a true and mean- ingful view of ultimate legal reality."

In the facts and circumstances indicated and for the reasons adopted by my noble brother in the judgment. I am of the view that the decree obtained on consent terms for compensation does not call for review.

I agree with the majority view.

VENKATACHALIAH, J. - These Review Petitions under Arti- cle 137 and Writ Petitions under Article 32 of the Constitu- tion of India raise certain fundamental issues as to the constitutionality, legal-validity, propriety and fairness and conscionability of the settlement of the claims of the victims in a mass-tort-action relating to what is known as the "Bhopal Gas Leak Disaster"considered world's industrial disaster, unprecedented as to its nature and magnitude. The tragedy, in human terms, was a terrible one. It has taken a toll of 4000 innocent human lives and has left tens of thousands of citizens of Bhopal physically affected in various degrees. The action was brought up by the Union of India as parens-patriae before the District Court Bhopal in Original Suit No. 1113 of 1986 pursuant to the statutory enablement in that behalf under the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 ('Act for short') claiming 3.3 Billion Dollars as compensation. When an inter-locutory matter pertaining to the interim-compensation came up for hearing there was a Court assisted settlement of the main suit claim itself at 470 Million U.S. Dollars recorded by he orders of this Court dated 14th and 15th of February 1989. The petitions also raise questions as to the jurisdiction and powers of the Court to sanction and record such settlement when appeals brought up against an inter-locutory order, were alone before this court.

The Union Carbide (India) Limited (for short the UCIL) owned and operated, in the northern sector of Bhopal, a chemical plant manufacturing pesticides commercially market- ed under the trade-names "Sevin" and "Temik". Methyl Isocy- anate (MIC) is an ingredient in the composition of these pesticides. The leak and escape of the poisonous fumes from the ranks in which they were stored occurred late in the night on the 2nd of December 1984 as a result of what has been stated to be a 'run-away' reaction owing to water entering into the storage tanks. Owing to the then prevail- ing wind conditions the fumes blew into the hutments abut- ting the premises of the plant and the residents of that area had to bear the burnt of the fury of the vitriolic fumes. Besides large areas of the city were also exposed to the gas.

2. Referring to this industrial accident this Court in the course of its order dated 4th May, 1989 had occasion to say:

"The Bhopal Gas Leak tragedy that occurred at midnight on 2nd December, 1984, by the escape of deadly chemical fumes form the appellant's pesticide-factory was a horrendous industrial mass disaster, unparalleled in its magnitude and devastation and remaining a ghastly monu- ment to the de-humanising influence of inher- ently dangerous technologies. The tragedy took an immediate toll of 2,660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees. What added grim poignance to the tragedy was that the indus- trial-enterprise was using Methyl Iso-cyanate, a lethal toxic poison, whose potentiality for destruction of life and biotic-communities was, apparently, matched only by the lack of a prepackage of relief procedures for management of any accident based on adequate scientific knowledge as to the ameliorative medical procedures for immediate neutralisation of its effects."

The toll of life has since gone up to around four thou- sand and the health of tens of thousands of citizens of Bhopal City has come to be affected and impaired in various degrees of seriousness. The effect of the exposure of the victims to Methyl Isocyanate (MIC) which was stored in considerably large quantities in tanks in the chemical plant of the UCIL which escaped on the night of the 2nd of December 1984 both in terms of acute and chronic episodes has been much discussed. There has been growing body of medical literature evaluating the magnitude and intensity of the health hazards which the exposed popu- lation of Bhopal suffered as immediate effects and to which it was potentially put at risk.

It is stated that the MIC is the most toxic chemical in industrial use. The petitioners relied upon certain studies on the subject carried out by the Toxicology Laboratory, Department of Industrial Environmental Health Sciences, Graduate School of Public Health, University of Pittsburg [reported in Environmental Health Perspective Volume 72, pages 159 to 167]. Though it was initially assumed that MIC caused merely simple and short-term injuries by scalding the surface tissues owing to its highly exothermic reaction with water it has now been found by medical research that injury caused by MIC is not to the mere surface tissues of the eyes and the lungs but is to the entire system including nephro- logical lymph, immune, circulatory system, etc. It is even urged that exposure to MIC has mutagenic effects and that the injury caused by exposure to MIC is progressive. The hazards of exposure to this lethal poison are yet an unknown quanta.

Certain studies undertaken by the Central Water and Air Pollution Control Board, speak of the high toxicity of the chemical.

The estimates of the concentration of MIC at Bhopal that fateful night by the Board inculcate a concentration of 26- 70 parts per million as against the 'OSHA' standard for work environment of 0.02 P.P.M. which is said to represent the threshold of tolerance. This has led to what can only be described as a grim and grisly tragedy. Indeed the effects of exposure of the human system to this toxic chemical have not been fully grasped. Research studies seem to suggest that exposure to this chemical fumes renders the human physiology susceptible to long term pathology and the toxin is

suspected to lodge itself in the tissues and cause long term damage to the vital systems, apart from damaging the exposed parts such as the eyes, lung membrane ere. It is also alleged that the 'latency-period' for the symptomatic manifestation of the effects of the exposure is such that a vast section of the exposed population is put at risk and the potential risk of long term effects is presently unpre-dictable. It is said that even in cases of victims presently manifesting symptoms, the prospects of aggravation of the condition and manifestation of other effects of exposure are statable possibilities.

Immediately symptomatic cases showed ocular inflamation affecting visual acuity and respiratory distress owing to pulmonary edema and a marked tending towards general morbid- ity. It is argued that analysis of the case histories of persons manifesting general morbidity trends at various intervals from 3rd December, 1989 upto April, 1990 indicate that in all the severely affected, moderately affected and mildly affected areas the morbidity trend initially showed a decline compared with the acute phase. But the analysis for the later periods, it is alleged, showed a significant trend towards increase of respiratory, opthalmic and general morbidity in all the three areas. It is also sought to be pointed out that the fatal miscarriages in the exposed group was disturbingly higher than in the control group as indicated by the studies carried out by medical researchers. One of the points urged is that the likely long term effects of exposure have not been taken into account in approving the settlement and that the only way the victims' interests could have been protected against future aggrava- tion of their gas related health hazards was by the incorpo- ration of an appropriate "re-opener" clause.

3. On 29th of March, 1985 the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Act) was passed authoris- ing the Government of India, as parens patriae exclusively to represent the victims so that interests of the victims of the disaster are fully protected, and that claims for com-pensation were pursued speedily, effectively, equitably and to the best advantage of the claimants. On 8th of April, 1985 Union of India, in exercise of the powers conferred on it under the Act, instituted before the U.S.District Court, Southern District of New York, an action on behalf of the victims against the Union Carbide Corporation (UCC) for award of compensation for the damage caused by the disaster. A large number of fatal-accidents and personal-injury actions had earlier also come to be filed in Courts in the United States of America by and on behalf of about 1,86,000 victims. All these earlier claims instituted in the various Courts in United States of America had come to be consoli- dated by the "Judicial Panel on Multi District Litigation" by its direction dated 6th February 1985 and assigned to United States District Court, Southern District of the New York, presided over by a Judge Keenan. The claim brought by the Union of India was also consolidated with them. The UCC held 50.9% of the shares in the UCIL. The latter was its subsidiary. UCC's liability was asserted on the averments that UCC, apart from being the holding compa- ny, had retained and exercised powers of effective control over its Indian subsidiary in terms of its Corporate Policy and the establishment of the Bhopal Chemi- cal Plant- with defective and inadequate safety standards which, compared with designs of UCC's American plants, manifested. an indifference and disregard for humansafety- was the result of a conscious and deliberate action of the UCC. It was averred that UCC had, on considerations of economic advantages, consciously settled and opted for standards of safety for its plant in a developing country much lower' than what it did for its own American counter- parts.The claim was partly based on 'Design liability' on the part of UCC. The liability was also said to arise out of the use of ultra-hazardous chemical poisons said to engender not merely strict liability on Rylands v. Fletcher principal but an absolute liability

on the principals of M.C. Mehta's case.

The defences of the UCC, inter-alia, were that UCC was a legal entity distinct in law from the UCIl that factually it never exercised any direct and effective control over UCIL and that its corporate policy itself recognised, and was subject to, the over-riding effect of the municipal laws of the country and therefore subject to the statutes in India which prohibit any such control by a foreign company over its Indian subsidiary, except the exercise of rights as share-holder permitted by-law.

The UCC also resisted the choice of the American Forum on the plea of Forum-Non-Conveniens. Union of India sought to demonstrate that the suggested alternative forum before the judiciary in India was not an 'adequate' forum pointing out the essential distinction between the American and Indian systems of Tort Law both substantive and procedural available under and a comparison of the rights, remedies and procedure the competing alternative forums. The nature and scope of a defendant's plea of Forum Non-Conveniens and the scope of an enquiry on such plea have received judicial considerations before the Supreme Court of United States of America in Gulf Oil Corp. v. Gilbert [330 U.S. 501], Koster v. Lumbermens Mutual Casualty Co. 1330 U.S. 518] and Piper Aircraft Co. v. Reyno [454 U.S. 235].

The comparison of rights, remedies and procedures avail- able in the two proposed forums though not a "major-factor", nevertheless, were relevant tests to examine the adequacy of the suggested alternative forum. System of American Tort Law has many features which make it a distinctive system. Judge Keenan adopting the suggested approach in Piper's decision that doctrine of forum non conveniens was desinged in part to help courts in avoiding complex exercises in comparative laws and that the decision should not hinge on an unfavour- able change in law which was lot a major factor in the analysis was persuaded to the view that differences in the system did not establish inadequacy of the alternative forum in India. Accordingly on 12th of May, 1986, Judge Keenan allowed UCC's plea and held that the Indian judiciary must have the "opportunity to stand all before the world and to pass judgment on behalf of its own people".

4. Thereafter the Union of India was constrained to alter its choice of the forum and to pursue the remedy against the UCC in the District Court at Bhopal. That is how Original Suit No. 1113 of 1986 seeking a compensation of 3 Billion Dollars against the UCC and UCIL came to be field at Bhopal.

Efforts were made by the District Court at Bhopal to explore the possibilities of a settlement. But they were not fruitful. Zahreeli Gas Kand Sangharsh Morcha one of the victim-organisations appears to have moved the Court for award of interim-compensation. On 13th December 1987, The District Court made an order directing payment of Rupees 350 crores as interim compensation. UCC challenged this award' before the High Court of Madhya Pradesh. The High Court by its order dated 4th of April, 1988 reduced the quantum of interim compensation to Rs. 250 crores. both Union of India and UCC brought up appeals by Special Leave before this Court against the order of

the High Court- Government of India asailing the reduction made by the High Court in the quantum of interim compensation from Rs. 350 crores to Rs. 250 crores and the UCC assailing the very jurisdiction and permissibility to grant interim compensa- tion in a part-action where the very basis of liability itself had been disputed. The contention of the UCC was that in a suit for damages where the basis of the liability was disputed the Court had no power to make an award of interim-compensation. It was urged that in common law-and that the law of India too-in a suit for damages no court could award interim-compensation.

Prior to 1980 when the Rules of Supreme Court in England were amended (Amendment No. 2/1980) Courts in United Kingdom refused interim-payments in actions for damages. In Moore v. Assignment Courier 1977 (2) All ER 842 (CA)], it was recog- nised that there was no such power in common law. It was thereafter that the rules of the Supreme Court were amend- ed by inserting Rules 10 and 11 of Order 29 Rules of Supreme Court specifically empowering the High Court to grant inter- im relief in tort injury actions. The amended provision stipulated certain preconditions for the invokability of its enabling provision. But in England Lord Denning in the Court of Appeal thought that even under the common by the court could make an interim award for damages [(See Lim Poh too v. Camden Islington Area Health Authority, (1979 1 AER 332). But his view was disapproved by the House of Lords (See 1979 (2)AER 910 at pages 913, 914). Lord Scarman said: "Lord Denning MR in the Court of Appeals declared that a radical reappraisal of the law is needed. I agree. But I part company with him on ways and means. Lord Denning MR be- lieves it can be done by the Judges, whereas I would suggest to your Lordships that such a reappraisal calls for social, financial, economic and administrative decisions which only the legislature can take. The perplex- ities of the present case, following on the publication of the report of Royal Commission of Civil Liability and Compensation for Per- sonal Injury (the Pearson report), emphasise the need for reform of the law.

Lord Denning MR appeared, however, to think, or at least to hope, that there exists machin- ery in the rules of the Supreme Court which may be adopted to enable an award of damages in a case such as this to be 'regarded as an interim award'.

It is an attractive, ingenious suggestion, but, in my judgment, unsound. For so radical a reform can be made neither by judges nor by modification of rules of court. It raises issues of social economic and financial policy not amenable to judicial reform, which will almost certainly prove to be controversial and can be resolved by the legislature only after full consideration of factors which cannot be brought into clear focus or be weighed and assessed, in the course of the forensic proc- ess. The Judge, however, wise, creative, and imaginative he may be, is cabined, cribbed, confined, bound in not as was Macbeth, to his saucy doubts and fears' but the evidence and arguments of the litigants. It is this limita- tion, inherent in the forensic process, which sets bounds to the scope of judicial law reform."

But in cases governed by common law and not affected by the statutory changes in the Rules of

Supreme Court in U .K., the Privy Council said:

"Their Lordships cannot leave this case with- out commenting on two unsatisfactory features. First, there is the inordinate length of time which has elapsed between service of the writ in February 1977 and final disposal of the case in the early months of 1984. The second is that, as their Lordships, understand the position, no power exists in a case where liability is admitted for an interim payment to be ordered pending a final decision on quantum of damages. These are matters to which consideration should be given. They are, of course, linked; though the remedy for delay may be a matter of judicial administration, it would be seen legislation may be needed to enable an interim award to be made."

[See: Jamil Bin Harun v. Young Kamstah: 1984 (1)AC 529, 5381 The District Court sought to sustain the interim award on the inherent powers of the court preserved in Section 151 CPC. But the High Court of Madhya Pradesh thought that appeal to and reliance on Section 151 was not appropriate It invoked Section 9 CPC read with the principle underlying the English Amendment, without its strict pre-conditions. The correctness of this view was assailed by the UCC before this Court in the appeal.

On 14th February, 1989 this Court recorded an over-all settlement of the claims in the suit for 470 million U.S. Dollars and the consequential termination of all civil and criminal proceedings. The relevant portions of the order of this Court dated 14th February, 1989 provide: (1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 millions (Four hundred and seventy Millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.

(2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31st March, 1989.

(3) To enable the effectuation of the settle- ment, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settle- ment, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential directions, if any, to issue." On 15th February, 1989 the terms of settlement signed by learned Attorney General for the Union of India and the Counsel for the UCC was filed. That memorandum provides:

1. "The parties acknowledge that the order dated February 14 1989 as supplemented by the order dated February 15, 1989 disposes of in its entirety all proceedings in Suit No.1113 of 1986. This settlement shall 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 and future deaths, personal injuries health ef- fects compensation, losses, damages and civil and criminal complaints of any nature whatso- ever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their sub- sidiaries 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 concerned with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceed- ings against each other. All such claims and causes of action whether within or outside India of Indian citizens public or private entities are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing Claims) Scheme 1985, and all such civil proceedings in India are hereby transferred to this court and are dismissed with prejudice, and all such crimi- nal proceedings including contempt proceedings stand quashed and accused deemed to be acquit- ted.

2. Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated November 30, 1986 in the District Court, Bhopal stands discharged, and all orders passed in Suit No. 1113 of 1986 and or in any Revision therefrom, also stand discharged."

A further order was made by this Court on 15th February, 1989 which, apart from issuing directions in paragraphs 1 and 2 thereof as to the mode of payment of the said sum of 470 million U.S. Dollars pursuant to and in terms of the settle- ment, also provided the following:

"3. Upon full payment of the sum referred to in paragraph 2 above:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settle- ment are defended by them and disposed of in terms of this order

(b) Any such suits, claims or civil or crimi- nal proceedings filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal of quashing in terms of this order.

4. Upon full payment in accordance with the Court's directions:

(a) The undertaking given by Union Carbide Corporation pursuant to the order dated 30 November, 1986 in the District Court Bhopal shall stand discharged, and all orders passed in Suit No. 1113 of 1986 and/or in revision therefrom shall also stand discharged.

(b) Any action for contempt initiated against counsel or parties relating to this case and arising out of proceedings in the courts below shall be treated as dropped."

5. The settlement is assailed in these Review Petitions and Writ Petitions on various grounds. The arguments of the petitioners in the case have covered a wide range and have invoked every persuasion--jurisdictional, legal, humanitar- ian and those based on considerations of public-policy. It is urged that the Union of India had surrendered the inter- ests of the victims before the might of multinational car- tels and that what are in issue in the case are matters of great moment to developing countries in general. Some of these exhortations were noticed by this Court in the course of its order of 4th May, 1989 in the following words: "31. As to the remaining question, it has been said that many vital juristic principles of great contemporary relevance to the hird World generally, and to India in partic- ular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of lost opportunity to this apex Court to give the law the new direction on vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal limits to be envisaged in the vital interests of the protection of the constitutional rights of the citizenry, and of the environment, on the permissibility of such ultra-hazardous tech- nologies and to prescribe absolute and deter- rent standards of liability if harm is caused by such enterprises. The prospect of exploita- tion of cheap labour and of captive-markets, it is said, induces multinationals to enter into the developing countries for such econom- ic-exploitation and that this was eminently an appropriate case for a careful assessment of the legal and Constitutional safeguards stem- ming from these vital issues of great contem- porary relevance.

On the importance and relevance of these considerations, this Court said:

32. These issues and certain cognate areas of even wider significance and the limits of the adjudicative disposition of some of their aspects are indeed questions of seminal importance. The culture of modern industrial technologies, which is sustained on processes of such pernicious potentialities, in the ultimate analysis, has thrown open vital and fundamental issues of technology options. Associated problems of the adequacy of legal protection against such exploita- tive and hazardous industrial adventurism, and whether the citizens of the country are assured the protection of a legal system which could be said to be adequate in a comprehensive sense in such contexts arise. These, indeed are issues of vital importance and this tragedy, and the conditions that enabled it

happen, are of particular concern.

33. The chemical pesticide industry is a concomitant, and indeed, an integral part, of the Technology of Chemical Farming.

Some experts think, that it is time to return from the high-risk, resource-intensive, high input, anti-ecological, monopolistic 'hard' technology which feeds, and is fed on, its self-assertive attribute, to a more human and humane flexible: eco-conformable, "soft" technology with its systemic-wisdom and oppor- tunities for human creativity and initiative.'Wisdom demands" says Schumacher "a new orientation of science and technology towards the organic, the gentle the non-vio- lent, the elegant and beautiful". The other view stressing the spectacular success of agricultural production in the new era of chemical farming with high-yielding strains, points to the break-through achieved by the Green Revolution with its effective response to, and successful management of the great challenges of feeding the millions. This technology in agriculture has given a big impetus to enterprises of chemical fertilizers and pesticides. This, say its critics, has brought in its trail its own serious problems. The technology-options before scientists and planners have been difficult."

