IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

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COMPILATION OF CASES ON PARENS PATRIAE
BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

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NOTE: In Sheoli Hati Vs. Somnath Das, (2019) 7 SCC 490 at para. 18 reference has also been made to the parens patriae principle.

(2019) 7 SCC 490 para 18

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(1990) 1 Supreme Court Cases 613

(BEFORE SABYASACHI MUKHARJI, C.J. AND K.N. SINGH, S. RANGANATHAN AND A.M. AHMADI AND K.N. SAIKIA, JJ.)

Writ Petition No. 268 of 1989†

CHARAN LAL SAHU .. Petitioner;

Versus

UNION OF INDIA .. Respondent.

And

Writ Petition No. 164 of 1986

RAKESH SHROUTI .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

And

Writ Petition No. 281 of 1989

RAJKUMAR KESWANI .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

And

Writ Petition No. 1551 of 1986

NASRIN BI AND OTHERS .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition Nos. 268 of 1989, 164 of 1986, 281 of 1989 and 1551 of 1986, decided on December 22, 1989

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (21 of 1985) — Held, constitutionally valid — But interim compensation or maintenance directed to be paid — Suggestions made for taking precautionary measures and for effectively dealing with such industrial disasters in future

On the night of December 2, 1984 there was massive escape of lethal gas from the MIC storage tank at Bhopal plant of the Union Carbide (I) Ltd. (UCIL) resulting in large scale death and disaster. The UCIL was incorporated in 1984 under the appropriate Indian law and was manufacturing pesticides at Bhopal, Madhya Pradesh. Its 50.99 per cent shareholdings were owned by the Union Carbide Corporation (UCC), a New York Corporation. LIC and the UTI own 22 per cent of the shares of UCIL. Within a week after the disaster, many American lawyers, came to Bhopal and obtained powers of attorney and suits were filed in America against UCC and UCIL on behalf of several victims. On or about February 6, 1985, all the suits in various US District Courts were consolidated by the Judicial Panel on Multi-District Litigation and assigned to US District Court, Southern District of New York. Judge Keenan was at all material times the presiding Judge there. Some suits were also filed before the District Court of Bhopal by individual claimants against UCC and UCIL. The

† Under Article 32 of the Constitution of India

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cases filed in USA were referred back to the Indian Courts by Judge Keenan. The Union of India filed a suit for damages in the District Court of Bhopal, which on December 17, 1987 ordered interim relief amounting to Rs 350 crores to the gas victims. The High Court on revision modified the order of District Judge and granted interim relief of Rs 250 crores. The matter then came before the Supreme Court by special leave. When the matter was being argued there, a settlement was arrived at between the Union of India and the UCC under which a sum of US Dollars 470 million was agreed to be paid by the UCC to the Union of India in full settlement of all the claims of all victims of the gas leak against the UCC. The Union of India also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection. This settlement received the imprimatur of the Supreme Court in its orders dated February 14 and 15, 1989 [(1989) 1 SCC 674: 1989 SCC (Cri) 243]. The reasons for the orders were stated by the Court on May 4, 1989 [(1989) 3 SCC 38].

The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 had been passed on March 29, 1985. It empowered the Union of India to take over the conduct of all litigation in this regard and conduct it in place of, or in association with, the individual claimants. It also enabled the Union of India to enter into a compromise with the UCC and UCIL and arrive at a settlement. Writ petitions were filed before the Supreme Court challenging the constitutional validity of this statute on the ground that the divestiture of the claimants' individual rights to legal remedy against the multinational for the consequences of carrying on dangerous and hazardous activities in India violates the fundamental rights guaranteed under Articles 14, 19 and 21. Upholding the constitutionality of the Act the Supreme Court

Held:

Per Mukharji, C.J. & Saikia, J.

The Act is constitutionally valid. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue, the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of Section 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, was necessary. In some cases, however, post-decisional notice might be sufficient but in the facts and the 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 the Supreme Court dated May 4, 1989 [(1989) 3 SCC 38] and having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending review proceedings. No further order on this aspect is necessary. The sections dealing with the payment of compensation and categorisation should be implemented. (Para 127)

In implementing the Act, justice perhaps has been done to the victims situated as they were, but justice has not appeared to have been done. That is a

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great infirmity. That is due partly to the fact that procedure was not strictly followed and also partly because of the atmosphere that was created in the country; attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of the Supreme Court. This was unfortunate. (Para 128)

Jones v. *National Coal Board*, (1957) 2 QB 55, *referred to*

Attempts should be made to formulate the principles of law guiding the government and the authorities to permit carrying on of trade dealing with materials and things which have dangerous consequences within sufficient specific safeguards especially in case of multinational corporations trading in India. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies. The government should, therefore, examine or have the problem examined by an expert committee as to what should be the conditions on which future licences and/or permission for running industries on Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measures should be formulated and scheme of enforcement indicated. The government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Deterrent or punitive damages should also be provided for, the basis for which should be formulated by a proper expert committee or by the government. For this purpose, the government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

(Paras 128 and 129)

Per K.N. Singh, J. (concurring)

Having regard to the legal and constitutional aspects and especially the need for immediate help and relief to the victims of the gas disaster, which is already delayed, we have upheld the constitutional validity of the Act. Mukharji, C.J. has rendered a detailed and elaborate judgment with which I respectfully agree. (Para 133)

The Code of Conduct for Transnational Corporations is binding on the countries which formally accept it. It was stated before us that India has accepted the Code. If that be so, it is necessary that the government should take effective measures to translate the provisions of the Code into specific actions and policies backed by appropriate legislation and enforcing machinery to prevent any accident or disaster and to secure the welfare of the victims of any industrial disaster. (Para 136)

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Industrial development in our country and the hazards involved therein, pose a mandatory need to constitute a statutory "Industrial Disaster Fund", contributions to which may be made, by the government, the industries whether they are transnational corporations or domestic undertakings, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. This may avoid delay, as has happened in the instant case in providing effective relief to the victims. The government and the Parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines as contained in the United Nations Code of Conduct on Transnational Corporations. (Para 138)

Per Ranganathan & Ahmadi, JJ. (partly concurring)

We are, in large measure, in agreement with the views of Mukharji, C.J. and K.N. Singh, J. but would like to say a few words on some of the issues in this case, particularly those in regard to which our approach has been somewhat different such as the question of payment of interim compensation. (Para 144)

The law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. Therefore, old antiquated Act should be drastically amended or fresh legislation should be enacted (provisions suggested). Further creation of an Industrial Disaster Fund (by whatever name called) deserves serious consideration. The Central Government will be well advised if, in future, it insists on certain safeguards before permitting a transnational company to do business in this country (safeguards suggested). (Paras 168 and 169)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Exclusive right conferred on Central Government to represent the victim claimants in suits instituted in India against multinational compauy — Validity — Held, State in capacity analogous to that of 'parens patriae' competent to represent the victims

