

Bhopal victims' legal victory

The decision of the U.S. Court of Appeals has opened several avenues for the Government of India to take the legal battle seriously and support the Bhopal victims and their lawyers against the continuing injustices of Union Carbide, newly acquired by its parent corporation Dow Chemical Corporation.

While we mourn the 17th anniversary of the Bhopal gas tragedy victims, the United States Second Circuit Court of Appeals' recent decision in *Bano et al. v. Union Carbide and Warren Anderson* could not have come at a better time. In a long drawn and enduring legal struggle of the victims against Union Carbide, a U.S. court of appeals has partly reversed the decision of the New York federal district court, which had earlier dismissed the case, to reconsider the Bhopal victims' claims for environmental contamination of Bhopal caused by the Carbide facility in Bhopal. There are a number of important aspects of this decision, which deserve to be highlighted so that the Government of India should wake up from its deep slumber and callous indifference to the cause of the Bhopal victims. It is sad that injustice is getting institutionalised for the Bhopal victims when we have an educated and sensitive person as the Union Law Minister and a human rights lawyer as the Attorney General of India. The Bhopal victims still hope that the Government of India will engage with the lawyers representing them in the U.S. court so that justice can be achieved. Himanshu R. Sharma, the attorney who represented the Bhopal victims on the appeal, stated: "One can only hope that the decision will galvanise the Indian Government to step forward and carry out its duty to assist the Bhopal victims in obtaining legal redress with regard to the pending criminal prosecution in India."

Factual findings

This latest decision of the U.S. Court of Appeals has opened several avenues for the Government of India to take the legal battle seriously and support the victims and their lawyers against the continuing injustices of Union Carbide, newly acquired by its parent corporation Dow Chemical Corporation. First, it is important to note and emphasise the aspects of the U.S. Court of Appeals' decision, which are an unqualified victory for the Bhopal victims and organisations. Secondly, there is an important sense in which the victory is not an unqualified one: the Government of India needs to develop a response, which would assist the Bhopal victims in pursuing effective redress. There are factual findings in the Second Circuit decision, which can be most helpful in terms of pursuing Dow Chemical and Union Carbide in terms of the pending criminal prosecution in Bhopal District Court.

The appeals court has given an absolutely unqualified victory to the Bhopal victims in one very important sense: it reversed the decision of Judge Keenan to dismiss Counts 9 through 15 of the victims' complaint against Union Carbide (approximately half of all claims). Counts 9 through 15 dealt with the contamination of the soil and land around the UCIL facility in Bhopal. These claims sought both compensation for personal injury and damage to health of people exposed to Carbide's contaminants and it sought to force Union Carbide Corporation to clean up both the plant and the water supply contaminated by its chemicals as well as to provide for a programme of medical monitoring for those affected. The US Court of Appeals has reinstated all of these claims.

Thus, in a very real sense, it could be concluded that the decision contradicts Union Carbide's oft-repeated claim that Bhopal is a closed chapter and that it can escape from the legacy of its

wrongful conduct in Bhopal altogether. Significantly, this also means that the Bhopal victims would be entitled to seek discovery of Union Carbide Corporation regarding its control of the UCIL plant as well as its role in setting environmental safety guidelines and parameters in Bhopal (throughout the history of its operations).

Further, the appeals court also rejected Warren Anderson's arguments that, in any event, he should be dismissed from the case because, as a former Chairman of Carbide, he was so far and effectively removed from matters of actual decision-making and control that no viable legal claim could be made against him anyway (with regard to the environmental contamination claims 9 through 15). Anderson also argued that the plaintiffs have failed to show that he was personally involved in any misconduct. The appeals court rejected his argument in its entirety: "In its general factual allegations, however, the amended complaint asserts that Anderson exercised significant direct control over management of the Bhopal plant, including control over safety features. The plaintiffs submitted at least some evidence to support these allegations in response to defendants' motions for summary judgment."

