Manu Singhvi opinion 2006

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Ex-parte: Dow Chemical Company .... Querist

OPINION

I

A Company incorporated in the United States called the Union Carbide Corporation ("UCC") established a Company in India known as Union Carbide India Limited ("UCIL") to manufacture pesticides. UCC held over 50% of the shares in UCIL and the factory was established on land leased to UCIL by the State of Madhya Pradesh.

In December 1984, there was a disastrous leak of poisonous gas from the UCIL plant causing an enormous loss of life and public outcry.

A litigation was commenced on behalf of the victims in the Courts in the United States which, after hearing the parties, held that the matter should be proceeded with in India.

The Government of India enacted a special law called the Bhopal Gas Leak Disaster (Processing Claims) Act, 1985, the broad effect of which was to enable the Government of India as *parens patriae* to conduct litigation on behalf of the victims.

As a consequence of the law, the Government of India filed a Suit in the appropriate Civil Court in Bhopal against both UCC and UCIL claiming 3.3 billions U.S. Dollars as compensation.

After negotiations between the parties, a settlement was arrived at between them as a result of which it was agreed that UCC and/or UCIL would pay in full and final settlement of the said claim a sum of 470 million US Dollars.

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The said amount was duly paid.

The settlement was recorded by two separate Orders of the Supreme Court dated 14th February 1989 and 15th February 1989 and by an Order dated 4th May 1989 the Supreme Court recorded its reasons as to why it had approved the settlement.

The validity of the settlement was challenged but was upheld by the Supreme Court on 4th October, 1991, with one modification, namely, that it was clarified that the term of the settlement granting immunity from criminal proceedings against UCC and UCIL and/or the officers and agreeing to quash them was set aside.

A review application against the said Order was rejected.

In the meanwhile, whilst these proceedings were pending, criminal proceedings had been started against UCIL, UCC and certain officers in the appropriate Court in Bhopal. The offence alleged was culpable homicide not amounting to murder under Section 304 of the Indian Penal Code. This charge was modified by the Supreme Court to the offence of causing death by negligence under Section 304A of the Indian Penal Code. This prosecution is pending.

As UCC did not appear in the said prosecution even though it was named as an accused, it was declared to be an absconder under Section 82 of the Code of Criminal Procedure, 1973 ("CrPC"), in 1992 and an Order for the attachment of its properties in India was passed under Section 83 of the CrPC. Proceedings adopted (by parties other than UCC) against the said proclamation did not succeed.

As a consequence of the said order of attachment, the shares held by UCC and UCIL were also attached. As UCC was keen to dispose of the shares, an application for variation of the Order of attachment was made and a variation was effected by the Supreme Court by its Order dated 14th February, 1994, under which UCC was permitted to sell the shares on the condition that the sale proceeds would be kept in an escrow account of the State Bank of India.

The shares were duly sold thereafter and, as a result, UCC ceased to hold any shares in UCIL.

NEERI report.

During the period that UCIL was functioning, it had stored hazardous waste in drums. It appears from the subsequent report by NEERI that this hazardous material had to be disposed off in a satisfactory manner and it was being considered as to how this should be done. NEERI also found that in addition to the said hazardous material which was stored in drums, a certain quantity of waste and hazardous material had seeped into the soil and the soil, therefore, required to be cleared to render it safe, particularly as there was an apprehension that in the course of time, the material which had already penetrated the soil may enter substrata, water streams and/or aquifers.

land surrendered to MP state

After the sale of UCC's shares in UCIL went through, the State of Madhya Pradesh purported to forfeit the lease of the land on which the factory of UCIL was situated and the land was surrendered to the State of Madhya Pradesh by the entity then controlling UCIL.

UCC wholly owned subsidy of DOW 2001

The Querist who are one of the largest chemical companies in the world have negotiated a take over of all the assets of UCC and once the take over is complete, in effect UCC will become a wholly owned subsidiary of the Querist. This is expected to happen sometime in the first half of the year 2001.

II

In the light of the foregoing facts and circumstances, the Querist seeks my opinion on the following:-

(i) Whether TDCC can be held responsible and/or liable for the Bhopal gas tragedy or leakage of 1984?

(ii) Whether, in the event that the aforesaid query is answered in the negative, the Querist can be held liable for the alleged contamination and/or consequent cleaning up of the Bhopal site?

III

I have discussed the matter with the learned Advocate of the Querist. I have examined the brief for opinion and the relevant

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documents. I must disclose that I am also the Senior Counsel appearing on behalf of the Querist in a PIL pending at the Madhya Pradesh High Court raising, inter-alia, both the issues raised in the aforesaid queries. My opinion on the queries put to me is stated, seriatim, hereinbelow.

IV

In respect of the first query, it is necessary to appreciate the following factual matrix:

The alleged polluter at the time of the Bhopal gas tragedy is supposed to be a corporate entity known as Union Carbide India Limited ("UCIL"), a Company incorporated under Indian laws. At the relevant time, when the disaster took place, approximately 50% of the shares of UCIL were owned by a US entity incorporated under US laws, viz. Union Carbide Corporation ("UCC"). The rest of UCIL was owned by institutional investors and the public.