Constitution of India — Preamble and Articles 38, 39 and 39-A — Doctrine of 'parens patriae' explained — Applicability in Indian context — Can be invoked by State in exercise of its sovereign power for protecting the disabled victims of industrial disaster by taking over claims of such victims and suing against the multinational company in respect of such claims — Exercise of such sovereign power under the Act for public welfare is always inherent — This is only subject to constitutional limitations — Maxim 'Salus populi suprema lex' — Constitutional Law — Sovereignty — Jurisprudence

Held:

Per Mukharji, C.J. and Saikia, J. (K.N. Singh, J. concurring)

Parens patriae means literally 'parent of the country' and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. Conceptually, the *parens patriae* theory is that it is the obligation of the State to protect and take into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and

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where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The Preamble to the Constitution, read with the Directive Principles, Articles 38, 39 and 39-A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further. (Para 35)

The doctrine of *parens patriae* cannot also be confined to only quasi-sovereign right of the State independent of and behind the title of the citizen. The concept of *parens patriae* can also be varied to enable the government to represent the victims effectively in domestic forum if the situation so warrants. Conceptually and jurisprudentially, the doctrine of *parens patriae* is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilised in America so far. But where citizens of a country are victims of a tragedy because of the negligence of any multinational, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. Thus *parens patriae* doctrine can be invoked by sovereign State within India.

(Paras 36, 37 and 63)

Words and Phrases, Vol. 31 page 99; *American Constitutional Law* by Lawrence H. Tribe, 1978 edn., para 3.24, *referred to*

Even if it be contended that the doctrine of *parens patriae* has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational, there is no bar on the State to assume responsibilities analogous to *parens patriae* to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case was an expression of its sovereign power. This power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the State. Sovereignty is difficult to define. By the nature of things, the State sovereignty in these matters cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered by legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim *salus populi suprema lex* — regard for public welfare is the highest law. It is not a rule, it is an evolution. This power has always been as broad as public welfare and as strong as the arm of the State. This can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid. Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. The jurisdiction of the State's power cannot be circumscribed by the limitations of the traditional concept of *parens patriae*. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. (Paras 63 and 100)

State of U.P. v. *Poosu*, (1976) 3 SCC 1; *K.M. Nanavati* v. *State of Bombay*, AIR 1961 SC 112: (1961) 1 SCR 497: (1961) 1 Cri LJ 173; *Ram Gopal* v. *Sarubai*, (1981) 4 SCC 505; *India Mica & Micanite Industries Ltd.* v. *State of Bihar*, (1982) 3 SCC 182, *referred to*

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For the authority of the Central Government to sue for and on behalf of or instead in place of the victims, no other theory, concept or any jurisprudential principle is required than the Act itself. The Act empowers and substitutes the Central Government. It displaces the victims by operation of Section 3 and substitutes the Central Government in its place. The victims being disabled have been divested of their rights to sue and such claims and such rights have been vested in the Central Government. These victims cannot be considered to be any match to the multinational companies or the government considering the conditions of the victims or their representatives in which they were after the disaster physically, mentally, financially, economically and also the position of litigation. They are not in a position to look after their own interests effectively or purposefully. They are the people who needed the State's protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrongdoers in this mass disaster. The circumstance that financial institutions viz. LIC, UTI held shares in the UCIL would not disqualify the Government of India from acting as *parens patriae* and in discharging its statutory duties under the Act. Even if the strict application of the *parens patriae* doctrine is not in order, as a concept it is a guide. The Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation that had arisen. We must recognize and accept it as such. (Paras 36, 74 and 100)

E.P. Royappa v. *State of T.N.*, (1974) 4 SCC 3: 1974 SCC (L&S) 248: (1974) 2 SCR 348; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: (1978) 2 SCR 621; *R.D. Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489: (1979) 3 SCR 1014, *followed*

Budhkaran Chaukhani v. *Thakur Prosad Shah*, AIR 1942 Cal 331: 46 CWN 425; *Banku Behary Mondal* v. *Banku Behary Hazra*, AIR 1943 Cal 203: 47 CWN 89; *Medai Dalavoi T. Kumaraswami Mudaliar* v. *Medai Dalavoi Rajammal*, AIR 1957 Mad 563: (1957) 2 MLJ 211; *Alfred L. Snapp & Son. Inc.* v. *Puerto Rico*, 458 US 592: 73 L ed 2d 995: 102 SCR 3260; *State of Georgia* v. *Tennessee Copper Co.*, 51 L ed 1038: 206 US 230 (1906): 27 SCR 618, *approved*

Ram Saroop v. *S.P. Sahi*, AIR 1959 SC 951: 1959 Supp 2 SCR 583; *Collector of Customs* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316: (1962) 3 SCR 786: (1962) 1 Cri LJ 364, *relied on*

B.K. Mukherjea: *Hindu Law of Religious and Charitable Trusts*, Tagore Law Lectures, 5th edn., p. 404; *Words and Phrases*, Permanent Edn., Vol. 33, p. 99; Black's *Law Dictionary*, 5th edn. 1979, p. 1003; Weaver's *Constitutional Law*, p. 490; *Words and Phrases*, Vol. 31 p. 99; *American Constitutional Law* by Laurence H. Tribe, 1978 edn. para 3.24, referred to

Per Ranganathan and Ahmadi, JJ. (concurring)

The legislature was perfectly justified in coming to the aid of the victims with this Act and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act had provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still been contended that such deprivation was necessary in larger public interest. Such representation can well be justified by resort to a principle analogous to, if not precisely the same as that of *parens patriae*. A victim of the tragedy is compelled to part with a valuable right of his in order that it might be more efficiently and satisfactorily exploited for his benefit than he himself is capable of. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a *parens patriae*. In the case of a litigation by a karta of a Hindu undivided family or by a guardian on behalf of a ward, who is *non-sui juris*, for example, the junior members of the family or the wards, are not to be consulted before entering into a settlement. In such cases, the court acts as guardian of such persons to scrutinise the settlement and satisfy itself that it is

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in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be open to the junior members of the family or the wards to call the karta or guardian to account but, barring such a contingency, the settlement would be effective and binding. In the same way, the Union as *parens patriae* would have been at liberty to enter into such settlement as it considered best on its own and seek the court's approval therefor.