6. Before we examine the grounds of challenge to the settlement we might, perhaps, refer to three events. The first is that the Central Bureau of Investigation, Govern- ment of India, brought criminal charges under Sections 304, 324, 326, 429 read with Section 35 of the Indian Penal Code against Mr.Warren Anderson, the then Chairman of the UCC and several other persons including some of the officers in- charge of the affairs of the UCIL. On 7th December, 1984 Mr.Warren Anderson came to India to see for himself the situation at Bhopal. He was arrested and later released on bail. One of the points seriously urged in these petitions is the validity of the effect of the order of this Court which terminated those criminal proceedings. The second event is that on 17th of November, 1986 the District Court at Bhopal, on the motion of the plaintiff- Union of India, made an order restraining the UCC by an interlocutory injunction, from selling its assets, paying dividends, buying back debts, etc. during the pendency of the suit. On 30th of November, 1986 the District Court vacated that injunction on the written assurance and under- taking dated 27th November 1986 filed by the UCC to maintain unencumbered assets of three billion U.S. Dollars. One of the points argued in the course of the hearing of these petitions is whether, in the event the order recording the settlement is reviewed and the settlement set aside, the UCC and UCIL would become entitled to the restitution of the funds that they deposited in Court pursuant to and in performance of their obligations under the settlement. The UCC deposited 420 million U.S. Dollars and the UCIL the rupee equivalent of 45 million U.S. Dollars. 5 million U.S. Dollars directed by Judge Keenan to be paid to the Interna- tional Red Cross was given credit to. The petitioners urge that even after setting aside of the settlement, there is no compulsion or obligation to restore to the UCC the amounts brought into Court by it as such a step would prejudicially affect the interests of the victims. The other cognate question is whether, if UCC is held entitled to such resti- tution, should it not, as a pre-condition, be held to be under a corresponding obligation to restore and effectuate its prior undertaking dated 27th November 1987 to maintain unencumbered assets of three billion U.S.Dollars, accepting which the order dated 30th November, 1987 of the District Court Bhopal came to be made.

The third event is that subsequent to the recording of the settlement a Constitution Bench of this Court dealt with and disposed of writ-petitions challenging the constitution- ality of the 'Act' on various grounds in what is known as Charanlal Sahu's case and connected matters. The Constitution Bench upheld its constitutionality and in the course of the Court's opinion Chief Justice Mukharji made certain observations as to the validity of the settlement and the effect of the denial of a right of being heard to the vic- tims before the settlement, a right held to be implicit in Section 4 of the Act. Both sides have heavily relied on certain observations in that pronouncement in support of the rival submissions.

7. We have heard learned Attorney General for the Union of India; Sri Shanti Bhushan, Sri R.K. Garg, Smt.Indira Jaising, Sri Danial Latif, Sri Trehan learned senior counsel and Shri Prashant Bhushan, learned counsel for petitioners and Sri F.S. Nariman, learned senior counsel for the UCC, Sri Rajinder Singh, learned senior counsel for the UCIL and Dr;N.M. Ghatate and Sri Ashwini Kumar, learned senior coun- sel for the State of Madhya Pradesh and its authorities. 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 re- corded 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 valid- ity of the settlement.

8. The contentions urged at the hearing in support of these petitions admit of the following formulations: Contention (A):

The proceedings before this Court were merely in the nature of appeals against an interlocu- tory order pertaining to the interim-compensa- tion. Consistent with the limited scope and subject-matter of the appeals, the main suits themselves could not be finally disposed of by the settlement. The Jurisdiction of this Court to withdraw or transfer a suit or proceeding to itself is exhausted by Article 139 A of the Constitution. Such transfer implicit in the final disposal of the suits having been imper- missible suits were not before the Court so as to be amenable to final disposal by recording a settlement. The settlement is, therefore, without jurisdiction

Contention (B):

Likewise the pending criminal prosecution was a separate and distinct proceeding unconnected with the suit from the interlocutory order in which the appeals before this Court arose. The criminal proceedings were not under or relata- ble to the 'Act'. The Court had no power to withdraw to itself those criminal proceedings and quash them. The orders of the Court dated 14th and 15th of February 1989, in so far as they pertain to the quashing of criminal proceedings are without jurisdiction.

Contention (C):

The 'Court-assisted-settlement' was as be- tween, and confined to, the Union of India on the one hand and UCC & UCIL on the other. The Original Suit No. 1113 of 1986 was really and in substance a representative suit for pur- poses and within the meaning of Order XXIII Rule 3B C.P.C. inasmuch as any order made therein would affect persons not eo-nomine parties to the suit. Any settlement reached without notice to the persons so affected without complying with the procedural drill of Order XXIII Rule 3B is a nullity.

That the present suit is such a representative suit; that the order under review did affect the interests of third parties and that the legal effects and consequences of non- compliance with Rule 3B are attracted to case are concluded by the pronouncement of the Constitution Bench in Charanlal Sahu's case. Contention (D):

The termination of the pending criminal proceedings brought about by the orders dated 14th and 15th of Febru- ary, 1989 is bad in law and would require to be reviewed and set aside on grounds that (i) if the orders are con- strued as permitting a compounding of offences, they run in the teeth of the statutory prohibition contained in Section 320 (9) of the Code of Criminal Procedure; (ii) if the orders are construed as permitting a withdrawal of the prosecution under Section 321 Cr.P.C. they would, again, be bad as violative of settled principles guiding withdrawal of prosecutions; and (iii) if the orders amounted to a quash- ing of the proceedings under Section 482 of the Code of Criminal Procedure, grounds for such quashing did not obtain in the case.

Contention (E):

The effect of the orders under review inter- dicting and prohibiting future criminal pro- ceedings against any person or persons whatso- ever in relation to or arising out of the Bhopal Gas Leak Disaster, in effect and sub- stance, amounts to conferment of an immunity from criminal proceedings. Grant of immunity is essentially a legislative function and cannot be made by a judicial act.

At all events, grant of such immunity is opposed to public policy and prevents the investigation of serious offences in relation to this horrendous industrial disaster where UCC had inter-alia alleged sabotage as cause of the disaster. Criminal investigation was necessary in public interest not only to punish the guilty but to prevent any recur- rence of such calamitious events in future.

Contention (F):

The memorandum of settlement and the orders of the Court thereon, properly construed, make the inference inescapable that a part of the consideration for the payment of 470 million U.S. Dollars was the stifling of the criminal prosecutions which is opposed to public-poli- cy. This vitiates the agreement on which the settlement is based for unlawfulness of the consideration. The consent order has no higher sanctity than the legality and validity of the agreement on which it rests.

Contention (G):

The process of settlement of a mass tort action has its own complexities and that a "Fairness-Hearing" must precede the approval of any settlement by the court as fair, reasonable and adequate. In concluding that the settlement was just and reasonable the Court omitted to take into account and provide for certain important heads of compensation such as the need for and the costs of medical surveillance of a large section of population, which though asymptomatic for the present was likely to become symptomatic later having regard to the character and the potentiality of the risks of exposure and the likely future damages resulting from long-term effects and to build-in a 're-opener' clause.

The settlement is bad for not affording a fairness-hearing and for not incorporating a "re-opener" clause. The settlement is bad for not indicating appropriate break-down of the amount amongst the various classes of victim- groups. There were no criteria to go by at all to decide the fairness and adequacy of the settlement.

Contention (H):

Even if the settlement is reviewed and set aside there is no compulsion or obliga- tion to refund and restore to the UCC the funds brought in by it, as such restitution is discretionary and in exercising this discre- tion the interests of the victims be kept in mind and restitution denied.

At all events, if restitution is to be al- lowed, whether UCC would not be required to act upon and effectuate its undertaking dated 27th November, 1986 on the basis of which order dated 30th November, 1986 of the Bhopal District Court Vacating the injunction against it was made.

Contention (I):

Notice to the affected-person implicit in section 4 of the Act was imperative before reaching a settlement and that as admittedly no such opportunity was given to the affected-person either by the Union of India before entering into the settlement or by the Court before approving it, the settlement is void as violative of natural justice. Sufficiency of natural justice at any later stage cannot cure the effects of earlier insufficiency and does not bring life back to a purported settlement which was in its incep- tion void.

The observations of the constitution Bench in Charanlal Sahu's case suggesting that a hear- ing was available at the review stage and should be sufficient compliance with natural justice, are mere obiter-dicta and do not alter the true legal position.

Point (j):

Does the settlement require to be set aside and the Original Suit No. 1113 of 1986 direct- ed to be proceeded with on the merits? If not, what other reliefs require to be granted and what other directions require to be issued? Re.:Contentions (A) and (B)

9. The contention articulated with strong emphasis is that the court had no jurisdiction to withdraw and dispose of the main suits and the criminal proceedings in the course of hearing of appeals arising out of an interlocutory order in the suits. The disposal of the suits would require and imply their transfer and withdrawal to this court for which, it is contended, the Court had no power under law. It is urged that there is no power to withdraw the suits or pro- ceedings dehors. Article 139-A and the conditions enabling the application of Article 139-A do not, admittedly, exist. It is, therefore, contended that the withdrawal of the suits, implicit in the order of their final disposal pursu- ant to the settlement, is a nullity. It is urged that Arti- cle 139A is exhaustive of the powers of the Court to with- draw suits or other proceedings to itself. It is not disputed that Article 139A in terms does not apply in the acts of the case. The appeals were by special leave under Article 136 of the Constitution against an interlocutory order. If Article 139A exhausts the power of transfer or withdrawal of proceedings, then the contention as substance. But is that so?

This Court had occasion to point out that 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 save against any kind of judgment or order made by a Court or Tribunal in by cause of matter and the powers can be exercised in spite of the limitations under the specific provisions for appeal contained in the Constitution other laws. The powers given by Article 136 are, however, in the nature special or resid- uary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference the Supreme Court. (See Durga Shankar Mehta v. Thaiair Raghuraj singh & Others [1955] S.C.R. 267]. Article 142 (1) of the Constitution provides: "142 (1) The Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

[Emphasis added]

The expression "cause or matter" in Article 142 (1) is very wide overing almost every kind of proceedings in Court. In Halsbury's Laws of England-Fourth Edition [vol 37] para 22 referring to the plenitude of that expression it is stated: "Cause or matter-The words "cause and "matter" are often used in juxtaposition, but they have different meanings. "Cause" means any action or any criminal proceedings and "matter" means any proceedings in court not in a cause. When used together, the words "cause or matter" cover almost every kind of proceeding in court, whether civil or crimi- nal, whether interlocutory or final, and whether before Or after judgment."

[emphasis added]

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. Take, for instance, a case where an interlocutory order in a matrimonial cause pending in the trial court comes up before the apex court. The parties agree to have the main matter itself either decided on the merits or disposed of by a compromise. If the argument is correct this court would be powerless to with- draw the main matter and dispose it of finally even if it be on consent of both sides. Take also a similar situation where some criminal proceedings are also pending between the litigating spouses. If all disputes are settled, can the court not call up to itself the connected criminal litiga- tion for a final disposal? If matters are disposed of by consent of the parties, can any one of them later turn around and say that the apex court's order was a nullity as one without jurisdiction and that the consent does not confer jurisdiction? This is not the way in which

jurisdic- tion with such wide constitutional powers is to be con- strued. While it is neither possible nor advisable to enu- merate exhaustively the multitudinous ways ill which such situations may present themselves before the court where the court with the aid of the powers under Article 142 (1) could bring about a finality to the matters, it is common experi- ence that day-in-and-day-out such matters are taken up and decided in this court. It is true that mere practice, howev- er long, will not legitimize issues of jurisdiction. But the argument, pushed to its logical conclusions, would mean that when an interlocutory appeal comes up before this Court by special leave, even with the consent of the parties, the main matter cannot be finally disposed of by this court as such a step would imply an impermissible transfer of the main matter. Such technicalities do not belong to the con- tent and interpretation of constitutional powers. 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 Articles 136 and 142 (1), the power under Article 139A, must be held not to exhaust the power of withdrawal and transfer.

Article 139A it is relevant to mention here, was introduced as part of the scheme of the 42nd Constitutional Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131 A, 139A and 144A. But Articles 131A, and 144A were omitted by the 43rd Amendment Act 1977, leaving Article 139A in tact. That article 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 Article 1.36 and 142 of the Constitution. The purposed constitutional plenitude of the powers of the Apex Court to ensure due and proper administration of justice is intended to be co-extensive in each case with the needs of justice of a given case and to meeting any exigen- cy. Indeed, in Harbans Singh v. U.P. State [1982] 3 SCR 235 the Court said:

"Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Arts. 32 and 136 of the Constitution I am of the opinion that this Court retains and must retain, an inherent power and juris- diction for dealing with any extra-ordinary situation in the larger interests of administration of justice and for pre- venting manifest injustice being done. This power must necessarily bc sparingly used only in exceptional circum- stances for furthering the ends of justice. Having regard to the facts and circumstances of this case, I am of the opin- ion that this is a fit case where this Court should enter- tain the present petition of Harbans Singh and this Court should interfere."

We find absolutely no merit in this hypertechnical submission of the petitioners' learned counsel. We reject the argument as unsound.

A similar ground is urged in support of contention [B] in relation to such withdrawal implicit in the quashing of the criminal proceedings. On the merits of the contention whether such quashing of the proceedings was, in the circum- stances of the case, justified or not we have reached a decision on

Contentions IDI and [E]. But on the power of the court to withdraw the proceedings, the contention must fail. We. accordingly, reject both Contentions [At and IB].

Re: Contention (C)

10. Shri Shanti Bhushan contends that the settlement recorded on the 14th and 15th of February, 1989, is void under Order XXIII Rule 3B, Code of Civil Procedure, as the orders affect the interests of persons not eo-nomine parties to the proceedings, and, therefore, the proceedings be- come representative-proceedings for the purpose and within the meaning of Order XXIII Rule 3-B C.P.C. The order record- ing the settlement, not having been preceded by notice to such persons who may appear to the Court to be interested in the suit, would, it is contended, be void. Order XXIII Rule 3-B CPC provides: "Order XXIII Rule 3B.

No agreement or compromise to be entered in a representative suit without leave of Court. (1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.

(2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation-In this rule, "representative suit" means,-

(a) a suit under Section 91 or Section 92.

(b) a suit under rule 8 of Order 1,

(c) a suit in which the manager of anundivided Hindu family sues or is sued as representing the other members of the family, (d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for time being in force bind any person who is not named as party to the suit."

Shri Shanti Bhushan says that the present proceedings by virtue of clause (d) of the Explanation

should be deemed to be a representative suit and that the pronouncement of the Constitution Bench in Sahu case which has held that Order XXIII Rule 3-B CPC is attracted to the present proceedings should conclude the controversy. The observations in Sahu's case relied in this behalf are these:

'However, Order XX111 Rule 3B of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. the said rule 3B provides that no agreement or compromise in a represen- tative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and sub-rule (2) of rule 3B enjoins that before granting such leave the Court shall give notice in such manner as it may think fit in a representative action. Representative suit, again, has been defined under Explanation to the said rule vide clause (d) as any other suit in which the' decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit. In this case, indubitably the victims would be bound by the settlement though not named in the suit. This is a position conceded by all. If that is so, it would be a representative suit in terms of and for the purpose of Rule 3B of Order XXIII of the Code. If the principles of this rule are the principles of natural justice then we are of the opinion that the principles behind it would be applicable, and also that section be applicable, and also that section 4 should be so construed in spite of the difficulties of the process of notice and other difficul- ties of making "informed decision making process cumbersome", as canvassed by the learned Attorney General"'.

"The Learned Attorney General, however, sought to canvas the view that the victims had notice and some of them had participated in the proceedings. We are, however, unable to accept the position that the victims had notice of the nature contemplated under the Act upon the underlying principle of Order XXIII Rule 3B of the Code. It is not enough to say that the victims must keep vigil and watch the proceeding .... In the aforesaid view of the matter, in our opinion, notice was necessary. The victims at large did not have the notice.

[Emphasis added]

11. We have given our careful consideration to this submission. The question is whether Rule 3-B of Order XXIII, proprio-vigore, is attracted to the proceedings in the suit or whether the general principles of natural justice under- lying the provision apply. If it is the latter, as indeed, the Sahu case has held, the contention in substance is not different from the one based on non-compliance with the right of being heard which has been read into Section 4. The Sahu case did not lay down that provisions of Order XXIII Rule 3-B CPC, proprio-vigore, apply. It held that the prin- ciples of natural justice underlying the said provisions were not excluded. It is implicit in that reasoning that Order XXIII Rule 3B in terms did not apply. The Court there- after considered the further sequential question whether the obligation to hear had been complied with or not and what were the consequences of failure to comply. The Court in the Sahu case after noticing that the principle underlying Rule 3-B had not been satisfied, yet, did not say that the set- tlement was, for that reason, void. If as Shri Shanti Bhu- shan says the Sahu case had concluded the matter, it would have

as a logical consequence declared the settlement void. On the contrary, the discussion of the effect of failure of compliance would indicate that the court declined to recog- nise any such fatal consequences. The Court said: "Though entering into a settlement without the required notice is wrong. In the facts and circumstances of this case, there- fore, we are of the opinion, to direct that notice should be given now, would not result in doing justice in the situation. In the premises, no further consequential order is necessary by the Court. Had it been necessary for this Bench to have passed such a conse- quential order, we would not have passed any such consequential order in respect of the same."

12. 1 .The finding on this contention cannot be differ- ent from the one urged under Contention (I) infra. If the principle of natural justice underlying Order XXIII Rule 3-B CPC is held to apply, the consequences of non-compliance should not be different from the consequences of the breach of rules of natural justice implicit in Section 4. Dealing with that, the Sahu case, having regard to the circumstances of the case, declined to push the effect of non-compliance to its logical conclusion and declare the settlement void. On the contrary, the Court in Sahu's case considered it appropriate to suggest the remedy and curative of an oppor- tunity of being heard in the proceedings for review. In sahu decision the obligation under Section 4 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 ac- ceptance, such a right is not referable to, and does not stem from, Rule 3-B of Order XXIII CPC. The pronouncement in Sahu case as to what the consequences of non-compliance are in conclusive as the law of the case. It is not open to us to say whether such a conclusion is right or wrong. These findings cannot be put aside as mere obiter. Section 112 CPC, biter-alia, says that nothing contained in that Code shall be deemed to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution or to interfere with any rules made by the Supreme Court. The Supreme Court Rules are framed and pro- mulgated under Article 145 of the ConstitutiOn. Under Order 32 of the Supreme Court Rules, Order XXIII Rule 3-B CPC is not one of the rules expressly invoked and made applicable. 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. In Isaacs v. Robertson,1984 (3) AER 140 at 143 the Privy Council said:

"The .... legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which appeal lies."

