

# The second settlement

## *Laboured self-justification*

PRASHANT BHUSHAN

THE Supreme Court took exactly fifteen minutes to arrive at a full and final "settlement" of all the claims of the Bhopal gas victims. It was on February 14, 1989 that a Constitution Bench, while hearing arguments on the award of interim compensation by lower courts from the Union Carbide Corporation (UCC) to the victims, suddenly announced it (the court) was proposing a total settlement of all claims of victims. Under the settlement, the Government would receive from UCC \$470 millions (about Rs. 1,175 crores) on behalf of the victims in consideration of discharging the corporation and all its employees from civil and criminal liability for the disaster — past, present and future. The proposal was accepted with alacrity by the Government and the UCC and was announced by the media as an adjudication by the courts. There was not even a pretence of consultation with the victims. Obviously, a clandestine arrangement had been worked out between UCC and the Indian Government; and it was precisely to prevent the victims from getting to know about it in advance that the Supreme Court's intervention was sought to "promote" the settlement.

This settlement was almost universally criticised and often stridently by the victims as well as the media as a sell-out to Union Carbide. The court was also lambasted for lending its authority to the settlement, especially for permitting and indeed ordering the quashing of all criminal proceedings and granting future immunity to UCC. This not only violated express provisions of law but was also opposed to public policy which prohibits, bargains involving strifling of criminal prosecutions. Review petitions and writ petitions challenging this settlement were immediately filed by victims, organisations and some public-spirited citizens.

The main grounds on which this settlement was challenged were: (i) That it had been reached and approved by the court without consulting and seeking the views of the victims. This was not only against natural justice but also contrary to the express mandate of

a specific provision of the Code of Civil Procedure; (ii) That the quashing of criminal proceedings and grant of criminal immunity was contrary to law and opposed to public policy. Moreover since this was part of the consideration for the payment by Union Carbide, the entire settlement would be illegal; (iii) That the court, while dealing with interim compensation, had no jurisdiction to transfer the main suit and criminal proceedings from the courts in Bhopal to itself and to dispose them; (iv) That the settlement amount was wholly inadequate to compensate the victims for the damage done to them.

### CLINGING TO THE SETTLEMENT

After more than two and a half years the Supreme Court finally on October 3 disposed of the review petitions. During this time three judges on the original Bench retired and one had to be given an ad hoc appointment to enable him to write the judgment. Other than revoking that part of the order by which criminal proceedings were quashed and immunities granted, the court has maintained the rest of the settlement. The 164-page leading judgment of Justice M. J. Venkatachalaiah is for most part a laborious and skilfully drafted document which displays a remarkable reluctance to upset the settlement. Even while accepting that there was no reason or occasion for quashing criminal proceedings and that a bargain involving the stifling of them would be opposed to public policy, the judgment refuses to declare the settlement void on this ground. By making a technical distinction between a motive and consideration the court says the grant of immunity to Union Carbide officials may have been the motive for and not part of the consideration of the payment by UCC. And this when on the face of it the terms of settlement state that the criminal proceedings would be quashed upon payment of \$470 millions by UCC. And yet, it is said not to be a consideration for the payment.

On the question of a hearing to the victims prior to the settlement, the court accepts that they ought to have been heard, and natural justice has been violated. Yet, the court refuses to

accept the established view of the consequences of such failure. Though several Constitution Benches of the court and even a recent seven-judge Bench in A. R. Antulay's case have clearly held that violation of natural justice renders a decision not just void but a nullity, the court refuses to follow them and instead clutches at an uncalled-for observation of the Bench which upheld the validity of the Bhopal enactment that the review petitions would provide an adequate hearing to the victims. Thus a post-decisional opportunity to some of the victims who filed the review petitions is being held to satisfy natural justice for all victims.

The court rejects the objection to its jurisdiction to transfer and deal with civil and criminal proceedings pending in Bhopal, saying that Article 14 of the Constitution empowers the Supreme Court with plenary jurisdiction to pass any order to do complete justice in any matter before it. Even an express prohibition of an ordinary law could not come in the way of the Supreme Court seizing a matter from any court and passing any order that it deemed fit for doing complete justice.

On the adequacy of the settlement amount, the court relies upon the exercise of medical evaluation and categorisation done by the Madhya Pradesh Government to say that the amount should be adequate. The serious flaws in the system of categorisation pointed out by the review petitioners have been brushed aside by the court which has chosen to rely upon the affidavits of the M.P. Government that this was the most sophisticated medical examination exercise ever undertaken. No note is taken of the fact that the doctors were instructed to categorise victims as temporarily injured/cured if their condition had not deteriorated three years after the disaster. The court has, however, declared that if the settlement amount falls short of the total amounts required to pay all the victims, the Government of India would have to pay the deficit. The court has also directed that persons at risk who may not be suffering from symptoms yet would be insured for any problem which they might develop in future. The premium would be paid out of the

settlement amount. The court has further ordered that a Rs. 50-crore modern hospital be immediately set up in Bhopal to monitor the victims for at least eight years. Union Carbide has been "requested" to bear the cost of this hospital to demonstrate its "humanitarian" concern. The court has not specified what it would do if UCC ignores this request.