In or about 1994, UCC sold its stake in UCIL to a third entity known as McLeod Russel (India) Limited. The sale was done under the specific permission of the Apex Court vide its Order dated 14th February 1994. Subsequently, McLeod Russel (India) Limited was renamed as Eveready Industries India Limited ("EIIL").

Dow Chemical Company (viz the Querist) was a totally distinct, unconnected corporate entity in USA, pre-existing the Bhopal gas tragedy. It also had a 100% subsidiary qua Transition Sub Inc ("TSI"). Many years after not only the Bhopal gas tragedy but the divestiture of shareholding by UCC in UCIL under the Apex Court's supervision and specific orders in 1994, TSI, the 100% subsidiary of the Querist, merged into UCC. In or about 2001, UCC thus became the subsidiary of the Querist. However, UCC continues as a totally distinct and separate corporate entity under US laws.

In the light of the foregoing facts and circumstances, it is clear on the admitted factual matrix, firstly, that the Querist was nowhere in the picture, either as owner, or parent, or as subsidiary, or associate company or as corporate entity at the time of the Bhopal gas disaster. In other words, the Querist was an independent pre-existing US corporate entity and entities like UCIL or UCC were

totally unconnected with it in any manner, direct or indirect, at the time of the Bhopal gas disaster.

Secondly, UCC itself was neither the Company in charge of the plant at Bhopal at the time of the disaster nor the continuing holder of interest in UCIL. Even if UCIL is assumed to be the polluter, the admitted position is that UCC divested all interest and control in UCIL under the Supreme Court's Order of 14th February 1994 and subsequent to that, it has no connection whatsoever with UCIL.

Thirdly, whatever connection, which itself is remote, exists between the Querist and UCC has come about by unconnected events and independent commercial decisions only after 2001.

Fourthly, from the foregoing admitted factual position, flows the established legal consequence that each corporate entity has a separate existence and identity. Not only is the Querist unconnected with the event at Bhopal in 1984 but even after the development of a connection with the Querist in 2001, the Querist and UCC continued to be wholly separate, distinct and independent corporate entities. The fact that UCC is a subsidiary of the Querist does not detract from the legal position that both are independent corporate entities. This stands established from as far back as the decision of the House of Lords in **SALOMAN -VERSUS- SALOMAN & CO.(1897 AC 22)** and its global progeny, spawned in several legal jurisdictions.

Consequently, on the established principles of inviolability of the corporate veil and the established legal identity and distinctness of each corporate entity, I would answer the first query put to me in the negative.

Assuming, however, that the corporate veil is pierced and UCC and the Querist are treated as one and the same (which in my opinion, for the foregoing reasons, is impermissible in law), even then the Querist can hardly be regarded as successor-in-business of UCC.

Firstly, there is no concept known as "successor-in-business". There may be a successor-in-interest but it has to be by specific contractual agreement or by operation of law. In the present case, there is neither any contractual arrangement nor operation of any

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law which, ipso facto, or ipso jure makes the Querist the successor-in-business or the successor-in-interest to UCC and/or UCIL in so far as the Bhopal business or disaster is concerned.

Secondly, the connection between the Querist and UCC has developed only after 2001, by which time the umbilical cord between UCC and UCIL and/or the entire Bhopal event had been clearly severed. The same principle of inviolability of the corporate veil may not necessarily result in UCC being treated as the same entity as the alleged polluter viz. UCIL. There would be no rationale or purpose in allowing UCC (which was itself a distinct and corporate entity), as far back as 14th February 1994, by no less an order than that of the Apex Court, to divest all its interest in UCIL and exit from the scene, if UCC was to be held liable in the manner as the query in the present opinion suggests.

Thirdly, the general principle of common law also has to be kept in mind to the effect that unless a foreign defendant either resides within the jurisdiction or voluntarily appears or submits to the jurisdiction of the Court, it would not be possible to hold that a Court therein would have jurisdiction. Reference, in this regard, may be made, inter-alia, to the **WORLD TANKER CASE [AIR 1998 SC 2330, PARAS 23 & 43], RAJ RAJENDRA SARDAR MALOJI MARSINGH RAO SHITOLE CASE [AIR 1962 SC 1737 AT PARA 10]**. Indeed, in **HEM UNION -VERSUS- STATE OF BIHAR [AIR 1970 SC 82, PARA 4]**, the Apex Court held that a Company on the one hand and its shareholders on the other, being distinct and separate entities, would not make the Company an agent either of the President of India or of the Central Government.

Fourthly, the general treatment and liability of the original alleged polluters by the Indian Courts has also to be kept in mind while deciding the first query. As far as the civil proceedings in respect of the claims in tort arising from the Bhopal disaster are concerned, the same have been settled, inter-alia, by the payment of monies to the Government of India as *parens patriae* by UCIL vide Orders of the Apex Court dated 14th February 1989 and 15th February 1989 and finally by recording the settlement vide Supreme Court Order dated 4th May 1989.

Low only after UCIL UCC connection broken