With reference to the "void" cases the Privy Council ob- served:

The cases that are referred to in these dicta do not support the proposition that there is any category

or orders of a court of unlimited jurisdiction of this kind; what they do sup- port is the quite different proposition that there is a category of orders of such a court which a person affected by the order is enti- tled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal ex- pressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the dis- tinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."

This should conclude the present Contention under C also against the petitioners.

Re: Contention (D)

13. This concerns the validity of that part of the orders of the 14th and 15th of February, 1989 quashing and terminating the criminal proceedings. In the order dated 14th February 1989 Clause (3) of the order provides: ". .... and all criminal proceedings related to and arising out of the disas- ter shall stand quashed wherever these may be pending."

Para 3 of the order dated 15th February, 1989 reads:

"Upon full payment of the sum referred to in paragraph 2 above:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settle- ment are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or crimi- nal proceedings filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal or quashing in terms of this order."

The signed memorandum filed by the Union of India and the UCC includes the following

statements: "This settlement shall 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 entitles with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, 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 or concerned with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceed- ings against each other and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted."

The order of 15th February, 1989 refers to the written memorandum filed by the learned counsel on both sides.

14. The two contentions of the petitioners, first, in regard to the legality and validity of the termination of the criminal proceedings and secondly, the validity of the protection or immunity from future proceedings, are dis- tinct. They are dealt with also separately. The first -- which is considered here -- is in relation to the termina- tion of pending criminal proceedings.

15. Petitioners' learned counsel strenuously contend that the orders of 14th and 15th of February, 1989, quashing the pending criminal proceedings which were serious non- compoundable offences under Sections 304, 324, 326 etc. of the Indian Penal Code are not supportable either as amount- ing to withdrawal of the prosecution under Section 321 Code of Criminal Procedure, the legal tests of permissibility of which are well settied or as amounting to a compounding of the offences under section 320 Criminal Procedure Code as, indeed, sub-section (9) of section 320 Cr.P.C. imposes a prohibition on such compounding. It is also urged that the inherent powers of the Court preserved under Section 482 Cr. P.C. could not be pressed into service as the principles guiding the adminis- tration of the inherent power could, by no stretch of imagi- nation, be said to accommodate the present case. So far as Article 142 (1) of the Constitution is concerned, it is urged, that the power to do "complete justice" does not enable any order "inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provisions" as observed by this Court in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad,[1963] Suppl. 1 SCR 885 at 899-900].

16. Shri Nariman, however, sought to point out that in Prem Chand Garg's case the words of limitation of the power under Article 142 (1) with reference to the "express statu- tory provisions of substantive law" were a mere obiter and were not. necessary for the decision of that case. Shri Nariman contended that neither in Garg's case nor in the subsequent decision in A.R. Antulay v. R.S. Nayak and Anr.,[1988] 2 S.C.C. 602 where the above observations in Garg's case were approved, any question of inconsistency with the express statutory provisions of substantive law arose and in both the cases the challenge had been on the ground of violation of fundamental rights.

Shri Nariman said that the powers under Articles 136 and 142 (1) are overrid- ing constitutional powers and that while it is quite under- standable that the exercise of these powers, however wide, should not violate any other constitutional provision, it would, however, be denying the wide sweep of these constitu- tional powers if their legitimate plentitude is whittled down by statutory provisions. Shri Nariman said that the very constitutional purpose of Article 142 is to empower the Apex Court to do complete justice and that if in that proc- ess the compelling needs of justice in a particular case and provisions of some law are not on speaking terms, it was the constitutional intendment that the needs of justice should prevail over a provision of law. Shri Nariman submitted that if the statement in Garg's case to the contrary passes into law it would wrongly alter the constitutional scheme. Shri Nariman referred to a number of decisions of this Court to indicate that in all of them the operative result would not strictly square with the provisions of some law or the other. Shri Nariman referred to the decisions of this court where even non-compoundable offences were permitted to be compounded in the interests of complete justice; where even after conviction under Section 302 sentence was reduced to one which was less than that statutorily prescribed; where even after declaring certain taxation laws unconstitutional for lack of legislative competence this court directed that the tax already collected under the void law need not be refunded etc. Shri Nariman also referred to the Sanchaita case where this Court, having regard to the large issues of public interest involved in the matter, conferred the power of adjudication of claims exclusively on one forum irrespec- tive of jurisdictional prescriptions.

17. Learned Attorney General submitted that the matter had been placed beyond doubt in Antulay's case where the court had invoked and applied the dictum in Garg's case to a situation where the invalidity of a judicial-direction which, 'was contrary to the statutory provision, namely section 7(2) of the Criminal Law (Amendment) Act, 1952 and as such violative of Article 21 of the Constitution" was raised and the court held that such a direction was invalid. Learned Attorney General said that the power under Article 142 (1) could not be exercised if it was against an express substantive statutory provision containing a prohibition against such exercise. This, he said, is as it should be because justice dispensed by the Apex Court also should be according to law.

The order terminating the pending criminal proceedings is not supportable on the strict terms of Sections 320 or 321 or 482 Cr. P.C. Conscious of this, Shri Nariman submitted that if the Union of India as the Dominus Litis through its Attorney-General invited the court to quash the criminal proceedings and the court accepting the request quashed them, the power to do so was clearly referable to Article 142(1) read with the principle of Section 321 Cr.P.C. which enables the Government through its public-prosecutor to withdraw a prosecution. Shri Nariman suggested that what this Court did on the invitation of the Union of India as Dominus Litis was a mere procedural departure adopting the expedient of "quashing" as an alternative to or substitute for "withdrawal". There were only procedural and terminolog- ical departures and the Union of India as a party inviting the order could not, according to Shri Nariman, challenge the jurisdiction to make it. Shri Nariman submitted that the State as the Dominus Litis may seek leave to withdraw as long as such a course was not an attempt to interfere with the normal course of justice for illegal reasons.

18. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the

powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both Garg's as well as Antulay's case the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 in so far as quashing of criminal proceedings are concerned is not exhausted by Sections 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. Prohi- bitions or limitations or provisions contained in ordinary laws cannot, ipso-facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohi- bitions 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. Sri Sorabjee, learned Attorney-General, refering to Garg's case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provi- sions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohi- bition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibi- tion should also be shown to be based on some underlying fundamental and general issues of publicpolicy and not merely incidental to a particular statutory scheme or pat- tern. It will again be wholly incorrect to say that powers under Article 142 arc subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public-policy and regulate the exercise of its power and discretion accordingly. The 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.

Learned Attorney General said that Section 320 Criminal Procedure Code is "exhaustive of the circumstances and conditions under which composition can be effected." [See Sankar Rangavva v. Sankar Ramayya (AIR 1916 Mad. 463 at 485] and that "the courts cannot go beyond a test laid down by the Legislature for determining the class of offences that are compoundable and substitute one of their own." Learned Attorney General also referred to the following passage in Biswabahan v. Gopen Chandra [1967] SCR 447 at 451: "If a person is charged with an offence, then unless there is some provision for composition of it the law must take its course and the charge enquired into resulting either in conviction or acquittal."

He said that "if a criminal case is declared to be non- compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law." (See ILR 40 Cal.113 at 117-118); and submitted that court "cannot make that legal which the law condemns". Learned' Attorney-General stressed that the criminal case was an independent matter and of great public

concern and could not be the subject matter of any compromise or settlement. There is some justification to say that statutory prohibition against compounding of certain class of serious offences, in which larger social interests and social security are in- volved, 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 crucial proceedings under Article 142(1) is iII-conceived. But the justification for its exercise is another matter.

19. The proposition that State is the dominus Litis in criminal cases, is not an absolute one. The society for its orderly and peaceful development is interested in the pun- ishment of the offender. [See A.R. Antulay v. R.S. Nayak & Anr. [1984] 2 SCC 500 at 508, 509 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."] See Sheonandan Paswan v. State of Bihar & Ors. [1987] 1 SCC 289 at 316].

But Shri Nariman put it effectively when he said that if the position in relation to the criminal cases was that the court was invited by the Union of India to permit the termi- nation of the prosecution and the court consented to it and quashed the criminal cases, it could not be said that there was some prohibition in some law for such powers being exercised under Article 142. The mere fact that the word 'quashing' was used did not matter. Essentially, it was a matter of mere form and procedure and not of substance, The power under Article 142 is exercised with the aid of the principles of Section 321 Cr.P.C. which enables withdrawal of prosecutions. We cannot accept the position urged by the learned Attorney-General and learned counsel for the petitioners that court had no power or jurisdiction to make that order. We do not appreciate Union of India which filed the memorandum of 15th February, 1989 raising the plea of want of jurisdic- tion.

But whether on the merits there were justifiable grounds to quash is a different matter. There must be grounds to permit a withdrawal of the Prosecution. 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 princi- ples recognised as proper and relevent. There is no indica- tion as to the grounds and criteria justifying the withdraw- al 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. This Court in State of Punjab v. Union of India, [1986] 4 SCC 335 said that 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. Indeed, the stand of the UCC in these review petitions is not specific as to the court to permit a withdrawal. Even the stand of the Union of India has not been consistent. On the question whether Union of India itself invited the order quashing the criminal cases, its subsequents stand in the course of the arguments in Sahu case as noticed by the court appears to have been this:

"... The Government as such had nothing to do with the quashing of the criminal proceedings and it was not representing the victims in respect of the criminal liability of the UCC or UCIL to the victims. He further submitted that quashing of criminal proceedings was done by the Court in exercise of plenary powers under Articles 136 and 142 of the Constitu- tion...."

The guiding principle in according permission for with- drawal of a prosecution were stated by this Court in M.N. Sankarayanan Nair v.P.V. Balakrishnan & Ors. [1972] 2 SCC 599:

"...Nevertheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpun- ished merely because the Government as a matter of general policy or expediency uncon- nected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at the behest."

Learned counsel for the petitioners submitted that the case involved the allegation of commission of serious of- fences in the investigation of which the society was vitally interested and that considerations of public interest, instead of supporting a withdrawal, indicate the very oppo- site.

The offences relate to and arise out of a terrible and ghastly tragedy. Nearly 4,000 lives were lost and tens of thousands of citizens have suffered injuries in various degrees of severity. Indeed at one point of time UCC itself recognised the possibility of the accident having been the result of acts of sabotage. 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. We hold that no specific ground or grounds for withdraw- al of the prosecutions having been set out at that stage the quashing of the prosecutions requires to be set aside.

20. There is, however, one aspect on which we should pronounce. Learned Attorney-General showed us some corre- spondence pertaining to a letter Rogatory in the criminal investigation for discovery and inspection of the UCC's plant in the United States for purposes of comparison of the safety standards. The inspection was to be conducted during the middle of February. 1989. The settlement, which took place on The 14th of February, 1989, it is alleged, was intended to circumvent that inspection we have gone through the correspondence on the point. The documents relied upon do not support such an allegation. That apart, we must confess our inability to appreciate this suggestion coming as it does from the Government of India which was a party to the settlement.

However, on Contention (D) we hold that the quashing and termination of the criminal proceedings brought about by the orders dated 14th and 15th February, 1989 require to be, and are, hereby reviewed and set aside,. Re: Contention (E)

22. The written memorandum setting out the terms of the settlement filed by the Union of India and the U.C.C. con- tains certain terms which are susceptible of being construed as conferring a general future immunity from prosecution. The order dated 15th February, 1989 provides in clause 3[a] and 3[b]:

"....that any suits, claims or civil or crimi- nal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order". "Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority or hereby en- joined and shall not be proceeded with before such court or Authority except for dismissed or quashing in terms of this order."

These provisions, learned Attorney General contends, amount to conferment of immunity from the operation of the criminal law in the future respecting matters not already the subject matter of pending cases and therefore, partake of the character of a blanket criminal immunity which is essentially a legislative function. There is no power or jurisdiction in the courts, says learned Attorney-General, to confer immunity for criminal prosecution and punishment. Learned Attorney General also contends that grant of immuni- ty to a particular person or persons may amount) to a preferential treatment violative of the equality clause. This position seems to be correct. In Apodaca v. Viramontes 13 ALR 1427, it was observed: " .... The grant of an immunity is in very truth the assumption of a legislative power....". (P.1433)

" .... The decisive question, then, is whether the district attorney and the district court in New Mexico, absent constitutional provision or enabling statute conferring the power, are authorized to grant immunity from prosecution for an offense to which incrimi- nating answers provoked by questions asked will expose the witness.

We are compelled to give a negative answer to this inquiry. Indeed, sound reason and logic, as well as the great weight of authority, to be found both in text books and in the decided cases, affirm that no such power exists in the district attorney and the district court, either or both, except as placed there by constitutional or statutory language. It is unnecesary to do more in this opinion in proof of the statement made than to give a few references to texts and to cite some of the leading cases.

After the above observation, the court referred to the words of Chief Justice Cardozo [as he then was in the New York Court of Appeals] in Doyle v. Hafstader [257 NY 244]: " .... The grant of an

immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individu- als or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the perform- ance of their duties, and the prosecuting officer from his. All these changes may be wrought through the enactment of a statute. They may be wrought in no other way while the legislative structure of our government con- tinues what it is".

In the same case the opinion of Associate Judge Pound who dissented in part on another point, but who entirely shared the view expressed by Chief Justice Cardozo may also be cited:

"The grant of Immunity is a legislative func- tion. The Governor may pardon after conviction [NY Const. Art. 4 & 51, but he may not grant immunity from criminal prosecution or may the courts. Amnesty is the determination of the legislative power that the public welfare requires the witness to speak? [P. 1433] Learned Attorney General referred us to the following passage in "Jurisprudence" by Wortley:

"Again, if we say that X has an immunity from arrest when a sitting member of the House of Commons, then during its subsistence he has an immunity that is denied to the generality of citizens; there is an inequality of rights and duties of citizens when the immunity is made out ...... ".[p. 297]

This inequality must be justified by intelligible dif- ferentia for classification which are both reasonable and have a rational nexus with the object.

Article 361(2) of the Constitution confers on the Presi- dent and the Governors immunity even in respect of their personal acts and enjoins no criminal proceedings shall be instituted against them during their term of office. As to the theoretical basis for the need for such immunity, the Supreme Court of the United States in a case concerning immunity from civil liability [Richard Nixon v. Ernest Fitzgerald, 457 US 731:73 LEd 2d 349 said:

" .... This court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the struc- ture of our government ...." [p. 362] " .... In the case of the President the inquiries into history and policy, though mandated independently by our case, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately under- taken by a federal court. This inquiry in- volves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve

effective government under a constitu- tionally mandated separation of powers." [p. 362 and 363]

" ...... In view of the special nature of the President's constitutional office and functions, we think it appropriate to recog- nise absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility. Under the Constitution and laws of the United States the President has discretionary respon- sibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encom- passed a particular action...."

[p.-367]

Following observations of Justice Storey in his "Commen- taries in the Constitution of United States" were referred to:

There are ...... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them .... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability".

[P-363]

23. Indeed, the submissions of learned Attorney General on the theoretical foundations as to the source of immunity as being essentially legislative may be sound. But the question does not strictly arise in that sense in the present case. The 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 be- comes inapposite in this case.

24. However, in view of our finding on contention (D) that the quashing of criminal proceedings was not justified and that the orders dated 14th and 15th of February, 1989 in that behalf require to be reviewed and set-aside, the present contention does not survive because as a logical corollary and consequence of such further directions as to future prosecutions earlier require to be deleted. We,

therefore, direct that all portions in the orders of this Court which relate to the incompetence of any future prose- cutions be deleted.

25. The effect of our order on Contentions [D] and [E] is that all portions of orders dated 14th and 15th February, 1989, touching the quashing of the pending prosecution as well as impermissibility of future criminal liability are set-aside. However, in so far as the dropping of the pro- ceedings in contempt envisaged by clause (b) of para 4 of the order dated 15th February, 1989 is concerned, the same is left undisturbed.

Contention (e) is answered accordingly.

Re.' Contention (F)

26. As we have seen earlier the memorandum of settle- ment as well as the orders of the Court contemplate that with a view to effectuating the settlement there be a termi- nation of pending criminal prosecution with a further stipu- lation for abstention from future criminal proceedings. Petitioners have raised the plea- and learned Attorney General supports them -- that the language of the memorandum of settlement as well as the orders of the court leave no manner of doubt that a part of the consideration for the payment of 470 million US dollars was the stifling of the prosecution and, therefore, unlawful and opposed to public policy. Relying upon Sections 23 and 24 of the Indian Con- tract Act it was urged that if any part of a single consid- eration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful, the agreement becomes "void".

27. At the outset, learned Attorney General sought to clear any possible objections based on estoppel to the Union of India, which was a consenting party to the settlement raising this plea. Learned Attorney General urged that where the plea is one of invalidity the conduct of parties becomes irrelevant and that the plea of illegality is a good answer to the objection of consent. The invalidity urged is one based on publicpolicy. We think that having regard to the nature of plea --- one of nullity no preclusive effect of the earlier consent should come in the way of the Union of India from raising the plea. Illegalities, it is said, are incurable. This position is fairly well established. In re A Bankruptcy Notice (1924 2 Ch.D. 76 at 97) Atkin L.J. said:

"It is well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be in- valid."

In Maritime Electirc Co. Ltd. v. General Daines Ltd. AIR 1937 PC 114 at 116-117 a similar view finds expression: .... an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. .... The court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

..... there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obli- gation of an unconditional character."

The case of this Court in point is of the State o/Kerala &Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc. [1974] 1 SCR 671 at 688 where this court repelled the contention that an agreement on the part of the Govern- ment not to acquire, for a period of 60 years the lands of the company did not prevent the State from enacting or giving effect to a legislation for acquisition and that the surren- der by the Government of its legislative powers which are intended to be used for public good cannot avail the company or operate against the Government as equitable estoppel. It is unnecessary to expand the discussion and enlarge authori- ties.

We do not think that the Union of India should be pre- cluded from urging the contention as to invalidity in-the present case.

28. The main arguments on invalidity proceed on the premise that the terms of the settlement and the orderS of 'the court passed pursuant thereto contemplate, amount to and permit a compounding of non-compoundable offences which is opposed to public policy and, therefore, unlawful. The orders of the court based on an agreement whose or part of whose consideration is unlawful have, it is Urged, no higher sanctity than the agreement on which it is based. The orders of the court based on consent of parties do not, so goes the argument, reflect an adjudicative imposition of the court, but merely set the seal of the court on what is essentially an agreement between the parties. It is urged that the validity and durability of a consent order are wholly de- pendent on the legal validity of the agreement, on which it rests. Such an order is amenable to be set-aside on any ground which would justify a setting aside of the agreement itself.