(Paras 147 and 159)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Central Government representing claimant victims in suit against the multinational company responsible for the disaster — Alleged to be joint tort-feasor and hence incompetent to represent the victims — Doctrine that no man should be judge in his own case inapplicable — Doctrine of necessity applies — But doctrines of 'de facto validity' and 'bona fide representation' not attracted — Administrative Law — Natural justice

Administrative Law — Natural justice — Nemo debet esse judex in propria sua causa — Principle of, when excluded — Doctrine of necessity when applies

Held:

Per Mukharji, C.J. and Saikia, J. (K.N. Singh, J. concurring)

The question whether there is scope for the Union of India being responsible or liable as a joint tort-feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature and there was any remote conflict of interests between the Union of India and the victims from the theoretical point of view the doctrine of necessity would override the possible violation of the principles of natural justice that no man should be judge in his own cause. According to this doctrine even if all the members of the Tribunal competent to determine a matter were subject to disqualification, they might be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent tribunal can be constituted. (Paras 75 and 105)

Halsbury's Laws of England, Vol. 1, 4th edn., p. 89, para 73; De Smith: *Judicial Review of Administrative Action*, 4th edn. pp. 276-77; *J. Mohapatra and Co.* v. *State of Orissa*, (1984) 4 SCC 103: (1985) 1 SCR 322, relied on

Kasturilal Ralia Ram Jain v. *State of U.P.*, AIR 1965 SC 1039: (1965) 1 SCR 375: (1965) 2 LLJ 583; *State of Rajasthan* v. *Vidhyawati*, AIR 1962 SC 933: 1962 Supp 2 SCR 989, referred to

Further, the Central Government has control over the LIC and UTI, which held 20 to 22% shares in UCIL. It cannot be said that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Government and the victims. Secondly, in a situation of this nature, the Central Government is the only authority which can pursue and effectively represent the victims. Moreover, this concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature, does not apply in the instant situation. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a judge in his own cause. The Central Government was not judging any claim, but was fighting and advancing the claims of the victims. (Para 102)

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However, the doctrine of de facto representation will not be applicable in this case. (Paras 76 and 105)

Gokaraju Rangaraju v. *State of A.P.*, (1981) 3 SCC 132: (1981) 3 SCR 474: 1981 SCC (Cri) 652; *Pushpadevi M. Jatia* v. *M.L. Wadhawan*, (1987) 3 SCC 367: 1987 SCC (Cri) 526; *Beopar Sahayak (P) Ltd.* v. *Vishwa Nath*, (1987) 3 SCC 693: 1987 SCC (Cri) 641, *referred to*

The doctrine of bona fide representation of the interest of the victims in the proceedings would also not be quite relevant in this case. (Para 105)

Dharampal Singh v. *Director of Small Industries Services*, 1980 Supp SCC 505: AIR 1980 SC 1888; *N.K. Mohd. Sulaiman* v. *N.C. Mohd. Ismail*, AIR 1966 SC 792: (1966) 1 SCR 937; *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*, 27 IA 216: ILR 25 Bom 337: 2 Bom LR 927, *referred to*

Per Ranganathan & Ahmadi, JJ. (concurring)

The Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and the other victims. It is, therefore, the best agency in the circumstances that could be looked up to for fighting the UCC on its own as well as on behalf of the victims. Even assuming that the Union of India has some liability in the matter, it cannot derive any benefit or advantage by entering into a low settlement with the UCC. The Act and the Scheme thereunder have provided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. The settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victims' rights, if any, to proceed against the Union, the State of Madhya Pradesh or the ministers and officers thereof, if so advised. If the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC at as high a figure as possible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. There is no vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, if thought fit. (Para 153)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Scope of the Act — Liability of the tort-feasor multinational company — Whether limited to civil liability to compensation only or includes criminal liability to punitive damages as deterrence also — Human rights concept advanced in favour of deterrence view — But question not resolved — Act does not abridge or curtail the damages or liability — Tort Law — Criminal liability

Constitution of India — Articles 21, 48-A and 51(g) — Human rights — State's obligation to protect and evolve — U.N. Code of Conduct on Transnational Corporations, Clauses 9 and 13

Held:

Per Mukharji, C.J. and Saikia, J.

The Act in question deals with the Bhopal gas leak disaster and it deals with the claims meaning thereby claims arising out of or connected with the disaster for compensation of damages for loss of life or any personal injury which has been or is likely to be caused and also claims arising out of or connected with the disaster for any damages to property or claims for expenses incurred or

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required to be incurred for containing the disaster or making or otherwise coping with the impact of the disaster and other incidental claims. The Act in question does not purport to deal with the criminal liability, if any, of the parties or persons concerned nor it deals with any of the consequences flowing from those. This position is clear from the provisions and the Preamble to the Act. (Paras 34 and 89)

Normally, in measuring civil liability, the law has attached more importance to the principle of compensation than that of punishment. Penal redress, however, involves both compensation to the person injured and punishment as deterrence. (Para 92)

Roshanlal Kuthlala v. *R.B. Mohan Singh Oberoi*, (1974) 4 SCC 628: (1975) 2 SCR 491; *Rookes* v. *Barnard*, 1964 AC 1129: (1964) 1 All ER 367; Salmond: *Law of Torts*, 15th edn., p. 30, *referred to*

Perhaps, in this case, had the action proceeded, one would have realised that the fall out of this gas disaster might have been the formulation of a concept of damages, blending both civil and criminal liabilities. There are, however serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and it is still very uncertain as to how far decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards. There were difficulties in that attempt. But as the provisions stand these considerations do not make the Act constitutionally invalid. These are matters on the validity of settlement. The Act, as such does not abridge or curtail damage or liability whatever that might be. So the challenge to the Act on the ground that there has been curtailment or deprivation of the rights of the victims which is unreasonable in the situation is unwarranted and cannot be sustained. (Paras 89, 90 and 92)

Nandram Heeralal v. *Union of India*, AIR 1978 MP 209: 1978 ACJ 215, *referred to*

While having regard to expanding horizons of the human rights concept norms and deterrence should be aspired for, it is difficult to correlate that aspect with the present problem in this decision. (Para 93)

Lakshmi Kant Pandey v. *Union of India*, (1984) 2 SCC 244: (1984) 2 SCR 795; *Mackinnon Mackenzie & Co. Ltd.* v. *Audrey D'Costa*, (1987) 2 SCC 469: 1987 SCC (L&S) 100; *Sheela Barse* v. *Secretary, Children Aid Society*, (1987) 3 SCC 50: (1987) 1 SCR 870: 1987 SCC (Cri) 458, *referred to*

As mentioned in the Universal Declaration of Human Rights that people are born free and the dignity of the persons must be recognised and an effective remedy by competent tribunal is one of the surest methods of effective remedy. If, therefore, as a result of this tragedy new consciousness and awareness on the part of the people of this country to be more vigilant about measures and the necessity of ensuring more strict vigilance for permitting the operation of such dangerous and poisonous gases dawn, then perhaps the tragic experience of Bhopal would not go in vain. (Para 94)

The Supreme Court is not concerned with the determination of the actual extent of liability. It will proceed on the basis that the law enunciated by it in *M.C. Mehta case* is the decision upon the basis of which damages will be payable to the victims in this case. (Para 92)

M.C. Mehta v. *Union of India*, (1987) 1 SCC 395, *followed*
Rylands v. *Fletcher*, (1868) 3 LR 3 HL 330: 19 LT 220: 33 JP 70, *referred to*

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The question whether the clause in the settlement that criminal proceedings would not be proceeded with and the same will remain quashed is valid or invalid, is not part of the proceedings under the Act. So the orders on this aspect in the order of February 14/15, 1989 are not orders under the Act. Therefore, on the question of the validity of the Act, this aspect does not arise.

(Para 126)

Per K.N. Singh, J.