Direct involvement

Now, this fact is fairly significant. For the first time in the entire history of the Bhopal litigation, a court (US Court of Appeals) has actually recognised that there is "at least some evidence" to support the claim that Anderson was personally, indeed "directly," involved in the direct management of the Bhopal plant, including its safety features. This portion of the decision can be read as explicitly authorising the plaintiffs to obtain further discovery, including testimony from Anderson himself, about his direct involvement and role in the UCIL plant. It also authorises plaintiffs to obtain discovery of Union Carbide Corporation's role vis-à-vis the Bhopal plant in terms of the type of technology, design and management practices implemented there (throughout the history of its operations). "I think, in one sense, this aspect of the decision represents a moral vindication of the Bhopal victims' position which has always been that Anderson was culpably involved in Carbide's conduct in Bhopal," Mr. Sharma said.

Accordingly, the appeals court reversed the lower court's decision dismissing the environmental contamination claims against Anderson and held that "our remand of the additional environmental claims applies to both Union Carbide and Anderson." One would hope that the Attorney General of India and the Union Minister for Law and Justice would take note of these findings and act upon them in terms of securing the appearance of Carbide and Anderson to face the criminal charges which remain pending against them in the Bhopal District Court. More importantly, the appeals court decision seems to invite (and implicitly endorse) the Indian Government to take action against them to bring them to justice, describing such efforts as a "legitimate interest": "Of course, the courts of India and the Indian Government may have a legitimate interest in preventing or responding to the flight of the defendants and others from India and the jurisdiction of its courts. But... the defendants at most flouted the authority of the courts of India, not the Southern District of New York. It is the courts of India (augmented perhaps by the powers of the Indian Government under, *inter alia*, treaties with the United States), not the United States District Court for the Southern District of New York, that would have the authority in this case to defend their own dignity by sanctioning the defendants' alleged acts of defiance, which occurred solely within their domain."

In other words, the appeals court is recognising the merits of the Bhopal victims' contention i.e., factually finding that the defendants are fugitives, but concluding that it is India's job to bring them to justice. Importantly, the opinion recognises this as a "legitimate interest" and also suggests that the Indian Government could use its powers "under... treaties with the United States" to accomplish this goal. "This is most likely a reference to treaties of extradition between India and the United States," Mr. Sharma explains. It suggests that requests for extradition of Carbide and/or Anderson might be favourably received, at least by the Court of Appeals. This aspect of the decision also opens up another strategic avenue for the Bhopal

victims — to obtain the assistance of the Indian Government, or even the Bhopal District Court, to compel Union Carbide to appear to face the criminal charges pending against it in India.

The Government of India can do the following immediately:

1. It must act on the U.S. court's invitation to secure the appearance of Union Carbide Corporation to face criminal charges pending before the Bhopal District Court. The Indian Government should immediately take all necessary steps, in accordance with the U.S. court's decision, to seek extradition of Carbide to face trial in the Bhopal District Court pursuant to treaties of extradition with the United States. Or, the Indian Government can directly approach the U.S. courts for international judicial assistance in seeking to enforce the summons issued to Union Carbide by Indian courts to appear before the Bhopal District Court to face the criminal charges of culpable homicide pending against it. The extradition of Anderson must proceed forthwith. Since he continues to be a party to the U.S. litigation, the Indian Government can obtain any assistance it needs in terms of his extradition from counsel for Bhopal victims engaged in that litigation.
2. The CBI must also act quickly to substitute Dow Chemical as the proper criminal defendant in the case in India because it is now the sole owner of Union Carbide Corporation. Under American law, the merger between Dow Chemical and Union Carbide means that Dow Chemical must inherit all of the liabilities, civil and criminal, of Carbide. This means that Union Carbide's pending criminal liability in the Bhopal District Court, which it has thus far managed to successfully evade, becomes the liability of Dow Chemical.

C. RAJ KUMAR

Visiting Researcher, New York

University School of Law