These principles are unexceptionable. Indeed, in Huddersfield Banking Company Ltd. v. Henry Lister & Son Ltd, [1895] 2 Ch. 273 at 276 Vaughan Williams J. said: it seems to me that the clear result of the authorities is that, notwithstanding the consent order has been drawn up and completed, and acted upon to the extent that the property has been sold and the money has been paid into the hands of the receiver, I may now set aside tile order and arrangement upon any ground which would justify me in setting aside an agreement entered into between the parties. The real truth of the matter

is that the order is a mere creature of the agreement, and to say that the Court can set aside the agreement -- and it was not disputed that this could be done if' a common mistake were proved -- but that it cannot set aside an order which was the creature of that agreement, seems to me to be giving the branch an existence which is independent of the tree.

[emphasis added]

This was affirmed in appeal by Lindley LJ. in the following words:

"the appellants, contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with; and they go so far as to say that a consent order can only be set aside on the ground of fraud. 1 dissent from that proposition en- tirely. A consent order, I agree, is an order; and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual".

[p. 280]

In Great North-West Central Railway Co. & Ors. v. Charlebois and Ors, [1899 AC 114 at 124, the Privy Council stated the proportion thus:

it is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done ...Such a judgment cannot be of more validity than the invalid contract on which it was founded".

[emphasis added]

It is, indeed, trite proposition that 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 unlaw- ful terms are embodied in a consensual decree. In state of Punjab v. Amar Singh, [1974] 2 SCC 70 at 90, this Court said:

After all, by consent or agreement, parties cannot achieve what is contrary to law and a decree

merely based on such agreement cannot furnish a judicial amulet against. statutory violation.... The true rule is that the con- tract of the parties is not the less a con- tract, and subject to the incidents of a contract, because there is superadded the command of the Judge".

29. We do not think that the plea of "Accord and Satisfaction" raised by the UCC is also of any avail to it. UCC contends that the funds constituting the subject-matter of the settlement had been accepted and appropriated by Union of India and that, therefore, there was full accord and satisfaction. We find factually that there is no appro- priation of the funds by the Union of India. The funds remain to the credit of the Registrar- General of this Court in the Reserve Bank of India. That apart as observed in Corpus Juris Seccundum, Vol. I:

"an illegal contract or agreement, such as one involving illegality of the subject matter, one involving the unlawful sale or exchange of intoxicating liquors, or a subletting, sub- leasing, or hiring out of convicts, held under lease from the state, in violation of statute, or stifling a prosecution for a public policy, cannot constitute or effect an accord and satisfaction ".

[P. 473]

[emphasis added]

30. The main thrust of petitioner's argument of unlaw- fulness of consideration is that the dropping of criminal charges and undertaking to abstain from bringing criminal charges in future were part of the consideration for the offer of 470 million US dollars by the UCC and as the of- fences involved in the charges were of public nature and non-compoundable, the consideration for the agreement was stifling of prosecution and, therefore, unlawful. It is a settled proposition and of general application that where the criminal charges are matters of public concern there can be no diversion of the course of public justice and cannot be the subject matters of private bargain and compromise.

31. Shri Nariman urged that there were certain funda- mental misconceptions about the scope of this doctrine of stifling of prosecution in the arguments of the petitioners. He submitted that the true principle was that while non- compoundable offences which are matter of public concern cannot be subject-matter of private bargains and that admin- istration of criminal justice should not be allowed to pass from the hands of Judges to private individuals, the doc- trine is not attracted where side by side with criminal - liability there was a pre-existing civil liability that was also settled and satisfied. The doctrine, he said, contem- plates invalidity based on the possibility of the element of coercion by private individuals for private gains taking advantages of the threat of criminal prosecution. The whole idea of applicability of this doctrine in this case becomes irrelevant having regard to the fact that the Union of India as dominus litis moved in the matter and that administration of criminal

justice was not sought to be exploited by any private individual for private gains. Shri Nariman submitted that distinction between "motive" and "consideration" has been well recognised in distinguishing whether the doctrine is or is not attracted.

32. The questions that arise in the present case are, first, whether putting an end to the criminal proceedings was a part of the consideration and bargain for the payment of 470 million US :dollars or whether it was merely one of the motives for entering into the settlement and, secondly, whether the memorandum of settlement and orders of this court, properly construed, amount to a compounding of the offences. If, on the con- trary, what was done was that Union of India invited the court to exercise its powers under Article 142 to permit a withdrawal of the prosecution and the expedient of quashing was a mere procedure of recognising the effect of withdraw- al, could the settlement be declared void ? We think that the main settlement does not suffer from this vice. The pain of nullity does not attach to it flowing from any alleged unlawfulness of consideration. We shall set out our reasons presently.

Stating the law on the matter, Fry L.J. in Windhill Local Board of Health v. Vint. [1890] 45 Ch.D. 351 at 366 said:

"We have therefore a ease in which a contract is entered into for the purpose of diverting -- I may say perverting -- the course of justice; and, although I agree that in this ease it was entered into with perfect good faith and with all the security which could possibly be given to such an agreement, I nevertheless think that the general principle applies, and that we cannot give effect to the agreement, the consideration of which is the diverting the course of public justice." In Keir v. Leeman, 16 Quecn's Bench 308 at 316, 3221, Lord Denman, C.J. said:

"The principle of law is laid down by Wilmot C.J. in Collins v. Blantem (a) that a contract to withdraw a prosecution for per- jury, and consent to give no evidence against the accused, is founded on an unlawful consid- eration and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty the law was eluded by a corrupt compromise, screening the criminal for a bribe.

But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

In the present instance, the offence is not confined to personal injury, but is accompa- nied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise. The approbation of the Judge (whether neces-

sary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns."

This was affirmed in appeal by Tindal C.J. who said (p.393): "It seems clear, from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of Collins v. Blantern, 2 Wils. 341, 347, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury."

Narasimha Raju v. E Gurumurthy Raju & Ors. [1963] 3 S.C.R. 687 of this court is a case in point. The first respondent who had filed a criminal complaint in the Magis- trate's Court against the appellant and his other partners alleging of commission of offences under Sections 420, 465, 468 and 477 read with Sections 107, 120B of the Indian Penal Code entered into an agreement with the accused persons under which the dispute between the appellant and the first respondent and others was to be referred to arbitration on the first respondent agreeing to withdraw his criminal complaint. Pursuant to that agreement the complaint was got dismissed, on the first-respondent abstaining from adducing evidence. The arbitration proceedings, the consideration for which was the withdrawal of the complaint, culminated in an award and the first respondent :applied to have the award made a rule of the court. The appellant turned around and challenged the award on the ground that the consideration for the arbitration-agreement was itself unlawful as it was one not to prosecute a non-compoundable offence. This court held that the arbitration agreement was void under Section 23 of the Indian Contract Act as its consideration was opposed to public policy. The award was held void.

34. Even assuming that the Union of India agreed to compound non-compoundable offences, would this constitute a stifling of prosecution in the sense in which the doctrine is under- stood. The essence of the doctrine of stifling of prosecu- tion 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. In Rameshwar v. Upen- dranath, AIR 1926 Calcutta 451,456 the High Court said: "Now in order to show that the object of the Agreement was to stifle criminal prosecution, it is necessary to prove that there was an agreement between the parties express or implied, the consideration for which was to take the administration of law out of the hands of the Judges and put it into the hands of a private individual to determine what is to be done hi particular case and that the contracting parties should enter into a bar- gain to that effect".

[emphasis added]

Narasimha Raju (supra) this Court said . [p.693]

"The principle underlying this provision is obvious. Once the machinery Of the Criminal Law is set into motion on the allegation that a non-compoundablc offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by, private individuals."

[Emphasis added]

This was what was reiterated in Ouseph Poulo & Ors. v. Catholic Union Bank Ltd. & Ors. [1964] 7 SCR 745: "With regard to non-compoundable offence, however, the position is clear that no court to law can allow a private party to take lite administration of law in its own hands and settle the questiotion as to whettier a particular offence has been cornmitted or not for itself" [Emphasis added]

In this sense, a private party is not taking administra- tion of law in its own hands in this case. It is the Union of India, as the dominus litis, that consented to the quash- ing of the proceedings. We have said earlier that what was purported to be done was not a compounding of the offences. Though, upon review, we have set aside that part of the order, the consequences of the alleged unlawfulness of consideration must be decided as at the time of the transac- tion. It is here that we see the significance of the concur- ring observations of Chapan J. in Majibar Rahman v. Muk- tashed Hossein, ILR 40 Calcutta page 113 at page 118, who said.

"I agree, but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case the compromise of which is expressly forbidden by the Code of Criminal Procedure."

As stated earlier, the arrangement which purported to terminate the criminal cases was one of a purported with- drawal not forbidden by any law but one which was clearly enabled. Whether valid grounds to permit such withdrawal existed or not is another matter.

35. Besides as pointed out by this court in Narasimha Raju's case (supra) the consequence of doctrine of stifling of prosecution is attracted, and its consequences follow where a "person sets the machinery of criminal law into action on the allegation that the opponent has committed a noncompoundable-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". (See page 692 of the report). In that case this court further held that the doctrine applies "when as a consideration for not proceeding with a criminal complaint, an agreement is made, in substance it really means that the complainant has taken upon himself to deal with his com- plaint and on the bargaming counter he has used his non- prosecution of the complaint as a consideration for the agreement which his opponent has been induced or coerced to enter into". (emphasis added). These are not the features of the present case.

36. More importantly, 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 enter- ing into the 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 the agreement to satisfy that liability. In Adhikanda Sahu & Ors. v. Jogi Sahu & Ors. AIR 1922 Patna 502, this distinc- tion is pointed out:

"The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exer- cised in a case where there is a civil liabil- ity already existing, which is discharged or remitted by the Agreement".

[P. 503]

In Deb Kumar Ray Choudhury V. Anath Bandhu Sen and Ors. AIR 1931 Cal. 421. it was mentioned:

"A contract for payment of money in respect of which a criminal prosecution was permissible under the law, was not by itself opposed to public policy.

...... the withdrawal of the prosecution in the case before us might have been the motive but not certainly the object or the consideration of the contract as evidenced by the bond in suit so as to render the agreement illegal.

These decisions are based upon the facts of the cases showing clearly that the agreements or the contracts sought to be enforced were the foundation for the withdrawal of non- compoundable criminal cases and were declared to be unlawful on the ground of public policy wholly void in law and, therefore, unenforce- able. This class of cases has no application, where, as in the present case,

there was a pre-existing civil liability based upon ad- justment of accounts between the parties concerned."

[emphasis added]

Again in Babu Harnarain Kapur v. Babu Ram Swamp Nigam & Anr. [AIR 1941 Oudh 593] this distinction has been pointed out: "Though the motive of the execution of the document may be the withdrawal of a non-compoundable criminal case,-the considera- tion is quite legal, provided there is an enforceable preexisting liability. In the Patna case it was observed that the distinc- tion between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particu- larly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement." [P.592]

Finally, this Court in Ouseph Poulo (supra) at page 749 held that:

"In dealing with such agreements, it is, however, necessary to bear in mind the dis- tinction between the motive which may operate in the mind of the complainant and the accused and which may indirectly be responsible for the agreement and the consideration for such an agreement. It is only where the agreement is supported by the prohibited consideration that it fails within the mischief of the principle, that agreements which intend to stifle criminal prosecutions are invalid." [Emphasis added]

37. On a consideration of the matter, we hold that the doctrine of stifling of prosecution is not attracted in the present case. In reaching this conclusion we do not put out of consideration that ii 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 consid- eration for stifling of the prosecution. In the context of the Union of India the'plea lacks as much in reality as in a sense of proportion.

38. Accordingly on Contention (F) we hold that the settlement is not hit by Section 23 or 24 of the Indian Contract Act and that no part of the consideration for payment of 470 million US dollars was unlawful. Re: Contention (G)

39. This concerns the ground that a "Fairness- Hearing", as understood in the American procedure is manda- tory before a mass- tort action is settled and the settle- ment in the present case is bad as no such procedure had preceded it. It is also urged that the quantum settled for is hopelessly inadequate as the settlement has not envisaged and provided for many heads of compensation such as the future

medical surveillance costs of a large section of the exposed population which is put at risk; and that Ihc toxic tort actions where the latency-period for the manifestation of the effects of the exposure is unpredictable it is neces- sary to have a "re-opener" clause as in the very nature of toxic injuries the latency period for the manifestation of effects is unpredictable and any structured settlement should contemplate and provide for the possible baneful contingencies of the future. It is pointed out for the petitioners that the order recording the settlement and the order dated 4th May, 1989 indicate that no provision was made for such imminent contingencies for the future which even indude the effect of the toxic gas on pregnant mothers result- ing in congenital abnormalities of the children. These aspects, it is urged, would have been appropriately dis- cussed before the Court, had the victims and victimgroups had a "Fairness-Hearing". It is urged that there has been no application of the Court's mind to matters particularly relevant to toxic injuries. The contention is two fold. First is that the settlement did not envisage the possibil- ities of delayed manifestation or aggravation of toxic morbidity, in the exposed population. This aspect, it is urged, is required to be taken care of in two ways: One by making adequate financial provision for medical surveillance costs for the exposed but still latent victims and secondly, by providing in the case of symptomatic victims a "re-opener clause" for meeting contingencies of aggravation of damages in the case of the presently symptomatic victims. The second contention is as to the infirmity of the settlement by an omission to follow the 'Fairness-Hearing' procedures.

40. On the first aspect, Sri Nariman, however, contends that the possibility that the exposed population might develop hitherto unsuspected complications in the future was known to and was in the mind of the Union of India and it must be presumed to have taken all the possi- bilities into account in arriving at the settlement. Sri Nariman said we now have the benefit of hindsight of six years which is a sufficiently long period over which the worst possibilities would have blow-over. Indeed, in the plains in the Bhopal Court, Shri Nariman points out, Union of India has specifically averred that there were possibilities of such future damage. Sri Nariman referred to the preface to the Report of April, 1986 of the Indian Council of Medical Research (ICMR) on "Health Effects of the Bhopal Gas Tragedy" where these contingencies are posited to point out that these aspects were in the mind of Union of India and that there was noth- ing unforeseen which could be said to have missed its atten- tion. in the said preface ICMR said:

, ... How long will they (i.e. the respiratory, ocular and other morbidities) last '? What permanent diabilities can be caused? What is the outlook for these victims ? What of their off-spring?"

Shri Nariman referred to the following passage in the introduction to the Working Manual 1 on "Health Problems of Bhopal (;as Victims" April, 1986, ICMR;

"Based on clinical experience gained so far, it is believed that many of them (i.e. vic- tims) would require specialised medicare for several years since MIC is an extremely reac- tive substance",

the possibility of the exposed population developing hitherto unsuspected complications in the future cannot be overlooked."

What is, however, implicit in this stand of the UCC is the admission that exposure to MIC has such grim implica- tions for the future; but UCC urges that the Union of India must be deemed to have put all these into the scales at the time it settled the claim for 470 million US dollars. UCC also suggests that with the passage of time all such prob- lems of the future must have already unfolded themselves and that going by the statistics of medical evaluation of the affected persons done by the Directorate of Claims, even the amount of 470 million US dollars is very likely to be an over-payment. UCC ventures to suggest that on the estimates of compensation based on the medical categorisation of the affected population, a sum of Rs. 440 crores could be esti- mated to be an over-payment and that for all the latent- problems not manifested yet, this surplus of Rs. 440 crores should be a protectable and adequate financial cushion.

41. We may at this stage have a brief look at the work of the medical evaluation and categorisation of the Health Status of the affected persons carried out by the Directorate of Claims. It would appear that as on 31st October, 1990, 6,39,793 claims had been filed. It was stated that a considerably large number of the claimants who were asked to appear for medical evaluation did not turn up and only 3,61,166 of them responded to the notices. Their medi- cal folders were prepared. The total number of deaths had risen to 3,828. The results of medical evaluation and categorisation of the affected persons on the basis of the data entered in their Medical Folders as on 31st October, 1990 are as follows:

No. of medical folders prepared 3,61,966 No. of folders evaluated 3,58,712

No. of folders categorised 3,58,712

No injury 1,55,203

Temporary injuries 1,73,382

Permanent injuries 18,922

Temporary disablement caused by a

Temporary injury 7,172

Temporary disablement caused by a permanent injury 1,313

Permanent Partial disablement 2,680

Permanent total disablement 40

Deaths 3,828

42. On the medical research literature placed before us it can reasonably be posited that the exposure to such concentrations of MIC might involve delayed manifestations of toxic morbidity. The exposed population may not have manifested any immediate symptomatic medical status. But the long latency-period of toxic injuries renders the medical surveillance costs a permissible claim even ultimately the exposed persons may not actually develop the apprehended complications. In Ayers v. Jackson TP, 525 A 2d.287 N.J.1987, referring to the admissibility of claims of medical surveillance expenses, it was stated: "The claim for medical surveillance expenses stands on a different footing from the claim based on enhanced risk. It seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease caused by plaintiffs' exposure to toxic chemicals ..... ".

"....The future expense of medical monitoring, could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are "reasonably anticipated" to be incurred by reason of their exposure. There is no doubt that such a remedy would permit the early detection and treatment of maladies and that as a matter of public policy the tort-feasor should bear its cost.

Compensation for reasonable and necessary medical expenses is consistent with well- accepted legal principles. It is also consist- ent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. The value of early diagnosis and treatment for cancer patients is welldocumented."

"Although some individuals exposed to hazard- ous chemicals may seek regular medical sur-

veillance whether or not the cost is reim- bursed, the lack of reimbursement will un- doubtedly deter others from doing so. An application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease.