In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48-A and 51(*g*). It is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by clauses 9 and 13 of UN Code of Conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to the laws of our country and the liability should not be restricted to the affiliate company only but the parent corporation should also be made liable for any damage caused to the human beings or ecology. The law must require Transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation. Under the existing civil law, damages are determined by the civil courts, after a long drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation, to avoid delay and to ensure immediate relief to the victims we would suggest that the law made by the Parliament should provide for constitution of tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeal against which may lie to this Court on limited ground of questions of law only after depositing the amount determined by the tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. These steps would minimise the misery and agony of victims of hazardous enterprises.

(Para 137)

Per Ranganathan and Ahmadi, JJ.

Whether the settlement should have taken into account the element of punitive liability is a moot question. This is an "uncertain province of the law" and it is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of its international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country. Secondly, whether the settlement took this into account and, if not, whether it is bad for not having kept this basis in view are questions that touch the merits of the settlement with which we are not concerned. So Supreme Court should express no opinion here on this issue. It is too far fetched to contend that the provisions of the Act permitting the Union of India

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to enter into a compromise should be struck down as unconstitutional because they have been construed by the Union of India as enabling it to arrive at such a settlement. (Para 156)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — State representing the victims in suit claiming compensation is dominus litis — But victims have not been entirely excluded either in conduct of the proceedings or in entering into compromise — Dominus litis

(Paras 64, 65 and 160)

Dominus Litis: Black's Law Dictopmaru, 5th edn., p. 437, *referred to*
Virgina Electric & Power Co. v. *Bowers*, 181 Va 542: 25 SE 2d 361, *cited*

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Power conferred on Central Government to represent victims in conducting the suit and entering into a compromise — Held, not uncanalised, unguided or arbitrary — Constitution of India, Article 14

Statute Law — Constitutionality of a statute — How to be determined — Validity of the power conferred by statute is different from validity of exercise of such power — Possibility of abuse of power will not render the statute providing such power invalid — Administrative Law — Ultra vires — Constitution of India, Articles 13(2) and 14 — Discretionary — Possibility of abuse

Held:

Per Mukharji, C.J. and Saikia, J. (K.N. Singh, J. concurring)

The power conferred by the Act on the Central Government to conduct the suit and enter into compromise are not uncanalised or arbitrary. The power is clearly exercisable only in the ultimate interests of the victims. It is circumscribed by the purpose of the Act. If there is any improper exercise or transgression of the power then the exercise of that power can be called in question and set aside, but the Act cannot be said to be violative of the rights of the victims on that score. The possibility of abuse of a statute does not impart to it any element of invalidity. Conferment of power and the manner of its exercise are two different matters and validity of a measure is not to be determined by its application to particular cases. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If upon being so judged it passes the test of reasonableness, then the possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid. (Paras 63 and 103)

Belfast Corporation v. *O.D. Cars Ltd.*, 1960 AC 490: (1960) 2 WLR 148: (1960) 1 All ER 65; *Collector of Customs* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316: (1962) 3 SCR 786: (1962) 1 Cri LJ 364; *P.J. Irani* v. *State of Madras*, AIR 1961 SC 1731: (1962) 2 SCR 169; *D.K. Trivedi* v. *State of Gujarat*, 1986 Supp SCC 20: (1986) 1 SCR 479, *relied on*

Per Ranganathan and Ahmadi, JJ. (concurring)

The Act cannot be said to have conferred any unguided or arbitrary discretion to the Union of India in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which makes it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the object. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged. (Para 157)

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M.C. Mehta v. *Union of India*, (1987) 1 SCC 395, *referred to*

The Act, therefore, cannot be considered to be unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the government to withdraw the proceedings or enter into a compromise. Any authority given to conduct a litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. In most of the mass disaster cases reported, proceedings finally end in a compromise if only to avoid an indefinite prolongation of the agonies caused by such litigation. (Para 152)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Explicit conferment of exclusive right on Central Government to represent victims in suit — Held, Article 14 not violated — Victims constitute a separate class — Procedure envisaged not unreasonable — Constitution of India, Article 14 — Words and phrases — "Exclusive", meaning of

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3, 4, 5 and 11 — Power conferred on Central Government to represent victims in suits — Divestiture of victims' individual rights to legal remedy against the disastrous effect on their lives due to the poisonous gas leak — Whether effected by a procedure which is just, fair and reasonable so as to be not violative of Article 21 — Whether procedure consistent with provisions of CPC — Held, State has taken over victims' rights in exercise of its sovereign power and in discharge of its constitutional obligation — Jurisdiction of civil court to entertain suit would still arise out of Section 9 CPC — Act not unreasonable and not lacking in legislative competence and hence principles of natural justice not attracted — However, opportunity to victims to present their views not denied — Act therefore not violative of Article 21 — Constitution of India, Article 21 — Civil Procedure Code, 1908, Order 1 Rule 8 and Order 23 Rule 3-B

Constitution of India — Article 21 — "Procedure" — Civil procedure — Change in, affecting enforcement of civil rights or denying access to justice thereby affecting right to life and liberty — Constitutionality of — Held, Article 21 not attracted when individual rights taken away by reasonable procedure under Act by State in capacity of parens patriae, in exercise of its sovereign power and in discharge of its constitutional obligations

Constitution of India — Article 21 — CPC as a standard of procedural fairness for new procedure in particular statute

Administrative Law — Natural justice — Denial of by legislative action — Held, principles of natural justice not attracted to an Act of Parliament which is within legislative competence

It was contended that so far as the Act takes away the right of the victims to fight or establish their own rights, it is a denial of access to justice and that such denial is so great a deprivation of both human dignity and right to equality that it cannot be justified because it would be affecting right to life, which again cannot be deprived without a procedure established by law which is just, fair and reasonable. It was submitted that the Act, so far as it deals with the claims of the victims, should be read in conformity with Civil Procedure Code and/or with the principles of natural justice; and unless the provisions of the Act are so read it would be violative of Articles 14 and 21 of the Constitution in the sense that there will be deprivation of rights to life and liberty without following a procedure which is just, fair and reasonable.

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Held:

Per Mukharji, C.J. and Saikia, J. (K.N. Singh, J. concurring)

The Constitution mandates compliance with the principles of natural justice otherwise the Act and the actions would be violative of Article 14 and would also be destructive of Article 19(1)(g) and negate Article 21 by denying a procedure which is just, fair and reasonable. (Para 109)

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248: (1978) 2 SCR 621; *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545: 1985 Supp 2 SCR 51; *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 Supp 2 SCR 131: 1985 SCC (L&S) 672; *Swadeshi Cotton Mills* v. *Union of India*, (1981) 1 SCC 664: (1981) 2 SCR 533: (1981) 51 Com Cas 210, *relied on*

Ganga Bai v. *Vijay Kumar*, (1974) 2 SCC 393: (1974) 3 SCR 882; *S.L. Kapoor* v. *Jagmohan*, (1980) 4 SCC 379: (1981) 1 SCR 746; *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1: 10 ELR 293, *referred to*