Be that as it may, the review judgment does represent a significant advance for the cause of the victims. The settlement amount is no longer an upper limit within which the compensation has to be apportioned. The Government will have to make good any deficit in the settlement amount. Of course, the adjudication of the individual claims will still take many years but legally every victim will be entitled to his due. The suggestion of insuring the victims' risks is very good, though it is not clear how it can be worked out in practical terms. Similarly, the direction to set up a hospital for medical treatment and monitoring of the progress of the victims is a step in the right direction.

#### **BAD PRECEDENT**

The revocation of criminal immunity to UCC and its officials certainly removes the most horrendous part of the settlement. Yet, the tenacity with which it clung on to the rest of the settlement speaks poorly of the court's willingness to admit the monumental error that it had been led into. In the process, the court has had to say that the consequences of the failure of natural settlement were not fatal to the settlement. And in order to justify the settlement amount, the court has almost expressed its disapproval of two salutary principles of liability in tort actions which have been developed in recent years to ensure that corporations, particularly multinationals, behave more responsibly and carefully before putting at risk people in Third World countries. These are the principles of absolute liability of a holding company and the principle of punitive damages.

The principle of absolute liability says a holding company which has the power to control the affairs of its subsidiary must also be held liable for damage caused by its subsidiary. This principle is absolutely unexceptionable and essential to ensure that multinational corporations do not evade their responsibility for negligence merely by using the device of subsidiary companies. Punitive damages are exemplary damages awarded beyond the actual damage caused to punish and deter the person or company if gross negligence

is shown to exist. These damages are awarded in proportion to the financial capacity of the person who caused the damage. This principle is also unexceptionable and is an important step to prevent corporations from behaving negligently in countries where life is said to be "cheap." Multinational corporations now being invited to do

### **The review judgment brings to a close an unfortunate chapter in the history of the apex court of India.**

business in this country are said to be insisting that they should not be burdened by the principles of absolute liability or punitive liability for damage caused by their subsidiaries in India. In impliedly rejecting these principles, the court has shown greater sensitivity to the demands of these corporations than the needs of the victims or the citizens of this country.

In justifying the settlement the court has continuously harped on the theme of the protracted nature of the litigation and the immediate need of the victims. But the court has conveniently overlooked the fact that mere payment of money from UCC to the Government would not by itself ensure that it reaches the victims. In fact, on the basis of the settlement alone, the payment to the victims could not have begun until the claims of all the victims had been adjudicated in some forum. Only then could the settlement amount have been apportioned between them. And that would take approximately the same time as the litigation against UCC. Till then the victims can only be given some kind of interim compensation. Thus the immediate needs of the victims could only have been satisfied by an award of interim relief other than a comprehensive settlement of the liability of UCC.

To justify the settlement, Chief Justice Ranganath Mishra has even gone so far as to suggest that a case of this kind is incapable of adjudication and must only be settled. If this indeed were the case, then no defendant having perpetrated such a mass disaster would ever offer for settlement anything more than an amount which represents the nuisance value of the litigation. And indeed, according to many reports emanating from the United States, this is exactly what the settlement amount represents for UCC. If the court were to advance seriously the

cause of the Bhopal victims or victims of such mass tort cases in general, it could have used its plenary powers and judicial craftsmanship to fashion such procedures as would have ensured a less protracted litigation. It is indeed strange to find the court expressing doubts about the liability of UCC itself in order to justify why it did not proceed with the award of interim compensation. UCC was undoubtedly liable on a mere affirmation of the salutary and established principles of strict liabilities and absolute liability. These were pure questions of law involving no evidence and would have been settled by the apex court in a matter of days. The rest is a matter of calculation of damages which would in any case have to be gone through before the victims get anything.

The court's judgment on the review proves that the apex court is not above the common failing of human psychology. It is a common human failure not to admit one's mistake especially if one has been abused and scorned for it. The wounds of the trenchant criticism heaped upon the court for its part in the settlement are all too evident in Chief Justice Ranganath Mishra's judgment. He lambasts the review petitioners and other public-spirited citizens and organisations who assailed the settlement as "people who have nothing at stake and have traded in the misery of others." He says, "Those who have clamoured for a judgment on merits were perhaps not alive to this aspect (the protracted nature of the litigation) of the matter. If they were and yet so clamoured, they are not true representatives of the cause of the victims; if they are not, they were certainly misleading the poor victims."

This "complement" to the review petitioners could more easily be turned to the court itself. One could just as easily say that those in the court who clamoured for a judgment ordering a settlement were perhaps not alive to the fact that the settlement by itself would not expedite relief to the victims. If they were alive to this and yet so clamoured, they were certainly misleading the poor victims and the world and were activated by considerations which had nothing to do with relief to the victims.

Leaving it at that, it must be said the Supreme Court has certainly not covered itself with glory in its handling of the Bhopal settlement. The review judgment brings to a close an unfortunate chapter in the history of the apex court of India. ■

*Prashant Bhushan is a Supreme Court advocate.*