Recognition of pre-symptom claims for medical surveillance serves other important public interests. The difficulty of proving causa- tion, where the disease is manifested years after exposure, has caused many commentators to suggest that tort law has no capacity to deter pollutors, because the costs of proper disposal are often viewed by pollutors as exceeding the risk of tort liability ...... "

"Other considerations compel recognition of a pre-symptom medical surveillance claim. It is inequitable for an individual,. wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely to have to pay his own expenses when medical interven- tion is clearly reasonable and necessary .... " "Accordingly, we hold that the cost of medical surveillance is a compensable item of dam- ages where the proves demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemi- cals, the toxicity of the chemicals, the seriousness of the diseases for which individ- uals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary ...... "

In the "Law of Toxic Tons" by Michael Dore, the same idea is expressed:

"In Myers v. Johns-Manville Corporation, the court permitted plaintiff prove emotional harm where they were suffering from "serious fear or emotional distress or a clinically diag- nosed phobia of cancer." The court distin- guished, however, between a claim for fear of cancer and a claim for cancerphobia. The former could be based on plaintiffs fear, preoccupation and distress resulting from the enhanced risk of cancer but the latter would require expert opinion testimony .... "

"The reasonable value of future medical serv- ices required by a defendant's conduct is recoverable element of damage in tradition and toxic tort litigation. Such damages have been awarded even in circum- stances where no present injury exists but medical testimony establishes that such future medical surveillance is reasonably required on the basis of the conduct of a particular defendant .... " It is not the reasonable probability' that the persons put at risk will actually suffer toxic injury in future that determines whether the medical surveillance is necessary. But what determines it is whether, on the basis of medical opinion, a person who has been exposed to a toxic substance known to cause long time serious injury should undergo periodical medical tests in order to look for timely warning signs of the on-set of the feared consequences. These costs constitute a relevant and admissible head of compensation and may have to be borne in mind in forming an

opinion whether a proposed settlement -- even as a settlement -- is just, fair and adequate.

43. Sri Nariman, however, urged that the only form of compensation known to the common law is a lumpsum award -- a once and for all determination of compensation for all plaintiffs' losses, past, present and future -- and that split-trials for quantification of compensation taking into account future aggravation of injuries, except statutorily enabled, are unknown to common law.

Indeed, that this is the position in common law cannot be disputed. In an action for negligence, damages must be and are assessed once and for all at the trial of such an issue. Even if it is found later that the damage suffered was much greater than was originally supposed, no further action could be brought. It is well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once and for all. Two actions, therefore, will not lie against the same defendant for personal injury sustained in the same accident. (See Churls- worth and Percy on Negligence [1990] 8th Edn. Para 43. Indeed, even under the Common Law, as administered in U.K. prior to the introduction of sec.32A of the Supreme Court Act 1981, Lord Denning thought that such special awards were not impermissible. But as pointed out earlier the House of Lords in Lim Poh Choo v. Camden Islington, did not approve that view.

Later sec.32A of the Supreme Court Act, 1981 expressly enabled award of provisional damages and Order 37 Rules 7 to 10 (Part II) Rules of Supreme Court provided for the assessment of such further damages. The contention of the UCC is that the common law rule of once and for all damages is unuttered in India unlike in England where split awards are now statutorily enabled and that, therefore, references to future medical surveillance costs and "re-opener" Clauses are inapposite to a once for all payment. The concept of re-opener clause in settlement, it is contended, is the result of special legal requirements in certain American jurisdictions and a settle- ment is not vitiated for not incorporating a "re-opener" clause or for not providing for future medical surveillance costs inasmuch as all these must be presumed to have engaged the minds of the settling parties at the time of a once for all settlement. Shri Nariman pointed out that the American case of Acushnet River v. New Bedford Harbour, 712 F 2d Supp. 1019 referred to by the learned Attorney-General was a case where the "re-opener" clause was a statutory incident under the Comprehensive Environmental Response, Compensation and Liability Act, 1980.

But petitioners say that in the process of evolving what is a fair, reasonable and adequate settlement some of the elements essential and relevant to fairness and adequacy such as provision for future medical surveillance and the likely future, but yet unforeseen, manifestation of toxic injury, having regard to the nature of the hazard, have not been kept in mind and, therefore, the approval accorded to the settlement is on an incomplete criteria. But UCC would say that Union of India was aware of the possibility of such future manifestations of the effects of the exposure and must be deemed to have kept all those in mind at the time of settlement.

44. But the point to emphasise is that those who were not parties to the process of settlement are assailing the settlement on these grounds. 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 impondera- ble. Generally speaking actions for damages are limited by the general doctrine of remoteness and mitigation of dam- ages. 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 we must look at the 'very proper refusal of the courts to sacrifice physically injured plaintiffs on the alter of the certainty principle'. The likelihood of future complica- tions--though they may mean mere assessment or evaluation of mere chances--are also put into the scales in qualifying damages. This principle may, as rightly pointed out by Sri Nariman, take care of the victims who have manifest symp- toms. But what about those who are presently wholly a symp- tomatic and have no material to support a present claim ? Who will provide them medical surveillance costs and if at some day in the future they develop any of the dreaded symptoms, who will provide them with compensation ? Even if the award is an "once and for all" determination, these aspects must be taken into account.

45. The second aspect is the imperative of the exercise of a "Fairness-Hearing" as a condition for the validity of the settlement. Smt. Indira Jaising strongly urged that in the absence of a "Fairness-Hearing" no settle- ment could at all be meaningful. But the question is whether such a procedure is relevant to and apposite in the context of the scheme under the Act. 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. Smt. Indira Jaising referred to certain passages in the report of Chief Judge Weinstein in what is known as the Agent Orange Litigation (597 Federal Supplement 740 (1984), to indicate what according to her, are the criteria a Court has to keep in mind in approving a settlement. The learned judge observed (at page 760 para 9): "In deciding whether to approve the settlement the Court must have a sufficient grasp of the facts and the law involved in the case in order to make a sensible evaluation of the ligation's prospects. (See Malchman v. Davis, 706 F.2d, 426, 433 (2d Cir.1983). An apprecia- tion of the probabilities of plaintiffs' recovery after a trial and the possible range of damages is essential. The cases caution, however, that the court"should not .... turn the settlement hearing 'into a trial or re- hearsal of the trial. "Flin v. FMC Corp.,528 F.2d, 1169, 1172(4th Cir. 1975), Cert. denied, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734(734(1976), quoting Teachers Ins. & annuity Ass'n of America v. Beame, 67 F.R.D. 30, 33(S.D.N.Y.1975). See also Malchman v. Davis, 706 F.2d 426, 433 (2D Cir. 1983)."

"A democratic vote by informed members of the class would be virtually impossible in any large class suit. The costs of ensuring that each member of the class in this case fully understood the issue bearing on settlement and then voted on it would be prohibitive and the enterprise quixotic. Even though hundreds of members of the class were heard from, there was an overwhelminglv large silent majority. In the final analysis there was and can be no "consent" in any meaningful sense."

[Emphasis added]

Learned Judge also referred to the nine relevant fac- tors: (1) The complexity expense and likely duration of the litigation, (2) The reaction of the class of the settlement, (3) The stage of the proceedings and the amount of discovery completed, (4) The risks of establishing liability, (5) The risks of establishing damages (6) The risks of maintaining the class action through the trial, (7) The ability of the defendants to withstand a greater judgement, (8) The range of reasonableness of the settlement fund in the light of the best possible recovery and, (9) the range of reasonableness of the settlement fund to a possible recovery in the light of all the attendant risks of litigation. But the limits were also indicated by learned Judge:

'Thus the trial court has a limited scope of review for determining fairness. The very purpose of settlement is to avoid trial of sharply disputed issue and the costs of pro- tracted litigation."

"The Court may limit its fairness proceeding to whatever is necessary to aid it in reaching a just and informed decision. 'Flirt v. FMC Corp. 528 F.2d at 1173. An evidentiary hearing is not required."

The settlement must, of course, be an informed one. But it will be an error to require its quantum to be co-exten- sive with the suit claim or what, if the plaintiffs fully succeeded, they would be entitled to expect. The Bhopal Gas Disaster (Processing of Claims) Act, 1985, has its own distinctive features. It is a legislation to meet a one time situation. It provides for exclusivity of the right of representation of all claimants by Union of India and for divesting the individual claimants of any right to pursue any remedy for any cause of action against UCC and UCIL. The constitutionality of this scheme has been upheld in the Sahu's case. Sri Nariman contended that the analogy of "Fairness-Hearing" euvisaged in certified class action in the United States is inapposite in the context of the present statutory right of the Union of India. Shri Nariman referred to the following statement of the Court in Saint case:

"...Our attention was drawn to the provisions of Order 1 Rule 8(4) of the Code. Strictly speaking Order 1, Rule 8 will not apply to a suit or a proceeding under the Act. It is not a case of one having common interest with others. Here the plaintiff the Central Gov- ernment has replaced and divested tire vic- tims."

[Emphasis added]

Consistent with the limitations of the scope of the review, says Shri Nariman, the Court cannot go behind the settlement so as to take it back to a stage of proposal and order a "Fairness Hearing". He urged that a settlement was after all a settlement and an approval of a settlement did not depend on

the legal certainty as to the claim or counter claim being worthless or valuable. Learned counsel commend- ed the following passage from the judgment in the Court of Appeal for the Fifth Circuit stated in Florida Trailer and Equipment Co. v. Deal,284 F.2d 567 (1960): " .... The probable out- come in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to ex- plore the likelihood of settlement apprehen- sive as they would then be that the applica- tion for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and (thus) no basis for a compromise."

Sri Nariman also pointed out that In Agent Orange set- tlement only a small fraction of one percent of the class Came forward at the fairness hearings; that there was no medical evidence nor a mini- trial about the factual aspects of the case and that in the end: "the silent majority re- mains inscrutable". It is pointed out that in United Kingdom a different variant or substitute of fairness hearing ob- tains. Order 15 Rule 13, Rules of Supreme Court makes provision for orders made in representative actions binding on persons, class or members of a class who cannot be ascer- tained or cannot be readily ascertained.

46. In our opinion, the right of the victims read into section 4 of the Act to express their views on a pro- posed settlement does not contribute to a position analogous to that in United States in which fairness hearings are imperative. Section 4 of the Act 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 sec. 4--and subject to which its constitutionality has been upheld in Sahu's 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. Accordingly, contention (G) is answered against peti- tioners. We hold that the settlement is not vitiated by reason alone of want of a "Fairness-Hearing" procedure preceding it. Likewise, the settlement is not vitiated by reason of the absence of a "re-opener" clause built into it. But there is one aspect as to medical surveillance costs and as to a provision for possible cases which are now a-sympto- matic and which may become symptomatic after a drawn-out of latency period. We will discuss that aspect under Point (J) infra.

Re: Contention (H)

47. The question is if the settlement is reviewed and set aside what should happen to the funds brought in by the UCC pursuant to the order. This question was raised by the petitioners and argued before us by the parties inviting a decision. We propose to decide it though the stage for giving effect to it has not yet arrived. The stand of the Union of India and other petitioners is that even upon a setting aside of the settlement, the funds should not be allowed to be repatriated to the United States as that would embroil the victims in endless litigations to realise the fruits of the decree that may be made in the suit and to realise the order for interim-payment. The stand of the Union of India as recorded in the proceedings dated 10.4.1990 is as follows:

"1. It is submitted that the Union of India consistent with its duty as parens patriae to the victims cannot consent to the taking away by Carbide of the moneys which are in India outside the jurisdiction of Indian Courts.

2. At this stage, the Union of India is not claiming unilaterally to appropriate the moneys, nor to disburse or distribute the same. The moneys can continue to be deposited in the Bank as at present and earn interest subject to such orders that may be passed in appropriate proceedings by courts.

3. It is submitted that in view of the facts and circumstances of the case, the previous history of the litigation, the orders passed by the district court Bhopal, Madhya Pradesh High Court and this Hon'ble Court, and the undertakings given by UCIL and Carbide to Courts in respect of their assets, this Hon'- ble Court may, in order to do complete justice under Article 142 of the constitution, require retention of the moneys for such period as it may deem fit, in order to satisfy any decree that may be passed in the suit including the enforceable order of the M.P. High Court dated 4th April 1988."

48. It is urged by the learned Attorney General that restitution being in the nature of a proceedings inexecu- tion, the party claiming that benefit must be relegated to the court of first instance to work out its remedies. It is also urged that the UCC did not bring in the funds on the faith of the court's order, but did so deliberately and on its own initiative and choice and deposited the funds to serve its own interest even after it was aware of the insti- tution of the proceedings challenging the settlement in an attempt to effectuate a fait-accompli. It is further said that the order of the High Court directing payment of inter- im compensation of Rs. 250 crores is operative and since the UCC has not sought or obtained any stay of operation of that order, the sums to the extent of Rs. 250 crores should not, at all events, be permitted to be repatriated. Learned Attorney General also sought to point out that the UCC had, subsequent to the settlement, effected certain corporate and administrative changes and without a full disclosure by the UCC of these changes and their effect on the interests of the claimants, the funds should not be permitted to be taken out of the court's jurisdiction, though, however, Government of India should not also be free to appropriate or use the funds.

49. We are not impressed by any of these contentions. It is not shown that the UCC brought-in the monies with any undue haste with a view to confronting Union of India with a fait accompli. The records indicate a different complexion of the matter. The payment appears to have been expedited at instance by the Union of India itself.

50. 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. Restitution is an equitable prin- ciple 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,

51. 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 oper- ated 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 to -- as much moral as it is legal -- to order refund and restitution of the amount to the UCC-- if the settlement is set aside. In Binayak v. Ramesh, [1966] 3 SCR 24 this Court dealing with scope of Section 144 CPC observed:

". .... The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received)the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the rever- sal or modification of the decree and neces- sarily carries with it the right to restitu- tion of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from ....

[p.27]

In Jai Berham and others v. Kedar Nath Marwari and Others [1922] P.C. 269 at 271 the Judicial Committee noticed that:

"The auction-purchasers have parted with their purchasemoney which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to .... ".

and said:

" .... and it would be inequitable and contrary to justice that the judgment- debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit."

In L. Guran Ditta v. T.R. Ditta, [1935] PC 12 Lord Atkin said:

" .... The duty of the Court when awarding restitution under sec. 144 of the Code is imperative. It shall place the appli- cant in the position in which he would have been if the order had not made: and for this purpose the Court is armed with powers [the 'may' is empowering, not discretionary] as to mesne profits, interest and so forth. As long ago as 1871 the Judicial Committee in 3 P.C. 465 (1) made it clear that interest was part of the normal relief given in restitution: and this decision seems right to have grounded the practice in India in such cases .... " [P. 13]

In Jagendra Nath Singh v. Hira Sahu and others. AIR 1948 All. 252 F.B. Motham J. observed:

"Every Court has a paramount duty to ensure that it does no injury to any litigant and the provisions of Sec. 144 lay down a procedure where effect can be given to that general provision of the law. The Court should be slow so to construe this section as to impose a restriction upon its obligation to act right and fairly according to the circumstances towards all parties involved."

[p.253]

52. We are satisfied in this case that the UCC trans- ported the funds to India and deposited the foreign currency in the Reserve Bank of India on the faith of the Court's order. If the settlement is set aside they shall be entitled to have their funds remitted to them back in the United States together with such interest as has accrued thereon. So far as the point raised by the learned Attorney-General as to the corporate changes of the UCC is concerned, we think, a direction to the UCC to prove and establish compli- ance with the District Court's order dated 30the November, 1986, should be sufficient safeguard and should meet the ends of justice.

53 Accordingly, in the event of the settlement being set aside the UCC shall be entitled to have 420

million US Dollars brought in by it remitted to it by the Union of India at the United States along with such interest as has accrued on it in the account.

But this right to have the restitution shall be strictly subject to the condition that the UCC shall restore its undertaking dated 27.11.1986 which was recorded on 30.11.1986 by District Court at Bhopal and on the strength of which the court vacated the order of injunction earlier granted against the UCC. Pursuant to the order recording the Settlement, the said order dated 30.11.1986 of the District Court was set-aside by this Court. If the settlement goes, the order dated 30.11.1986 of the District Court will auto- matically stand restored and the UCC would be required to comply with that order to keep and maintain unencumbered assets of the value of US 3 billion dollars during the pendency of the suit. The right of the UCC to obtain the refund of and repatriate the funds shall be subject to the performance and effectuation of its obligations under the said order of 30.11.1986 of the District Court at Bhopal. Till then the funds shall remain within the jurisdiction of this Court and shall not be amenable to any other legal process. The Contention (H) is disposed of accordingly. Re: Contention (1)

54. The contention is that notices to and opportunities for hearing of the victims, whom the Union of India claims to represent, were imperative before the proposed settlement was recorded and this, admittedly, not having been done the orders dated 14th and 15th February, 1989 are nullities as these were made in violation of the rules of natural jus- tice. Shri Shanti Bhushan urged that the invalidity of the settlement is squarely covered and concluded, as a logical corollary, by the pronouncement of the Constitution Bench in Sahu case. He referred to and relied upon the following observations of Chief Justice Sabyasachi Mukharji in Sahu's case:

"It has been canvassed on behalf of the vic- tims that the Code of Civil Procedure is an instant example of what is a just, fair and reasonable procedure, at least the principles embodied therein and the Act would be unrea- sonable if there is exclusion of the victims to vindicate properly their views and rights. This exclusion may amount to denial of jus- tice. In any case, it has been suggested and in our opinion there is a good deal of force in this contention, that if a part of the claim, for good reasons or bad, is sought to be compromised or adjusted without at least considering the views of the victims that would be unreasonable deprivation of the rights of the victims .... "

" .... Right to a hearing or repre- sentation before entering into a compromise seems to be embodied in the due process of law understood in the sense the term has been used in the constitutional jargon of this country though perhaps not originally intended .... "

"In view of the principles settled by this court and accepted all over the world, we are of the opinion that in a case of this magni- tude and nature, when the victims have been given some say by section 4 of Hie Act in order to make that opportunity, contemplated by sec. 4 of the Act meaningful and effective, it should be so read that the victims have to be given an opportunity of the making their

representation before the court comes to any, conclusion in respect of any settlement." "In our opinion, the constitutional require- ments, the language of the section, the pur- pose of the Act and the principles of natural justice lead us to this interpretation of section 4 of the Act that in case of a pro- posed or contemplated settlement, notice should be given to the victims who ace affect- ed or whose rights are to be affected to ascertain their views. Section 4 is signif- icant. It enjoins the Central Government only to have "due regard" to any matters which such person may require to be urged. So the obliga- tion is on the Central Govt. in the situation contemplated by Sec. 4 to have due regard to the views of the victims and that obligation cannot be discharged by the Central Government unless the victims are told that a settlement is proposed, intended or contemplated. It is not necessary that such views would require consent of all the victims. The Central Govt. as the Representative of the victims must have the views of the victims and place such views before the court in such manner it considers necessary before a settlement is entered into. If the victims want to advert to certain aspects of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportuni- ties must be given to the victims. Individual notices may not be necessary. The court can, and in our opinion should, in such situation formulate modalities of giving notice and public notice can also be given inviting views of the victims by the help of mass media."

" .... The Act would be bad if it is not construed in the light that notice before any settlement under sec.4 of the Act was required to be giver .... "

[Emphasis Supplied]

Shri Shanti Bhushan urged that with these findings and conclusions the only logical resultant is that the settle- ment must be declared a nullity as one reached in violation of the rules of natural justice. For Shri Shanti Bhushan, the matter is as simple as that.