T.A. Balakrishna Udayar v. *Vasudeva Ayyar*, AIR 1917 PC 71: ILR 40 Mad 793; *T.B. Barot* v. *African Products Ltd.*, AIR 1928 PC 261: 29 MLW 72; *Hari Vishnu Kamath* v. *Ahmed Syed Ishaque*, AIR 1955 SC 233; *Venkatasubbiah* v. *D. Lakshminarasimham*, AIR 1925 Mad 1274: 49 MLJ 273, *cited*

The Act is a special legislation providing a special procedure for a kind of special class of victims. Sections 3 and 4 give to the Central Government an exclusive right to act in place of the persons who are entitled to make claim or have already made claim. The expression 'exclusive' is explicit and significant. When the expression is explicit, it is conclusive, alike in what it says and in what it does not say. The said expression must be given its full meaning and extent. This is corroborated by the use of the expression 'claim' for all purposes. In view of the enormity of the disaster the claimant victims, as they were placed against the multinational and a big Indian corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. If duality of rights are given to the Central Government along with the victims in instituting or proceeding for the realisation or the enforcement of the claims arising out of Bhopal gas leak disaster, then that would be so cumbersome that it would not be speedy, effective or equitable and would not be the best or more advantageous procedure for securing the claims arising out of the leakage. There indubitably is differentiation. But this differentiation is based on a principle which has rational nexus with the aim intended to be achieved by this differentiation. There were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorised by the Constitution, Article 14 is not breached. (Paras 97 and 98)

The Act does not create new causes of action or create special courts. The jurisdiction of the civil court to entertain suit would still arise out of Section 9 of the CPC and the substantive cause of action and the nature of the reliefs available would also continue to remain unchanged. The only difference produced by the provisions of the Act would be that instead of the suit being filed by the victims themselves the suit would be filed by the Central Government on their behalf. (Para 57)

The suit filed by the Government would be a representative suit in terms of and for the purpose of Rule 3-B of Order XXIII of the Code. If the principles

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of this rule are the principles of natural justice then, that the principles behind it would be applicable; and also that Section 4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome". (Para 116)

Civil Procedure Code guides civil proceedings in this country and has been recognised and accepted as being in consonance with the fairness of the proceedings and in conformity with the principles of natural justice. However there is no question of the Central Government acting as a court under the Act in respect of the claims which it should enforce for or on behalf or instead of the victims of the Bhopal gas leak disaster. (Para 106)

R. Viswanathan v. *Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1: (1963) 3 SCR 22; *M. Narayanan Nambiar* v. *State of Kerala*, AIR 1963 SC 1116: 1963 Supp 2 SCR 724: (1963) 2 Cri LJ 186: (1963) 2 LLJ 660; *Chintaharan Ghose* v. *Gujaraddi Sheik*, AIR 1951 Cal 456; *Ram Sarup* v. *Nanak Ram*, AIR 1952 All 275: 1951 AWR 155, *referred to*

The State has taken over the rights and claims of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed needed the umbrella of protection. Thus, the State has the power and jurisdiction and for this purpose unless the Act is otherwise unreasonable or violative of the constitutional provisions, no question of giving a hearing to the parties for taking over these rights by the State arises. For legislation by the Parliament, no principle of natural justice is attracted provided such legislation is within the competence of the legislature, which indeed the present Act is within the competence of the Parliament. Section 3 makes the Central Government the *dominus litis*. (Para 106)

Basheshar Nath v. *CIT*, AIR 1959 SC 149: 1959 Supp 1 SCR 528: (1959) 35 ITR 190; *Special Courts Bill, 1978, In re*, (1979) 1 SCC 380: (1979) 2 SCR 476; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602: 1988 SCC (Cri) 372; *Ram Krishna Dalmia* v. *S.R. Tendulkar*, AIR 1958 SC 538: 1959 SCR 279: 61 Bom LR 192; *Ambika Prasad Mishra* v. *State of U.P.*, (1980) 3 SCC 719: (1980) 3 SCR 1159; *Budhan Choudhary* v. *State of Bihar*, AIR 1955 SC 191: (1955) 1 SCR 1045: 1955 Cri LJ 374, *referred to*

The restrictions or limitations on the substantive and procedural rights in the impugned legislation will have to be judged from the point of view of the particular statute in question. No abstract rule or standard of reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed in this case, the extent and urgency of the evil sought to be remedied, disproportionate imposition, prevailing conditions at the time. Having considered the background, the plight of the impoverished, the urgency of the victims' need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in mass action, the strength for the foreign multinationals, the nature of injuries and damages, and the limited but significant right of participation of the victims as contemplated by Section 4 of the Act, the Act cannot be condemned as unreasonable.

(Para 99)

State of Madras v. *V.G. Row*, AIR 1952 SC 196: 1952 SCR 597, *relied on*

Per Ranganathan and Ahmadi, JJ.

The Act has to be considered having regard to the unique situation in which the victims, in order to realise to the best advantage their rights against UCC, had to be helped out by transposing that right to be enforced by the government. The Act is not draconian in its content. Strictly speaking, under Section 3 the Central Government can totally exclude the victim himself or his

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legal practitioner from taking part in the proceedings (except in pending suits outside India), Section 4 keeps the substance of the rights of the victims intact. It enables, and indeed obliges, the government to receive assistance from individual claimants to the extent they are able to offer the same. If any of the victims or their legal advisers have any specific aspect which they would like to urge, the Central Government shall take it into account. Again if any individual claimant at his own expense retains a legal practitioner of his own choice, such legal practitioner will have to be associated with the government in the conduct of any suit or proceeding relating to his claim. Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as well as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims or their legal advisers as are in a position to offer any such assistance. Though Section 3 denies the claimants the benefit of being *eo nomine* parties in such suits or proceedings, Section 4 preserves to them substantially all that they can achieve by proceeding on their own. In other words, while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Sections 3 and 4 would therefore, show that there has been no real total deprivation of the right of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground. (Paras 146 to 150)

Section 4 of the Act adequately safeguards the interests of individual victims. It enables each one of them to bring to the notice of the Union of India any special features or circumstances which he would like to urge in respect of any matter and if any such features are brought to its notice the Union is obliged to take it into account. Again, the individual claimants are also at liberty to engage their own counsel to associate with the State counsel in conducting the proceedings. If the suits in this case had proceeded, in the normal course, either to the stage of a decree or even to one of settlement the claimants could have kept themselves abreast of the developments and the statutory provisions would have been more than adequate to ensure that the points of view of all the victims are presented to the court. Even a settlement or compromise could not have been arrived at without the court being apprised of the views of any of them who chose to do so. Advisedly, the statute has provided that though the Union of India will be the *dominus litis* in the suit, the interests of all the victims and their claims should be safeguarded by giving them a voice in the proceedings to the extent indicated above. This provision of the statute is an adaptation of the principle of Order I Rule 8 and of Order XXIII Rule 3-B of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially speaking, it does incorporate the principles of natural justice to the extent possible in the circumstances. The statute cannot, therefore, be faulted, on the ground that it denies the victims an opportunity to present their views or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise. (Para 160)

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Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Settlement of claims before court — Prior notice should be given to victims — Mode of giving notice — Public notice may be given — Held, notice not given — Consequences of not giving notice — Post decisional hearing not snfficient in the circumstances — But the victims having opportunity to present their views in review before Supreme Court, on peculiar facts and circumstances held, direction to give post decisional notice at this stage not necessary — Administrative Law — Natural justice — Notice — Civil Procedure Code, 1908, Order 23 Rule 3-B

Administrative Law — Natural justice —/Pre-decisional notice — Not given — Effect — But review petition pending before Supreme Court where opportunity of hearing available — Thus justice done but not appeared to have been done — But in certain circumstances to do justice to a great right it is permissible to do a little wrong

Administrative Law — Natural justice — Principles of, inherent in Constitution — Must be complied with in a particular manner having regard to particular fact situation — Constitution of India, Article 14

Held:

Per Mukharji, C.J. and Saikia, J.

Section 4 means and entails that before entering into any settlement affecting the rights and claims of the victims some kind of notice or information should be given to the victims. It enjoins the Central Government only to have "due regard to any matters which such person may require to be urged". So, the obligation is on the Central Government in the situation contemplated by Section 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 Government 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 aspect of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities must be given to the victims. Individual notices may not be necessary, The court should in such a situation formulate modalities of giving notice. In mass disaster actions of the present type or mass calamity actions affecting large number of people, public notices have been given in different forms and it may be possible to invite the views of the victims within a stipulated period by announcement in the mass media such as press, radio, and TV etc. intimating the victims that a certain settlement is proposed or contemplated. And having regard to the views, the Central Government may proceed with the settlement of the action. Consent of all is not a precondition. (Paras 117, 118 and 120)

It is not required by the principles of natural justice that all other particulars for the basis of the proposed settlement should be disclosed in a suit of this nature before the final decision. Whatever data was already there have been disclosed; that would have been sufficient for the victims to be able to give their views, if they want to. Further disclosure in this case before finality might jeopardise future action, if any, necessary so consistent with the justice of the case. (Para 123)

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In the present case the victims had no notice of the nature contemplated under the Act upon the underlying principle of Order XXIII Rule 3-B, CPC. It is not enough to say that the victims must keep vigil and watch the proceeding. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the court cannot presume that the victims were a lot, capable and informed to be able to have comprehended or contemplated the settlement. (Para 119)

However, one of the important requirements of justice is that people affected by an action or inaction should have opportunity to have their say. That opportunity the victims have got when these applications were heard and they were heard after utmost publicity and they would have further opportunity when review application against the settlement would be heard. (Para 121)

Principles of natural justice are integrally embedded in our constitutional framework and their pristine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situations or cases. The Supreme Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time, these must be applied in a particular manner in particular cases having regard to the particular circumstances. (Para 128)

Principles of natural justice are fundamental in the constitutional set up of this country. No man or no man's right should be affected without an opportunity to ventilate his views. Justice is a psychological yearning, in which men seek acceptance of their viewpoint by having an opportunity of vindication of their viewpoint before the forum or the authority enjoined or obliged to take a decision affecting their right. Yet, in the particular situations, one has to bear in mind how an infraction of that should be sought to be removed in accordance with justice. (Para 124)

Though on the materials available, the victims would have had to express their views, 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. Therefore, though settlement without notice is not quite proper, on the materials so far available, justice has been done to the victims but justice has not appeared to have been done. But in view of the magnitude of the misery involved and the problems in this case, in the facts and the circumstances of this case keeping the settlement in abeyance and giving notice to the victims for a post-decisional hearing would not be in the ultimate interest of justice. Sufficient opportunity being 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. "To 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 rare occasions. Though entering into a settlement without the required notice is wrong, in the facts and the circumstances of this case, 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 Supreme Court. (Para 124)

Per Ranganathan and Ahmadi, JJ. (concurring)

Though prima facie 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 practical complications that may arise as the result

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of such an order, it is not necessary to express any final opinion on the validity of the settlement. It is proper to leave it open to be agitated, to the extent permissible in law, in the review petition pending before the Supreme Court. (Para 164)

Moreover claims have already been filed and these are being scrutinised and processed. A correct picture as to whether the amount of compensation for which the claims have been settled is meagre, adequate or excessive will emerge only at that stage when all the claims have been processed and their aggregate is determined. In these circumstances, no useful purpose will be served by a post-decisional hearing on the quantum of compensation to be considered adequate for settlement. (Para 165)

For these reasons, it would seem more correct and proper not to disturb the orders of February 14/15, 1989 [(1989) 1 SCC 674] on the ground that the rules of natural justice have not been complied with, particularly in view of the pendency of the review petition. (Para 166)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Sections 3 and 4 — Settlement of claims — Grant of interim relief to the victims is inherent in the Act and the Scheme framed thereunder — To read the Act otherwise would expose it to unconstitutionality — Tort Law

Interpretation of Statutes — Constructive intuition approach — Act should be read purposefully and meaningfully having regard to the spirit of the Act and mischief intended to be cured

Held:

Per Mukharji, C.J. and Saikia, J. (K.N. Singh, J. concurring)

The Act should be construed as creating an obligation on the Central Government to pay interim relief as the Act deprives the victims of normal and immediate right of obtaining compensation from the Union Carbide. Had the Act not been enacted, the victims could have and perhaps would have been entitled not only to sue the Union Carbide themselves, but also to enter into settlement or compromise of some sort with them. The provisions of the Act deprived the victims of that legal right and opportunity, and that deprivation is substantial deprivation because upon immediate relief depends often the survival of these victims. In that background, it is just and proper that this deprivation is only to be justified if the Act is read with the obligation of granting interim relief or maintenance by the Central Government until the full amount of the dues of the victims is realised from the Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. It is true that there is no actual expression used in the Act itself which expressly postulates or indicates such a duty or obligation under the Act. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. This is the true basis and will be in consonance with the spirit of the Act. Only if it is so read, it can be held to be constitutionally valid making it meaningful and purposeful. The Act must, therefore, be so read.

This approach to the interpretation of the Act can legitimately be called the 'constructive intuition' which is a permissible mode of viewing the Acts of Parliament. The freedom to search for 'the spirit of the Act' or the quantity of the mischief at which it is aimed (both synonymous for the intention of the Parliament) opens up the possibility of liberal interpretation "that delicate and

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important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the Parliament and fulfil the object of the Act. (Para 101)

Per Ranganathan and Ahmadi, JJ. (partly dissenting)

The provisions of the Act and Scheme thereunder envisage interim payments to the victims. Though grant of interim relief to ameliorate the plight of its subjects in such a situation is a matter of imperative obligation on the part of the State and not merely 'a matter of fundamental human decency', but such obligation flows from its character as a welfare State and would exist irrespective of what the statute may or may not provide. The view that the Act would be unconstitutional unless this is read as "a major inarticulate premise" underlying the Act is doubtful. This is for two reasons. In the first place, it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed, the main point on which the interim orders in this case were challenged before the Supreme Court and, in the context of the events that took place, remains undecided. It may be mentioned here that no decided case was brought to the Court's notice in which interim payment was ordered pending disposal of an action in tort in this country. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation — which it did — and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. Since the Act and the Scheme thereunder envisage interim relief to the victims, the point is perhaps only academic. (Para 158)

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 — Section 2(c) and (e) — Central Government is a 'claimant' (Para 104)

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(1) That UCC shall consent to the jurisdiction of the courts of India and shall continue to waive defenses based on the statute of limitation;

(2) That UCC shall agree to satisfy any judgment rendered by an Indian court against it and if applicable, upheld on appeal, provided the judgment and affirmance "comport with minimal requirements of due process"; and

(3) That UCC shall be subject to discovery under the Federal Rules of Civil Procedure of the U.S. after appropriate demand by the plaintiffs.