But after making the observation excerpted above, the Constitution Bench, having regard to the nature of this litigation, proceeded to spell out its views and conclusions on the effect of non-compliance of natural justice and whether there were other remedial and curative exercise. Chief Justice Mukharji noticed the problem arising out of non-compliance thus:

" .... It further appears that that type of notice which is required to be given had not been given. The question therefore, is what is to be done and what is the consequence ? The Act would be bad if it is not construed in the light that notice before any settlement under sec. 4 of the Act was required to be given. Then arises the question of conse- quences of not giving the notice .... " [Emphasis supplied]

Learned Chief Justice proceeded to say:

" .... In this adjudication, we are not strictly concerned with the validity or otherwise of the settlement, as we have indi- cated hereinbefore. But constitutional adju- dication cannot be divorced from the reality of a situation, or the impact of an adjudica- tion. Constitutional deductions are never made in the vacuum. These deal with life's problems in the reality of a given situation. And no constitutional adjudication is also possible unless one is aware of the consequences of such an adjudication. One hesitates in matters of this type where large consequences follow one way or the other to put as under what others have put together. It is well to remem- ber, as old Justice Holmes, that time has upset many fighting faiths and one must always wager one's salvation upon some prophecy based upon imperfect knowledge. Our knowledge changes; our perception of truth also changes .... " .... No man or no man's right should be affected without an opportunity to ventilate his views. We are also conscious that justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication of their view point before the forum or the authority enjoined or obliged to take a deci- sion affecting their right. Yet, in the par- ticular situations, one has to bear in mind how an infraction of that should be sought to be removed in accordance with justice. In the facts and the circumstances of this case where sufficient opportunity is available when review application is heard on notice, as directed by Court, no further opportunity is necessary and it cannot be said that injustice has been done. do a great right" after all, it is permissible sometimes "to do a little wrong". In the facts and circumstances of the case, this is one of those rate occasions ....

[Emphasis supplied]

Chief Justice Mukharji also observed;

But having regard to the urgency of the situation and having regard to the need for the victims for relief and help and having regard to the fact that so much effort has gone in finding a basis for the settlement, we, at one point of time, thought that a post-decisional hearing in the facts and circumstances of this case might be considered to be sufficient compliance with the require- ments of principles of natural justice as embodied under Sec. 4 of the Act. .... " [p. 63]

In the facts and the circumstances of this, therefore, we are of the opinion, to direct that notice should be given now, would not result in doing justice hi the situation. In the premises, no further consequential order is necessary by this Court. .... " [P. 65]

While Shri Nariman understandably strongly relies on these observations as the law of the case, Shri Shanti Bhushan seeks to deny them any binding force on the ground that they were mere passing

observations inasmuch as the question of validity of the settlement was not before the court in Sahu case Shri Shanti Bhushan relied upon several pronouncements of this Court :viz. National Textile Workers Union v. P.R. Ramakrishnan, [1983] 1 SCC 228 Institute of Chartered Accountants v. L.K. Ratna, [1986] 4 SCC 537, K.I. Shephard v. Union of India, [1987] 4 SCC 431, R.B. Shreeram Durga Prasad v. Settlement Commission, [1989] 1 SCC 628 and H.L. Trehan v. Union of lndia [1989] 1 SCC 764 to emphasise the imperatives of observance of natural jus- tice and the inevitability of the consequences the flow from a non-compliance of the requirements of a pre-decisional hearing.

These are all accepted principles. Their wisdom, verity and universality in the discipline of law are well estab- lished. Omission to comply with the requirements of the rule of Audi Alteram Pattern, as a general rule, vitiates a decision. Where there is violation of natural justice no resultant or independent prejudice need be shown, as the denial of natural justice is, in itself, sufficient preju- dice and it is no answer to say that even with observance of natural justice the same conclusion would have been reached. The citizen "is entitled to be under the Rule of law and not the Rule of Discretion" and "to remit the maintenance of constitutional right to judicial discretion is to shift the foundation of freedom from the rock to the sand". But the effects and consequences of non-compliance may alter with situational variations and particularities, illustrating a "flexible use of discretionary remedies to meet novel legal situations". "One motive" says Prof. Wade "for holding administrative acts to be voidable where ac- cording to principle they are void may be a desire to extend the discretionary powers of the Court". As observed by Lord Reid in Wiseman v. Borneman [1971 AC 297] natural justice should not degenerate into a set of hard and fast rules. There should be a circumstantial flexibility. In Sahu case this Court held that there was no compli- ance with the principles of natural justice but also held that the result of the non-compliance should not be a me- chanical invalidation. The Court suggested curatives. The Court was not only sitting in judicial review of legisla- tion; but was a court of construction also, for, it is upon proper construction of the provisions, questions of consti- tutionality 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 the different ways in which that obligation could be complied with or satisfied. This is, in substance, what the Court has done and that is the law of the case. It cannot be said that these observations were made by the way and had no binding force.

Sri Garg submitted that when the Union of India did not, even primafacie, probabilise that the quantification re- flected in the settlement was arrived on the basis of ra- tional criteria relevant to the matter, the determination fails as the statutory authority had acted ultra-vires its powers and trusts under the statutory scheme. Sri Garg said that it would be a perversion of the process to call upon the victims to demonstrate how the settlement is inadequate. There was, according to Sri Garg, no material to shift the risk of non-persuasion. Sri Garg urged that unless the elements of reasonableness and adequacy- even to the extent a settlement goes -are not established and the quantifica- tion shown to be justified on some tenable basis the settle- ment. would incur the criticism of being the result of an arbitrary action of Government.

Shri Shanti Bhushan, however, strongly commended the following observations of Megarry J in Leary v. National Union of Vehicle Builders [1971] Ch.34 which were referred to with approval by the court in Institute of Chartered Accountants v. L.K. Ratna [1986] 4 SCC 537 as to the effect of non-observance of natural justice:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will never-the-less have the effect of depriving the member 'of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

Prof. Wade in his treatise on Administrative Law observes: "If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

We might recall here that the Privy Council in Calvin v. Carr [1980] AC 576 had expressed its reservations about Megarry J's 'General Rule' in Learv's case. However, the reservations were in the area of domestic jurisdiction, where contractual or Conventional Rules operate. The case did not involve a public law situation. But the House of Lords in Llyod v. Memahan [1987] AC 625 applied the princi- ple to a clearly public law situation. The principle in Leary's might, perhaps, be too broad a generalisation. But the question here is not so much as to the conse- quences of the omission on the part of the Union of India to have "due regard" to the views of the victims on the settle- ment or the omission on the part of the Court to afford an opportunity to the victims of being heard before recording a settlement as it is one of the effects and implications of the pronouncement in Sahu case which is the law of the case. In Sahu case the Court , expressly held that the non-compli- ance 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 them- selves 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 hold the suggested curative as a mere obiter.

55. While reaching this conclusion, we are not unmind- ful of the force of the petitioner's case. The Sahu's case laid down that Section 4 of the Act contemplated and con- ferred a right on the victims of being heard. It also held that they were not so heard before the Government agreed to the terms

of the settlement. According to the Sahu's case, the victims should have an opportunity of being heard in the Review Proceedings. The petitioners who were litigating the matter did not represent all the victims and victim-groups.

56. In the ultimate analysis, the crucial question is whether the opportunity to the affected persons predicated in the Sahu case can reasonably be said to have been afford- ed. Indeed, at the very commencement of the hearing of the review petitions, Smt. Indira Jaising made a pertinent submission that the court should determine and clarify the nature and scope of the review hearing: whether they partake of the nature of a "Fairness Hearing" or of the nature of a "post-decisional hearing" or whether the court would device some way in which the victims at large would have an effective sense of participation as envisaged in the Sahu decision. Smt. Indira Jaising submitted that opportunity of being heard in the review suggested and indicated by the Sahu decision cannot be understood to confer the opportunity only to those who were eo-nomine parties to the review petitions.

57. In the present hearings Shri Nariman placed before us a number of press-clippings to show that, from time to time, largely circulated newspapers in the country carried detailed news reports of the settlement and of the subse- quent legal proceedings questioning them. Shri Nariman's contention is that in view of this wide publicity the major- ity of the affected persons must be presumed to have had notice, though not in a formal way and to have accepted the settlement as they had not bestirred themselves to move the Court.

58. Shri Nariman also raised what he urged were basic objection as to the scope of the review jurisdiction and to the enlargement of the scope of the review hearings to anything resembling a "Fairness Hearing" by treating the concluded settlement as a mere proposal to settle. Shri Nariman said that the Court could either review the orders dated 14th and 15th February, 1989 if legal grounds for such review under law were strictly made out or dismiss the review petitions if petitioners fail to make out a case in accordance with the accepted principles regulating the review jurisdiction; but the court could not adopt an in- termediate course by treating the settlement as a proposed or provisional settlement and seek now to do what the Union of India was expected to do before the settlement was reached.

59. The whole issue, shorn of legal subtleties, is a moral and humanitarian one. What was transacted with the court's assistance between the Union of India on one side and the UCC on the other is now sought to be made binding on the tens of thousands of innocent victims who, as the law has now declared, had a right to be heard before the settle- ment could be reached or approved. The implications of the settlement and its effect on the lakhs of citizens of this country are, indeed, crucial in their grim struggle to reshape and give meaning to their torn lives. Any paternal- istic condescension that what has been done is after all for their own good is out of place. Either they should have been heard before a settlement was approved in accordance with the law declared by this Court or it, at least, must become demonstrable in a process in which they have a reasonable

sense of participation that the settlement has been their evident advantage or, at least, the adverse consequences are effectively neutralised. The ultimate directions on Point J that we propose to issue will, we think, serve to achieve the last mentioned expectation. Legal and procedural technicali- ties should yield to the paramount considerations of justice and humanity. It is of utmost importance that in an endea- vour of such great magnitude where the court is trusted with the moral responsibility of ensuring justice to these tens of thousand innocent victims, the issues of human suffering do not become obscure in procedural thickets. We find it difficult to accept Shri Nariman's stand on the scope of the review. We think that in a situation of this nature and magnitude, the Review-proceeding should not be strict, orthodox and conventional but one whose scope would accommo- date the great needs of justice. That apart, quite obvious- ly, the individual petitioners and the petitioner-organisa- tions which have sought review cannot, be held to represent and exhaust the interest of all the victims. Those represented by the petitioner-organisations--even if their claims of membership are accepted on face value-- constitute only a small percentage of the total number of persons medically evaluated. The rest of the victims consti- tute the great silent majority.

When an order affects a person not a party to the pro- ceedings, the remedy of an affected person and the powers of the Court to grant it are well-settled. For instance, in Shivdeo Singh & Ors. v. State of Punjab & Ors. AIR 1963 SC 1909 on a writ petition filed under Article 226 of the Constitution by A for cancellation of the order of allotment passed by the Director of Rehabilitation in favour of B, the High Court made an order cancelling the allotment though 'B' was not a party. Later, B filed a writ petition under Arti- cle 226 for impleading him as a party and for re-hearing the whole matter. The High Court granted it. Before this Court, the objection was this:

'Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, there- fore, the second order of Khosla, J, was without jurisdiction."

This Court rejected the contention observing that: "It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary juris- diction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Here the previous order of Khosla, J., affected the interests of persons who are not made parties to the proceedings before him. It was at their instance and for giving them a hearing that Khosla, J., entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though their interests were sought to be affected by the decision of the High Court, that the second application was entertained by Khosla, J."

60. The nature of the present review proceedings is indeed suigeneris. Its scope is pre-set by the terms of the order dated 4th May 1989 as well as what are further neces- sarily implicit in Sahu

decision. In the course of the order dated 4th May 1989, it was observed.

" .... If, owing to the pre-settlement procedures being limited to the main contest- ants in the appeal, the benefit of some con- trary or supplemental information or material, having a crucial bearing on the fundamental assumptions basic to the settlement, have been denied to the Court and that as a result, serious miscarriage of justice, violating the constitutional and legal rights of the persons affected, has been occasioned, it will be the endeavour of this Court to undo any such injustice. But that, we reiterate, must be by procedures recognised by law. Those who trust this Court will not have cause for despair." The scope of the review in the present case is to ensure that no miscarriage of justice occurs in a matter of such great moment. This is, perhaps, the last opportunity to verify our doubts and to undo injustice, if any, which may have occurred. The fate and fortunes of tens of thousands of persons depend on the effectiveness and fairness of these proceedings. The legal and procedural technicalities should yield to the paramount considerations of justice and fair- ness. The considerations go beyond legalism and are largely humanitariam. It is of utmost importance that great issues of human suffering are not subordinated to legal technicali- ties.

But in view of our conclusion on point J that on the material on record, the settlement-fund should be sufficient to meet the needs of a just compensation and the order we propose to pass with regard to point J, the grievance of the petitioners on the present contention would not, in our opinion really survive. Contention (1) is answered accord- ingly.

Re: Point (J)

61. Before we go into the question whether the settle- ment should be set aside on grounds of inadequacy of the settlement fund, certain subsidiary contentions and argu- ments may be noticed. They deal with (i) that there has been an exclusion of a large number of claims on the ground that despite service of notices they did not respond and appear for medical documentation and (ii) that the whole exercise of medical documentation is faulty and is designed and tends to exclude genuine victims. These contentions are really not directly germane to the question of the validity of the settlement. However, they were put forward to discredit the statistics emerging from the medical documentation done by the Directorate of Claims on which the UCC sought to rely. We may as well deal with these two contentions.

62. The first contention is that the claims of a large number of persons who had filed their claims are not regis- tered on the ground that they did not respond to the notices calling upon them to undergo the requisite medical tests for medical documentation. It was urged that no effective serv- ice of notice had taken place and that the claims of a large number of claimants---according to them almost over 30% of the total number---- have virtually gone for default. While the victim-groups allege that there was a systematic attempt to suppress the claims, the Directorate of Claims would say that the lack of response indicated that the claims were speculative and spurious and, therefore,

the claimants did not offer themselves to medical examination. In order to appreciate this grievance of the victim- groups it is, perhaps, necessary to advert to the provisions of the Act and the Scheme attracted to this stage of proc- essing of the claims. Section 9 of the Act enjoins upon the Central Government to frame a Scheme providing for any or all of the matters enumerated in clauses (a) to (i) of Sub- section (2) of Sec. 9. The Scheme, known as the "Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985," was promulgated by notification dated 24th September, 1985, published in the Gazette of India. Para 4 of the Scheme deals with the manner of filing of claims and specifies the forms in which they should be filed. Para 5(1) requires the Deputy Commissioner of Claims to place the claims in the appropriate category amongst those enumerated in sub-para (2) of para 5. Sub-para (2) requires the regis- tration of the claim under various heads such , as "death"; "total disablement resulting in permanent disability to earn livelihood"; 'permanent partial disablement effecting the overall capacity of a person to earn his livelihood"; "temporary partial disablement resulting in reduced capacity to earn livelihood" and so on. Sub-paras (3), (4) and (5) of para 5 of the Scheme provide: "(3) On the consideration of a claim made under paragraph 4 of the Scheme, if the Deputy Commissioner is of the opinion that the claim falls in a category different from the cate- gory mentioned by the claimant, he may decide the appropriate category after giving an opportunity to the claimant to be heard and also after taking into consideration any facts made available to him in this behalf by the Government or the authorities authorised by the Government in this behalf.

(4) Where the Deputy Commissioner is of the opinion that a claim made under paragraph 4 does not fall in any of the categories speci- fied in sub-paragraph (2) he may refuse to register the claim:

Provided that before so refusing he shall give a reasonable opportunity for a personal hear- ing to the claimant.

(5) If the claimant is not satisfied with the order of the Deputy Commissioner under sub- paragraph (3) or sub-paragraph (4) he may prefer an appeal against such order to the Commissioner, who shall decide the same." The stage at which medical examination was required related presumably to the exercise under sub-paragraph (3) of Para 5 of the Scheme. Failure of a claimant to respond to the notice and offer himself for medical examination would entail a refusal to register the claim. It is manifest that such a refusal is apealable under the scheme. But this grievance does not survive in view of the stand taken by the Government in these proceedings. In the affidavit of Sri Ramesh Yashwant Durve, dated 5th December, 1989 in W.P. No. 843/88, it is stated:-

"That all claimants who did not respond to the first notice were given a second and then a third notice to appear at one of the medical documentation centers for their medical exami- nation. Wide publicity was also done by way of beating of drums in mohallas, radio announce- ments and newspaper advertisements. In addi- tion to all these, ward committee members were also involved in motivating the claimants to get themselves medically examined. All those claimants who approach the Director of Claims even now are given a fresh date on which to appear for medical examination

and are in- formed accordingly.

Although the medical documentation exercise is completed, even then if a claimant fails to appear for medical examination after service of all three notices and he makes an applica- tion for medical examination, his medical examination is arranged at one of the two medical documentation centers---TB Center and JP Hospital-specially kept functioning for such claimants. It is relevant to point out that this arrangement has been approved by Supreme Court vide order dated 29 September, 1989 .... "

"For the reasons given above, a fresh public notice and fixing of dates for medical docu- mentation is also not needed. It may be point- ed out here that these people will still have an opportunity to file claims when the Commis- sioner for Welfare of the gas victims issues a notification in terms of para 4(i) of Bhopal Gas Leak Disaster (Registration & Processing of Claims) Scheme, 1985 inviting claims." This assurance coupled with the right of appeal should sufficiently safeguard the interests of genuine claimants.

63. It was urged by the petitioners that the very con- cept of injury' as an element in the eligibility for medical documentation was erroneous as it tended to exclude victims who did not have or retain some medical documentation of their initial treatment immediately after the exposure. The stand of the Director of Claims on the point is this: -- "That it is unlikely that a person who was injured and suffered during the post-exposure period is not in possession of any form of medical record. The line of treatment was widely publicised. Therefore, the patient must have received treatment from one of the pri- vate practitioners, if not from one of the many temporary and permanent govt./semi-govt. institutions or institutions run by voluntary organisations, and he must be in possession of some form of record.

Every claimant is advised to bring relevant medical record at the time of medical examina- tion. Documents of post-exponsure medical record are accepted even after the medical documentation of the claimant is over.

It is incorrect to say that the documents for post-exposure period are just not available. Had it been so, 55% of the claimants who fail in category 'B' to 'CF' would also have been categorised as 'A'. In this connection it may be clarified that even in post-exposure period prescrip- tions were issued. Besides this, private practitioners were also issuing prescriptions in printed form. It is therefore incorrect to say that there is dearth of documentation. However, bearing this point in mind, a very liberal approach in admitting documents was adopted as will be clear from the guidelines for evaluation. It will also be relevant here to state that the claimants are being helped to get the benefit of any medical records available in any hospital or dispensary. Institutions like ICMR, COM (Gas Relief), Jawahar Lal Nehru Hospital, Bhopal Eye Hospi- tal, Indian Red Cross Society, BHEL Hospital and the Railway Hospital have treated numerous gas victims during the post-exposure

period. The relevant medical records from them have been retrieved and are being linked with the respective claim folders so that the benefit of such post-exposure record is extended to these claimants.