9. On September 5, 1986 the Union of India filed a suit for damages in the District Court of Bhopal, being Regular Suit No. 1113 of 1986. It is this suit, inter alia, and the orders passed therein which were settled by the orders of this Court dated February 14 and 15, 1989[1], which will be referred to later. On November 17, 1986 upon the application of the Union of India, the District Court Bhopal, granted a temporary injunction restraining the UCC from selling assets, paying dividends or buying back debts. On November 27, 1986 the UCC gave an undertaking to preserve and maintain unencumbered assets to the extent of 3 billion U.S. dollars.

10. On November 30, 1986 the District Court Bhopal lifted the injunction against the Carbide selling assets on the strength of the written undertaking by UCC to maintain unencumbered assets of 3 billion U.S. dollars. On December 16, 1986 UCC filed a written statement contending that they were not liable on the ground that they had nothing to do with the Indian Company; and that they were a different legal entity; and that they never exercised any control and that they were not liable in the suit. Thereafter, on January 14, 1987 the Court of Appeal for the Second Circuit affirmed the decision of Judge Keenan but deleted the condition regarding the discovery under the American procedure granted in favour of the Union of India. It also suo motu set aside the condition that on the judgment of the Indian court complying with due process the decree issued should be satisfied by UCC. It ruled that such a condition cannot be imposed as the situation was covered by the provisions of the Recognition of Foreign Country Money Judgments Act.

11. On April 2, 1987, the court made a written proposal to all parties for considering reconciliatory interim relief to the gas victims. In September 1987, UCC and the Government of India sought time from the Court of District Judge, Bhopal, to explore avenues for settlement. It has been asserted by the learned Attorney General that the possibility of settlement was there long before the full and final settlement was effected. He sought to draw our attention to the assertion that the persons concerned were aware that efforts were being made from time to time for settlement. However, in November 1987 both the Indian Government and the

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The Judgments of the Court were delivered by

SABYASACHI MUKHARJI, C.J. (for himself and Saikia, J.)—Is the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (hereinafter referred to as 'the Act'†) constitutionally valid? That is the question.

2. The Act was passed as a sequel to a grim tragedy. On the night of December 2, 1984 occurred the most tragic industrial disaster in recorded human history in the city of Bhopal in the State of Madhya Pradesh in India. On that night there was massive escape of lethal gas from the MIC storage tank at Bhopal Plant of the Union Carbide (I) Ltd. (hereinafter referred to as 'UCIL') resulting in large scale death and untold disaster. A chemical plant owned and operated by UCIL was situated in the northern sector of the city of Bhopal. There were numerous hutments adjacent to it on its southern side, which were occupied by impoverished squatters. UCIL manufactured the pesticides, Sevin and Temik, at the Bhopal plant, at the request of, it is stated by Judge John F. Keenan of the United States District Court in his judgment, and indubitably with the approval of, the Government of India. UCIL was incorporated in 1984 under the appropriate Indian law. 50.99 per cent of its shareholdings were owned by the Union Carbide Corporation (UCC), a New York Corporation. LIC and the Unit Trust of India own 22 per cent of the shares of UCIL, a subsidiary of UCC.

3. Methyl Isocyanate (MIC), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities. The exact reasons for the circumstances of such leakage have not yet been ascertained or clearly established. The results of the disaster were horrendous. Though no one is yet certain as to how many actually died as the immediate and direct result of the leakage, estimates attribute it to about 3000. Some suffered injuries the effects of which are described as carcinogenic and ontogenic by Ms Indira Jaising, learned counsel; some suffered injuries serious and permanent and some mild and temporary. Livestock was killed, damaged and infected. Businesses were interrupted. Environment was polluted and the ecology affected, flora and fauna disturbed.

4. On December 7, 1984, Chairman of UCC Mr Warren Anderson came to Bhopal and was arrested. He was later released on bail. Between December 1984 and January 1985 suits were filed by several American lawyers in the courts in America on behalf of several victims. It has been stated that within a week after the disaster, many American lawyers, described by some as 'ambulance chasers', whose fees were stated to be based on a percentage of the contingency of obtaining damages or not, flew over to Bhopal and obtained powers of attorney to bring actions against UCC and UCIL. Some suits were also filed before the District Court of Bhopal by individual claimants against UCC (the American Company) and the UCIL.

† Ed.: Also referred to as 'the Bhopal Act'.

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5. On or about February 6, 1985, all the suits in various U.S. District Courts were consolidated by the Judicial Panel on Multi-District Litigation and assigned to U.S. District Court, Southern District of New York. Judge Keenan was at all material times the presiding judge there.

6. On March 29, 1985, the Act in question was passed. The Act was passed to secure that the claims arising out of or connected with the Bhopal gas leak disaster were dealt with speedily, effectively and equitably. On April 8, 1985 by virtue of the Act the Union of India filed a compliant before the U.S. District Court, Southern District of New York. On April 16, 1985 at the first pre-trial conference in the consolidated action transferred and assigned to the U.S. District Court, Sourthern District, New York, Judge Keenan gave the following directions:

(*i*) that a three member Executive Committee be formed to frame and develop issues in the case and prepare expeditiously for trial or settlement negotiations. The Committee was to comprise of one lawyer selected by the firm retained by the Union of India and two other lawyers chosen by lawyers retained by the individual plaintiffs;

(*ii*) that as a matter of fundamental human decency, temporary relief was necessary for the victims and should be furnished in a systematic and coordinated fashion without unnecessary delay regardless of the posture of the litigation then pending.

7. On September 24, 1985 in exercise of powers conferred by Section 9 of the Act, the Government of India framed the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (hereinafter called 'the Scheme').

8. On May 12, 1986 an order was passed by Judge Keenan allowing the application of UCC on *forum non conveniens* as indicated hereinafter. On May 21, 1986 there was a motion for fairness hearing on behalf of the private plaintiffs. On June 26, 1986 individual plaintiffs filed appeal before the U.S. Court of Appeal for the Second Circuit challenging the order of Judge Keenan. By an order dated May 28, 1986 Judge Keenan declined the motion for a fairness hearing. The request for fairness hearing was rejected at the instance of Union of India in view of the meagreness of the amount of proposed settlement. On July 10, 1986 UCC filed an appeal before the U.S. Court of Appeal for the Second Circuit. It challenged Union of India being entitled to American mode of discovery, but did not challenge the other two conditions imposed by Judge Keenan, it is stated. On July 28, 1986 the Union of India filed cross-appeal before the U.S. Court of Appeal praying that none of the conditions imposed by Judge Keenan should be disturbed. In this connection it would be pertinent to set out the conditions incorporated in the order of Judge Keenan, dated May 12, 1986 whereby he had dismissed the case before him on the ground of *forum non conveniens*, as mentioned before. The conditions were the following:

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Union Carbide announced that settlement talks had failed and Judge Deo extended the time.