It will be irrational and unscientific to admit all claims without reference to any documentary evidence as suggested by the petitioner ....

(See the affidavit dated 5th December, 1989 of Sri Ramesh Yeshwant Durve filed in W.P. No. 843/88.)

63. As to the charge that after the purported settle- ment, Government is playing down the seriousness of the effects of the disaster, and that the medical documentation did not help proper evaluation it is, perhaps, necessary to read the affidavit dated 5th December, 1989 of the Addition- al Director of Claims, in W.P. No. 843 of 1988. The Addi- tional Director says:

'The Medical Documentation Exercise has been an unique effort. It was possibly for the first time that such a comprehensive medical examination (with documentation evaluation and categorisation) of such a large population was undertaken anywhere in the world. There was no earlier experience or expertise to fail back upon. The whole exercise had, therefore, to be conceived, conceptualised and concretised locally. But care was taken to ensure that the guidelines were approved by legal and medical experts not only at the State level but also at the National level. The guidelines were also approved by GOI's Committee of Experts on Medical Documentation. In other words, a systematic arrangement was organised to make the most objective assessment of the medical health status of the claimants in a scientific manner.

It has to be recognised in this context that the guidelines for categorisation can only be a broad indicator as it is not possible for anyone to envisage all types of situations and prescribe for them. Likewise, the examples cited are only 'illustrative examples' and not 'exhaustive instructions'.

Hundreds of graduate and post-graduate doctors assisted by qualified para-medical staff have examined the claimants with the help of so- phisticated equipments. It cannot be reasona- bly contended that all of them have colluded with the Government to distort the whole exercise.

The exercise of categorisation is not just an arithmetical exercise directly flowing from the evaluation sheet. Had it been so. the same Assistant Surgeon, who does the evaluation can him self do the categorisation also. Post graduate specialists have been engaged for this work because the

total medical folder has to be assessed keeping the evaluation sheet as a basic indicator. In doing the categorisa- tion, the postgraduate specialist takes into account symptoms reported, clinical findings, specialist's opinions and investigation re- ports."

The Additional Director accordingly assests: "...it will be meaningless to suggest that the Govt. is jeopardising the interests of the claimants by deliberately distorting the Medical Documentation Exercise. Similarly, it will be absurd to suggest that the Govt. is trying to help UCC in any way."

The Additional Director also refers to the attempts by unscrupulous persons to exploit the situation in pursuit of unjust gains and how the authorities had to encounter at- tempts of impersonation and "attempts by claimants to pass of other's urine as their own." It was said that there were urine-donors. The affidavit also discloses certain real practices involving medical prescriptions and certificates by some members of the medical profession and ante-dated urine-thiocynate estimations. The Additional Director says that despite all this Government endeavoured to give the benefit to the claimants wherever possible. It is stated: 'The State Govt. had to preserve the scientif- ic character and ensure the credibility of the exercise of evaluation. Beating this limita- tion in mind, wherever possible, the govern- ment has attempted to give the benefit to the claimants. The various guidelines relating to documentation of the immediate postdisaster phase are proof of this intention. At the same time, government have had to adhere to certain quality standards so that the exercise could stand up to scrutiny in any Court of law or in any scientific form."

The stand of the Directorate cannot be brushed aside as arbitrary. However, provisions of appeal ensure that in genuine cases there will be no miscarriage of justice.

64. Shall we set aside the settlement on the mere possibility that medical documentation and categorisation are faulty? And that the figures of the various kinds of injuries and disablement indicated are undependable? As of now, medical documentation discloses that "there is no conclusive evidence to establish a casual link between cancer-incidence and MIC exposure". It is true that this inference is tentative as it would appear studies are con- tinuing and conclusions of scientific value in this behalf can only be drawn after the studies arc over. While the medical literature relied upon by the petitioners suggests possibilities of the exposure being carcinogenic, the ICMR studies show that as of now the annual incidence of cancer registration is more among the unexposed population as compared to the exposed population." (See Sri Ramesh Yesh- want Durve's affidavit dated 5th December, 1989, para 9). Similarly, "there is no definite evidence that derangement in immune system of the gas exposes have taken place". But the literature relied 'upon by petitioners does indicate that such prognosis cannot be ruled out. These matters are said to be under close study of the ICMR and other research agencies using, as indicated, the "multi-test CMI technique to screen the status of the immune system".

65. But the whole controversy about the adequacy of the settlement-fund arises on account of the

possibility that the totality of the awards made on all the claims may exceed the settlement-fund in which event the settlement- fund will be insufficient to satisfy all the Awards. This is the main concern of the victims and victim-groups. There is, as it now stands, a fund of one thousand two hundred crores of rupees for the benefit of the victims. The main attack on its adequacy rests solely on the possibility that the medical documenta- tion and categorisation based thereon, of the victims' medical status done by the Directorate of Claims is faulty. The charge that medical documentation was faulty and was calculated to play down the iII-effects of the exposure to MIC is, in our opinion, not substantiated. This attack itself implies that if the categorisation of the claimants on the basis of the severity of the injuries is correct then the settlement-fund may not, as a settlement, be unreasona- ble.

66. At the same time, it is necessary to remind our- selves that in bestowing a second thought whether the set- tlement is just, fair and adequate. We should not proceed on the premise that the liability of the UCC has been firmly established. It is yet to be decided if the matter goes to trial. Indeed, UCC has seriously contested the basis of its alleged liability. But it is true that even to the extent a settlement goes, the idea of its fairness and adequacy must necessarily be related to the magnitude of the problem and the question of its reasonableness must be assessed putting many considerations into the scales. It may be hazardous to belittle the advantages of the settlement in a matter of such complexity. Every effort should be made to protect the victims from the prospects of a protracted, exhausting and uncertain litigation. While we do not intend to comment on the merits of the claims and of the defences, factual and legal arising in the suit, it is fair to recognise that the suit involves complex questions as to the basis of UCC's liability and assessment of the quantum of compensation in a mass tort action. One of the areas of controversy is as to the admissibility of scientific and statistical data in the quantification of damages without resort to the evidence as to injuries in individual cases.

67. Sri Nariman contended that scientific and statis- tical evidence for estimates of damages in toxic tort ac- tions is permissible only in fairness hearings and such evidence would not be so admissible in the proceedings of adjudication, where personal injury must be proved by each individual plaintiff. That would, indeed, be a struggle with infinity as it would involve individual adjudication of tens of thousands of claims for purposes of quantification of damages.

In an article on 'Scientific and Legal Standards of Statistical Evidence in Toxic Tort and Discrimination Suits' by Carl Cranor and Kurt Nutting (See: Law and Philosophy Vol. 9 No. 2 May, 1990) there is an interesting discussion as to what would be the appropriate standard of evidence in presenting and evaluating scientific and statistical infor- mation for use in legal proceedings. The learned authors say: .

"These are two of the main sides in the con- troversy concerning the kind and amount of scientific evidence necessary to support legally a verdict for the plaintiff. Black seems to urge that courts should only accept evidence that is scientifically valid, and adhere to the standards of evidence

implicit in the discipline, while the Ferebee court urges that plaintiffs in presenting scientific evidence and expert scientific testimony should be held to legal standards of evidence. Powerful forces are arrayed on both sides of this issue. On the side of requiring scientif- ic testimony only to measure up to legal standards of evidence, the social forces include plaintiffs or potential plaintiffs, plaintiffs' attorneys, public interest groups, consumer advocacy groups, all individuals who are concerned to make it somewhat easier to recover damages under personal injury law for alleged injuries suffered as a consequence of activities of others. On the other side of the same issue are defendants, potential defend- ants (typically corporations, manufacturing firms) and, interestingly, the scientific community." [Page 118]

In Sterling v. Velsicol Chemical Corp. (855 F 2d 1188 (1988)) the US Court of Appeals tended to the view that generalised proof of damages is not sufficient to prove individual damages and that damages in mass tort personal injury cases must be proved individually by each individual plaintiff. The Court held:

"We cannot emphasise this point strongly enough because generalised proof will not suffice to prove individual damages. The main problem on review stems from a failure to differentiate between the general and the particular. This is an understandably easy trap to fall into in mass tort litigation. Although many common issues of fact and law will be capable of resolution on a group basis, individual particularised damages still must be proved on an individual basis."

68. While Shri Nariman contends that admissibility of scientific and statistical evidence is confined to Fairness Hearings alone and not in adjudication where personal injury by each individual plaintiff must be proved, the learned Attorney-General, however, urges that such evidence and estimates of damages are permissible in toxic-tort actions and says that the fundamental principle is and should be that countless injured persons must not suffer because of the difficulty of proving damages with certainty or because of the delay involved in pursuing each individual claim. He referred to the following passage in Florance B. Bigelow v. RKO Radio Pictures Inc., (327 US 251, 264 (1946): "the most elementary conceptions of justice and public policy require that the wrong doer shall bear the risk of the uncertainty which his own wrong has created."

Learned Attorney General also urged that in tort actions of this kind the true rule is the one stated in Story Parch- ment Company v. Paterson Parchment Paper Co. (282 US 555, 568):

"The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. Taylor v. Bradley, 4 Abb. App. DEc. 363,366, 367, 100 Am. Dec. 415:

It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.

The general rule is, that all damages result- ing necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The later description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perver- sion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere specula- tion or guess, it will be enough if the evi- dence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making,were otherwise.'

And in Frederick Thomas Kingsley v. The Secretary of State for India, (AIR 1923 Calcutta 49), it was observed: "Shall the injured party be allowed to recover no damages (or merely nominal) because he cannot show the exact amount of the certainty, though he is ready to show, to the satisfac- tion of the Jury, that he has suffered large damages by the injury ? Certainty, it is true, would be thus attained, but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the Jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." The risk of the uncertainty, says learned Attorney- General, should, in such cases, be thrown upon the wrongdoer instead of upon the injured party. Learned Attorney General also urged that, on first principle, in cases where thou- sands have been injured, it is far simpler to prove the amount of damages to the members of the class by establish- ing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the de- fendants. He said statistical methods are commonly accepted and used as admissible evidence in a variety of contexts including quantification of damages in such mass tort ac- tions. He said that these principles are essential princi- ples of justice and the Bhopal disaster is an ideal setting for an innovative application of these salutary principles.

69. The foregoing serves to highlight the complex- ities of the area. Indeed, in many tort actions the

world- over speedy adjudications and expeditious reliefs are not easily accomplished and many of them have ended in settle- ments. In the context of the problems presented by the issues of liability in cases of certain corporate torts beyond the corporate veil there is an impressive body of academic opinion amongst the school men that the very theo- ries of limited corporate liability which initially served as incentives for commercial risk-taking needs re-thinking in certain areas of tortious liability of Corporations. Some scholars have advocated abolition of imited liability for "knowable tort risks". (See "An Economic Analysis of Limited liability 117 1980" "The Limited Liability in Corporation Law' (30 U.Toronto LJ. , (Place of Enterprise Liability in the Control of Corporate Conduct" (90Yale Law Journal 1 (1980); "Should Shareholders be personally liable for the torts of their Corporations?"- (76 Yale Law Journal 1190 (1967). This, of course, has the limitation of one more shade of an academician's point of view for radical changes in law.

70. With the passage of time there are more tangible details available by way of the proceedings of the Director- ate of Claims which has medically evaluated and categorised nearly 3,60,000 affected persons. We have looked into the formats and folders prepared by the Directorate of Claims for the medical evaluation of the conditions of the victims. Some sample medical dossiers pertaining to some individual claimants containing an evaluation of the data pertaining to the medical status of the persons have also been shown to us. It is on the basis of such medical dossiers that evalua- tion and categorisation are stated to have been done. The guidelines for carrying out these medical evaluations, it is stated, have been formulated and issued by the Government of India.

71. Petitioners seriously assail the correctness of the guidelines for medical evaluation as also the result of the actual operational processes of evaluation based thereon. Petitioners described the results indicated by the medical categorisation done by the Directorate of Claims which showed only 40 cases of total permanent disablement as shocking and wholly unrelated to the realities. Indeed, some learned counsel for the petitioners, of course in a lighter vein, remarked that if these were the final figures of injuries and incapacitations caused by the Bhopal Gas Leak Disaster, then UCC should be entitled to a refund out of the sum settled and wondered why, in the circumstances, UCC was taking shelter under the settlement and fighting shy of a trial.

It appears to us that particulars care has gone into the prescription of the medical documentation tests and the formulation of the results for purposes of evaluation and categorisation.

72. After a careful thought, it appears to us that while it may not be wise or proper to deprive the victims of the benefit of the settlement, it is, however, necessary to ensure that in the-perhaps unlikely--event of the settle- ment-fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after the fund is exhausted are not left to fend themselves. But, such a contingency may not arise having regard to the size of the settlement-fund. If it should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a welfare State and in the circum- stances in which the settlement was made, should not be found wanting in making good the

deficiency, if any. We hold and declare accordingly.

73. It is relevant here that the Union of India while, quite fairly, acknowledging that there was in fact such a settlement, however, sought to assail its validity on cer- tain legal issues. But the factum of the settlement was not disputed. Indeed, Union of India did not initiate any sub- stantive proceedings of its own to assail the agreement or the consensual element constituting the substratum of the order of the Court. The legal contentions as to the validity of the settlement were permitted to be raised in as much as that an order made on consent would be at no higher footing and could be assailed on the grounds on which an agreement could be. But, as stated earlier, the factum of the consen- sual nature of the transaction and its existence as a fact was not disputed. Those legal contentions as to the validity have now failed. The result is that the agreement subsists. For all these reasons we leave the settlement and the orders dated 14/15th February, 1989---except to the extent set aside or modified pursuant to the other findings---undisturbed.

74. We may here refer to and set at rest one other contention which had loomed in the hearings. The petitioners had urged that the principles of the liability and the standards of assessment of damages in a toxic mass tort arising out of a hazardous enterprise should be not only on the basis of absolute liability-not merely on Rylands v. Fletcher principle of strict liability--not admitting of any exceptions but also that the size of the award be propor- tional to the economic superiority of the offender, contain- ing a deterrent and punitive element. Sustenance was sought from M.C. Mehta v. Union of India, AIR 1987 SC 1086. This argument in relation to a proceeding assailing a settlement is to be understood as imputing an infirmity to the settle- ment process as not being informed by the correct principle of assessment of damages. Respondents, however, raised several contentions as to the soundness of the Mehta princi- ple and its applicability. It was also urged that Mehta principle, even to the extent it goes, does not solve the issues of liability of the UCC as distinct from that of UCIL as Mehta case only spoke of the liability of the offending enterprise and did not deal with principles guiding the determination of a holding-company for the torts of its subsidiaries.

It is not necessary to go into this controversy. The settle- ment was arrived at and is left undisturbed on an over-all view. The settlement cannot be assailed as violative of Mehta princi- ple which might have arisen for consideration in a strict adjudication. In the matter of determination of compensation also under the Bhopal Gas Leak Disaster (P.C) Act, 1985, and the Scheme flamed thereunder, there is no scope for applying the Mehta principle inasmuch as the tort-feasor, in terms of the settlement -for all practical purposes--stands notional- ly substituted by the settlementfund which now represents and exhausts the liability of the alleged hazardous entre- preneurs viz., UCC and UCIL. We must also add that the Mehta principle can have no application against Union of India inasmuch as requiring it to make good the deficiency, if any, we do not impute to it the position of a joint tort-feasor but only of a welfare State. There is, therefore, no substance in the point that Mehta principle should guide the quantification of compensation to the victim-claimants.

75. This necessarily takes us to the question of the medical surveillance costs; and the operational

expenses of the Hospital. We are of the view that for at least a period of eight years from now the population of Bhopal exposed to the hazards of MIC toxicity should have provision for medi- cal surveillance by periodic medical check-up for gas relat- ed afflictions. This shall have to be ensured by setting up long-term medical facilities in the form of a permanent specialised medical and research establishment with the best of expertise. An appropriate action-plan should be drawn up. It will be proper that expert medical facility in the form of the establishment of a full-fledged hospital of at least 500 bed strength with the best of equipment for treatment of MIC related affliction should be provided for medical sur- veillance and for expert medical treatment. The State of Madhya Pradesh shall provide suitable land free of cost. The allocation of the land shall be made within two months and the hospital shall be constructed, equipped and made func- tional within 18 months. It shall be equipped as a Special- ist Hospital for treatment and research of MIC related afflictions and for medical surveillance of the exposed population.

76. We hold that the capital outlays on the hospital and its operation expenses for providing free treatment and services to the victims should, both on humanitarian consid- erations and in fulfilment of the offer made before the Bhopal court, be borne by the UCC and UCIL. We are conscious that it is not part of the function of this Court to re- shape the settlement or restructure its terms. This aspect of the further liability is also not a matter on which the UCC and the UCIL had an opportunity to express their views. However, from the tenor of the written submissions made before the District Court at Bhopal in response to the proposal of the Court for "reconciliatory substantial inter- im relief" to the gas victims, both the UCC and UCIL had offered to fund and provide a hospital for the' gas victims. The UCC had re-called that in January, 1986, it had offered "to fund the construction of hospital for the treatment of gas victims the amount being contributed by the UCC and the UCIL in equal proportions". Shri Nariman had also referred to this offer during the submissions in the context of the bona fides of the UCC in that behalf. It is, no doubt, true that the offer was made in a different context and before an overall settlement. But that should not detract the UCC and the UCIL from fulfilling these obligations, as indeed, the moral sensibilities to the immense need for relief in all forms and ways should make both the UCC and UCIL forthcoming in this behalf. Such a hospital should be a fully equipped hospital with provision for maintenance for a period of eight years which in our estimate might together involve the financial outlay of around Rs. 50 crores. We hope and trust that UCC and UCIL will not be found wanting in this behalf.

77. Then comes the question which we posed at the end of paragraph 44. This concerns the exposed members of the populace of Bhopal who were put at risk and who though presently a symptomatic and filed no claim for compensation might become symptomatic in future. How should cases of yet unborn children of mothers exposed to MIC toxicity where the children are found to have or develop congenital defects be taken care of?

The question is as to who would provide compensation for such cases?

We are of the view that such contingencies shall be taken care of by obtaining an appropriate

medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India for compen- sation to this contingent class of possible prospective victims. There shall be no individual upper monetary limit for the insurance liability. The period of insurance cover should be a period of eight years in the future. The number of persons to be covered by this Group Insurance scheme should be about and not less than one lakh of persons. Having regard to the population of the seriously affected wards of Bhopal city at the time of the disaster and having regard to the addition to the population by the subsequent births extrapolated on the basis of national average of birth rates over the past years and the future period of surveillance, this figure broadly accords with the percent- age of population of the affected wards bears to the number of persons found to be affected by medical categorisation. This insurance cover will virtually serve to render the settlement an open ended one so far as the contingent class of future victims both existing and after-born are concerned. The possible claimants fall into two categories: those who were in existence at the time of exposure; and those who were yet unborn and whose congenital defects are traceable to MIC toxicity inherited or derived congenitally. In so far as the second class of cases is concerned, some aspects have been dealt with in the report of the Law Commission in United Kingdom on "Injuries to Unborn Chil- dren". The Commission, referring to the thenexisting Law, said:

"7. Claims for damages for pre-natal injuries have been made in many other jurisdictions but there is no English or Scottish authority as to whether a claim would lie and, if it did, what rules and limitations should govern it. In our working paper we did not attempt to forecast how such a claim would be decided if it came before a court in this country, al- though we did add, as an appendix to the paper, a brief account of some of the deci- sions of courts in other jurisdictions..." "8. It is, however, important from our point of view to express our opinion (reinforced by our general consultation and supported by the report of the Scottish Law Commission) that it is highly probable that the common law would, in appropriate circumstances, provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault. It is impor- tant to make our opinion on this point clear because, on consultation, it has become appar- ent that many people think that we were, in our working paper, proposing the creation of new liabilities, whereas it is probable that liability under the common law already exists ..... ".

Thereafter in United Kingdom, the Congenital Disabili- ties (Civil Liability) Act, 1976, was brought forth. Section 1 (1) of that Act says:

(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in sub-section (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child."

It is not necessary for the present purpose to go into other features of that legislation and the state of

corresponding law in India. Our present question is as to how and who would provide compensation to the two class of cases referred to us earlier. We hold that these two classes of cases are compensatable if the claimants are able to prove injury in the course of the next eight years from now. The premia for the insurance shall be paid by the Union of India out of the settlement fund. The eligible claimants shall be entitled to be paid by the insurer compensation on such principles and upon establishment of the nature of the gas related toxic morbidity by such medical standards as are applicable to the other claimants under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, and the scheme framed thereunder. The individual claimants shall be enti- tled to have their claims adjudicated under the statutory scheme.

78. We must, however, observe that there is need for expedi- tious adjudication and disposal of the claims. Even the available funds would admit of utilisation unless the claims are adjudicated upon and the quantum of compensation determined. We direct both the Union of India and the State Government to take expeditious steps and set-up adequate machinery for adjudication of claims and determination of the compensation. The appointment of the Claim Commissioners shall be completed expeditiously and the adjudicative proc- ess must commence within four months from today. In the first instance, there shall at least be 40 Claim Commission- ers with necessary secretarial assistance to start the adjudication of the claims under the Scheme.

79. In the matter of disbursement of the amounts so adjudicated and determined it will be proper for the author- ities administering the funds to ensure that the compensa- tion-amounts, wherever the beneficiaries are illiterate and are susceptible to exploitation, are properly invested for the benefit of the beneficiaries so that while they receive the income therefrom they do not, owing to their illiteracy and ignorance, deprive themselves of what may turn out to be the sole source of their living and sustenance for the future. We may usefully refer to the guide-lines laid down in the case of Muljibhai Ajarambhai Harijan & Anr. v. United India Insurance Co. Ltd.& Ors., 1982 (1) Gujarat Law Report- er 756. We approve and endorse the guidelines formulated by the Gujarat High Court. Those guidelines, with appropriate modifications, could usefully be adopted. We may briefly recapitulate those guidelines:

(i) The Claims Commissioner should, in the case of minors, invariably order the amount of compensation awarded to the minor to be invested in long term fixed depos- its at least till the date of the minor at- taining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn;

(ii) In the case of illiterate claimants also the Claims commissioner should follow the procedure set out in (i) above, but if lump sum payment is required for effecting pur- chases of any movable or immovable property such as, agricultural implements, assets utilisable to earn a living, the Commissioner may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to .withdraw money;

(iii) In the case of semi-literate persons the Commissioner should ordinarily resort to the procedure set out in (ii) above unless he is satisfied that the whole or part of the amount is required for expanding any existing business or for purchasing some property for earning a livelihood.

(iv) In the ease of widows the Claims Commis- sioner should invariably follow the procedure set out in (i) above;

(v) In personal injury cases if further treat- ment is necessary withdrawal of such amount as may be necessary for incurring the expenses for such treatment may be permitted;

(vi) In all cases in which investment in long term fixed deposits is made it should be on condition that the Bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid month- ly directly to the claimant or his guardian, as the case may be.

It should be stipulated that the FDR shall carry a note on the face of the document that no loan or advance will be allowed on the security of the said document without express permission.

(vii) In all eases liberty to apply for withdrawal in case of an emergency should be available to the claimants.

Government might also consider such investments being handled by promulgating an appropriate scheme under the Unit Trust of India Act so as to afford to the beneficiaries not only adequate returns but also appropriate capital appreciation to neutralise the effect of denudation by inflation.

80. Point (J) is disposed of in terms of the foregoing directions.

81. We might now sum up the conclusions reached, the findings recorded and directions issued on the various contentions:

(i) The contention that the Apex Court had no jurisdiction to withdraw to itself the origi- nal suits pending in the District Court at Bhopal and dispose of the same in terms of the settlement and the further contention that, similarly, the Court had no jurisdiction to withdraw the criminal proceedings are reject- ed.

It is held that under Article 142(1) of the Constitution, the Court had the necessary jurisdiction and power to do so.

Accordingly, contentions (A) and (B) are held and answered against the petitioners.

(ii) The contention that the settlement is void for non-compliance with the requirements of Order XXIII Rule 3B, CPC is rejected. Contention (C) is held and answered against the petitioners.

(iii) 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 criminal proceedings are, accordingly, directed to be proceeded with. Contention (D) is answered accordingly.

(iv) The orders dated 14th 15th of February, 1989 in so far a, they seek to prohibit future criminal proceedings are held no to amount to a conferment of criminal immunity; but are held to be merely consequential to the quash- ing of the criminal proceedings.

Now that the quashing is reviewed, this part of the order also set aside. Contention (E) is answered accordingly.

(v) The contention (F) that the settlement, and the orders of the Court thereon, are void as opposed to public policy and as amounting to a stifling of criminal proceedings is rejected.

(vi) Having regard to the scheme of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the incidents and imperatives of the American Procedure of 'Fairness Hearing' is not strictly attracted to the Court's sanc- tioning of a settlement. Likewise, the absence of a "Re-opener" clause does not, ipso facto, vitiate the settlement. Contention (G) is rejected.

(vii) It is held, per invitim, that if the settlement is set aside the UCC shah be enti- tled to the restitution of the US 420 million dollars brought in by it pursuant to the orders of this Court.

But, such restitution shall be subject to the compliance with and proof of satisfaction of the terms of the order dated 30th November 1986, made by the Bhopal District Court. Contention (H) is rejected subject to the condition aforesaid.

(viii) The settlement is not vitiated for not affording the victims and victim-groups an opportunity of being heard. However, if the settlement-fund is found to be insufficient, the deficiency is to be made good by the Union of India as indicated in paragraph 72. Conten- tion (I) is disposed of accordingly.

(ix) On point (J), 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. Directions are issued as indicated in paragraph 77.

(b) In the matter of administration and dis- bursement of the compensation amounts deter- mined, the guide-lines contained in the judg- ment of the Gujarat High Court in Muljibhai v. United India Insurance Co, 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 8 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 8 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 claims], 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 asymtomatic and filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or prenatal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability. 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 premia shall be paid out of the settlement fund. (e) On humanitarian consideration and in fulfilment 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.

82. In the result, the Review Petitions arc allowed in part and all the contentions raised in the Review-Petitions and the I.As in the civil appeals are disposed of in terms of the findings recorded against the respective contentions. In the light of the disposal of the Review-petitions, the question raised in the writ-petitions do not survive. The writ-Petitions are dismissed accordingly without any order as to costs.

AHMADI, J. I have carefully gone through the elaborate judgment prepared by my learned Brother Venkatachaliah, J. and I am by and large in agreement with his conclusions except on a couple of aspects which I will presently indi- cate.

The points which arise for determination on the plead- ings, documents and submissions made at the Bar in the course of the hearing of these petitions have been formulat- ed at points (A) to (J) in paragraph 8 of my learned Broth- er's judgment and the conclusions reached by him have been summarised and set out in the penultimate paragraph of his judgment at (i) to (ix), with their sub-paragraphs. I am in agreement with the conclusions at (i) to (vii) which answer contentions (A) to (H). So far as conclusion (viii) pertain- ing contention (I) is concerned. I agree that the settlement is not vitiated for not affording the victims or victim- groups an opportunity or being heard but I find it difficult to persuade myself to the view that if the settlement. Fund is found to be insufficient the shortfail must be made good by the Union of India. For reasons which I will presently state I am unable to comprehend how the Union of India can be directed to suffer the burden of the shortfall, if any, without finding the Union of India liable in damages on any count. As regards conclusion (ix) referable to contention(J). I am in agreement with sub-paragraphs (a), (b) and (d) thereof but so far as sub-paragraphs (c) and (e) are concerned I agree with the directions therein as I understand them to be only recommendatory in nature and not linked with the settlement.

In Charan Lal Sahu's case [1990]1 SCC 613 this Court upheld the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act,. 1985 (herein after called 'the Act'). In that case although the question re- ferred to the Bench was in regard to the constitutional validity of the said enactment, submissions were made on the question whether the impugned settlement was liable to be set aside on the ground that it was in flagrant violation of the principles of natural justice, in that, the victims as well as the victim-groups had no opportunity to examine the terms of the settlement and express their views thereon. Mukharji, CJ. who spoke for the majority (Ranganathan, J. and myself expressing separately) observed that on the materials available "the victims have not been able to show at all any other point or material which would go to impeach the validity of the settlement". It was felt that though the settlement without notice to the victims was not quite proper, justice had in fact been done to the victims but did not appear to have been done. Taking the view that in enter- ing upon the settlement regard should have been had to the views of the victims and for that purpose notices should have been issued before arriving at the settlement, the majority held that "post- decisional notice might be suffi- cient but in the facts and circumstances of this case, no useful purpose would be served by giving a post-decisional hearing having regard to the circumstances mentioned in the order of this Court dated May 4, 1989, and having regard to the fact that there are no further additional data and facts available with the victims which can profitably and meaningfully be presented to con- trovert the basis of the settlement and further having regard to the

fact that the victims had their say or on their behalf their views have been agitated in the proceedings and will have further opportunity in the pending review proceedings". It would, therefore, appear that the majority had applied its mind fully to the terms of the settlement in the light of the data as well as the facts and circumstances placed before it and was satisfied that the settlement was a fair and reasonable one and a postdecisional hearing would not be of much avail. Referring to the order of May 4, 1989 carrying the Court's assurance that it will be only too glad to consider any aspect which may have been overlooked in considering the terms of the settlement, Mukharji, CJ., opined that the further hearing which the victims will receive at the time of the hearing of the review petitions will satisfy the requirement of the principles of natural justice. K.N. Singh, J. while agreeing with the view ex- pressed by Mukharji, CJ. did not express any opinion on the question of inadequacy of the settlement. In the circum- stances it was held that there was no failure of justice necessitating the setting aside of the settlement as viola- tive of fundamental rights. After stating this the learned Chief Justice observed tha while justice had in fact been done, a feeling persisted in the minds of the victims that they did not have a full opportunity to ventilate their grievances in regard to the settlement. In his view this deficiency would be adequately met in the hearing on the Review Petitions (the present petitions). After taking notice of the aforesaid view expressed by the learned Chief Justice, Ranganathan, J. (myself concurring) observed as under:

"Though we are prima facie inclined to agree with him that there are good reasons why the settlement should not be set aside on the ground that the principles of natural justice have been violated quite apart from the prac- tical complications that may' arise as a result of such an order, we would not express any final opinion on the validity of the settlement but would leave it open to be agitated to the extent permissible in law in the review petition pending before this Court."

It is, therefore, manifest from the above that the Sahu Bench was 'prima facie' of the view that the settlement was not liable to be set aside on the ground that the principles of natural justice had been violated. Mukharji, CJ. went on to say that no useful pur- pose would be served by a post-decisional hearing and that the settlement was quite reasonable and fair. Of course K.N. Singh, J. did not express any opinion on the inadequacy of the settlement amount but he was otherwise in agreement with the view expressed by Mukharji, CJ. on all the other points. The view of Ranganathan, J. and myself is evident from the passage extracted above.

This case has gone through several twists and turns. One of the world's worst disaster occurred on the night between 2nd and 3rd December, 1984 choking several tO death and injuring thousands of residents living near about the indus- trial plant of UCIL. Litigation was initiated on behalf of some of the victims in the U.S. District Court, Southern District of New-York presided over by Judge Keenan. After the enactment of the Act on 29th March, 1985, the Union of India also approached Judge Keenan with a complaint. Judge Keenan ultimately terminated the proceedings before him on the ground of 'forum-non-convenience'. Thereafter the Union of india representing the victims file a suit for damages in the Bhopal District Court against the UCIL as well as the UCC in which an order for interim compensation was made against which an appeal was filed in the High Court. The matter was brought to this Court against the High Court order. It was during the hearing of the said matter that a court assisted settlement was struck and orders were passed recording the same on

14th/15th February, 1989. On 4th May, 1989 this Court gave its reasons for the settlement. Soon a hue and cry was raised against the settlement by certain victims and victim groups. In the meantime petitions were filed in this Court challenging the constitutional validity of the Act on diverse grounds. In the course of the hearing of the cases raising the question of validity of the Act submissions were also made regarding the validity of the settlement. The hearing continued from 8th March, 1989 to 3rd May, 1989 and the same received wide publication in the media. The judgment in the said case was pronounced on 22nd December, 1989 upholding the validity of the Act.. In the meantime petitions were filed under Article 137 of the Constitution to review the settlement. Several Writ Peti- tions under Article 32 also came to be filed. These came up for hearing before a Constitution Bench presided over by Mukharji,CJ. The hearing continued for more than two weeks and the media carried reports of the day to day court pro- ceedings throughout the country. Unfortunately, before the judgment could be pronounced a tragic event took place. Mukharji, CJ. passed away necessitating a rehearing by a Constitution Bench presided over by Misra, CJ. This hearing lasted for about 18 to 19 days and received the same wide coverage in the press, etc. In fact considerable heat was generated throughout the court hearings and the press also was none too kind on the court. It is, therefore, difficult to imagine that all those who were interested in the review of the settlement were unaware of the proceedings. Mr. Nariman has placed on record a number of press-clippings to make good his point that news- papers having large circulation throughout the country carried news regarding the settlement and subsequent at- tempts to challenge the same. Can it then be said that the victims were unaware of the proceedings before this Court ? To say so would be to ignore the obvious. In view of the observations in Sahu's case, the scope of the inquiry in the present petitions can be said to be. a narrow one. One way of approaching the problem is to ask what the Court could have done if a pre-decisional hearing was afforded to the victims. The option obviously would have been either to approve the terms of the compromise, or to refuse to super add the Court's seal to the settlement and leave the parties to go to trial. The Court could not have altered, varied or modified the terms of the settlement without the express consent of the contracting parties. If it were to find the compensation amount payable under the settlement inadequate, the only option left to it would have been to refuse to approve the settlement and turn it into a decree of the Court. It could not have unilaterally imposed any additional liability on any of the contracting parties. If it found the settlement acceptable it could turn it into a Court's decree. According to the interpretation put by the majority in Sahu's case on the scope of sections 3 and 4 of the Act, a pro-decisional hearing ought to have been given but failure to do so cannot vitiate the settlement as according to the majority the lapse could be cured by a post-decisional hearing. The scope of the review petitions cannot be any different at the post. decisional stage also. Even at that stage the Court can either approve of the settlement or disapprove of it but it cannot, without the consent of the concerned party, impose any new or additional financial obligations on it. At the post decisional stage it must be satisfied that the victims are informed of or alive to the process of hearing, individually or through press reports, and if it is so satisfied it can apply its mind to the fairness and reasonableness of the settlement and either endorse it or refuse to do so. In the present case the majority speaking through Brother Venkatachaliah, J. has not come to the conclusion that the settlement does not deserve to be approved nor has it held that the settle- ment-fund is inadequate. Merely on the apprehended possibil- ity that the settlementfund may prove to be inadequate, the majority has sought to saddle the Union of India with the liability to make good the deficit, if any. The Union of India has not agreed to bear this liability. And why should it burden the Indian tax-payer with this liability when it is neither held liable in tort nor is it shown to have acted negligently in entering upon the settlement? The Court has to reach a definite conclusion on the question whether the compensation fixed under the agreement is adequate or other- wise and based thereon decide whether or not to convert it into a decree. But on a mere possibility of there

being a shortfall, a possibility not supported by any realistic appraisal of the material on record but on a mere apprehen- sion, quia timet, it would not be proper to saddle the Union of India with the liability to make good the shortfall by imposing an additional term in the settlement without its consent, in exercise of power under Article 142 of the Constitution or any statute or on the premises of its duty as a welfare State. To my mind, therefore, it is impermissi- ble in law to impose the burden of making'good the shortfall on the Union of India and thereby saddle the Indian tax- payer with the tortfeasor's liability, if at all. If I had come to the conclusion that the settlement-fund was inade- quate, I would have done the only logical thing of reviewing the settlement and would have Left the parties to work out a fresh settlement or go to trial in the pending suit. In Sailit's case as pointed out by Mukharji, CJ. the victims had not been able to show any material which would vitiate the settlement. The voluminous documentary evidence-placed on the record of the present proceedings also does not make out a case of inadequacy of the amount, necessitating a review of the settlement. In the circumstances I do not think that the Union of India can be saddled with the li- ability to make good the deficit, if any, particularly when it is not found to be a tortfeasor. It's liability as a tortfeasor, if at all, would have to be gone into in a separate proceeding and not in the present petitions. These, in brief, are my reasons for my inability to agree with the latter part of conclusion (viii) imposing a liabil- ity on the Union of India to make good the deficit, if any. One word about the shifting stand of the Union of India. It entered into a Court assisted settlement but when the review applications came up for hearing it supported the review petitioners without seeking the Court's leave to withdraw from the settlement on permissible grounds or itself filing a review petition. To say the least this conduct is indeed surprising.

I would have liked to reason out my view in greater detail but the constraint of time does not permit me to do so. The draft of the main judgment was finalised only yes- terday by noon time and since the matter was already listed for judgment today, I had only a few hours to state my views. I had, therefore, no time to write a detailed judg- ment but just a little time to indicate in brief the crux of some of the reasons for my inability to agree with the view expressed in the judgment of Brother Venkatachaliah, J. on the question of Union of India's liability to make good the deficiency, if any.

G.N. Petitions disposed of.

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