12. The District Judge of Bhopal on December 17, 1987 ordered interim relief amounting to Rs 350 crores. Being aggrieved thereby the UCC filed a civil revision which was registered as Civil Revision Petition No. 26 of 1988 and the same was heard. On or about February 4, 1988, the Chief Judicial Magistrate of Bhopal ordered notice for warrant on Union Carbide, Hong Kong for the criminal case filed by CBI against Union Carbide. The charge-sheet there was under Sections 304, 324, 326, 429 of the Indian Penal Code read with Section 35 IPC and the charge was against M/s Warren Anderson, Keshub Mahindra, Vijay Gokhale, J. Mukund, Dr R.B. Roy Chowdhary, S.P. Chowdhary, K.V. Shetty, S.I. Qureshi and Union Carbide of USA, Union Carbide of Hong Kong and Union Carbide having Calcutta address. It charged the Union Carbide by saying that MIC gas was stored and it was further stated that MIC had to be stored and handled in stainless steel which was not done. The charge-sheet, inter alia, stated that a Scientific Team headed by Dr Varadarajan had concluded that the factors which had led to the toxic gas leakage causing its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. It was further stated in the charge-sheet that the needless storage of large quantities of the material in very large size containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident. It also charged that MIC was stored in a negligent manner and the local administration was not informed, inter alia, of the dangerous effect of the exposure of MIC or the gases produced by its reaction and the medical steps to be taken immediately. It was further stated that apart from the design defects the UCC did not take any adequate remedial action to prevent back flow of solution from VGS into RVVH and PVH lines. There were various other acts of criminal negligence alleged. The High Court passed an order staying the operation of the order dated December 17, 1987 directing the defendant-applicant to deposit Rs 350 crores within two months from the date of the said order. On April 4, 1988 the judgment and order were passed by the High Court modifying the order of the District Judge, and granting interim relief of Rs 250 crores. The High Court held that under the substantive law of torts, the court has jurisdiction to grant interim relief under Section 9 of the CPC. On June 30, 1988 Judge Deo passed an order restraining the Union Carbide from settling with any individual gas leak plaintiffs. On September 6, 1988 special leave was granted by this Court in the petition filed by UCC against the grant of interim relief and Union of India was also granted special leave in the

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petition challenging the reduction of quantum of compensation from Rs 350 crores to Rs 250 crores. Thereafter, these matters were heard in November-December 1988 by the bench presided over by the then learned Chief Justice of India‡ and hearing continued also in January-February 1989 and ultimately on February 14-15, 1989 the order culminating in the settlement was passed††.

13. In judging the constitutional validity of the Act, the subsequent events, namely, how the Act has worked itself out, have to be looked into. It is, therefore, necessary to refer to the two orders of this Court. The proof of the cake is in its eating, it is said, and it is perhaps not possible to ignore the terms of the settlement reached on February 14 and 15, 1989 in considering the effect of the language used in the Act. Is that valid or proper — or has the Act been worked in any improper way? These questions do arise.

14. On February 14, 1989 an order was passed in C.A. Nos. 3187-88 of 1988 with SLP (C) No. 13080 of 1988.†† The parties thereto were UCC and the Union of India as well as Jana Swasthya Kendra, Bhopal, Zehreeli Gas Kand Sangharsh Morcha, Bhopal, Madhya Pradesh. That order recited that having considered all the facts and the circumstances of the case placed before the court, the material relating to the proceedings in the courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, the court found that the case was pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities relating to and arising out of the disaster and it was found just, equitable and reasonable to pass, inter alia, the following orders: (SCC p. 675, para 1)

"(1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 million (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 Bhopal gas disaster.

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

(3) To enable the effectuation of the settlement, 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 settlement, and all criminal proceedings related to an arising out of the disaster shall stand quashed wherever these may be pending."

‡ Pathak, C.J.
†† (1989) 1 SCC 674

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15. A written memorandum was filed thereafter and the court on February 15, 1989 passed an order after giving due consideration thereto. The terms of settlement were as follows: (SCC p. 677)

> "1. The parties acknowledge that the order dated February 14, 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 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 to or connected with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceedings 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 of Claims) Scheme, 1985, and all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.
>
> 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."

16. It appears from the statement of objects and reasons of the Act that Parliament recognized that the gas leak disaster involving the release, on December 2 and 3, 1984 of highly noxious and abnormally dangerous gas from a plant of UCIL, a subsidiary of UCC, was of an unprecedented nature, which resulted in loss of life and damage to property on an extensive scale, as mentioned before. It was stated that the victims who had managed to survive were still suffering from the adverse effects and the further complications which might arise in their cases, of course, could not be fully visualised. It was asserted by Ms Indira Jaising that in case of some of the victims the injuries were carcinogenic and ontogenic and these might lead to further genetic complications and damages. The Central Government and the Government of Madhya Pradesh and various agencies had to incur expenditure on a large scale for containing the disaster and mitigating or otherwise coping with the effects thereto. Accordingly, the Bhopal Gas Leak Disaster (Processing

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of Claims) Ordinance, 1985 was promulgated, which provided for the appointment of a Commissioner for the welfare of the victims of the disaster and for the formulation of the Scheme to provide for various matters necessary for processing of the claims and for the utilisation by way of disbursal or otherwise of amounts received in satisfaction of the claims.

17. Thereafter, the Act was passed which received the assent of the President on March 29, 1985. Section 2(*b*) of the Act defines 'claim'. It says that "claim" means — (*i*) a claim, arising out of, or connected with, the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered; (*ii*) a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be, sustained; (*iii*) a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster; (*iv*) any other claim (including any claim by way of loss of business of employment) arising out of, or connected with, the disaster. A "claimant" is defined as a person entitled to make a claim. It has been provided in the Explanation to Section 2 that for the purpose of clauses (*b*) and (*c*), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

18. Section 3 is headed *"Power of Central Government to represent claimants"*. It provides as follows:

> "3. (1) Subject to the other provisions of this Act, the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such persons.
>
> (2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include—
>
> (*a*) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and (*b*) entering into a compromise.
>
> (3) The provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceedings have been instituted in or before any court or other authority (whether within or outside India) before the commencement of this Act:
>
> Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the com-

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mencement of this Act in or before any court or other authority outside India, the Central Government shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits."

19. Section 4 of the Act is headed as "*Claimant's right to be represented by a legal practitioner*". It provides as follows:

"Notwithstanding anything contained in Section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

20. Section 5 deals with the powers of the Central Government and enjoins that for the purpose of discharging its functions under this Act, the Central Government shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908. Section 6 provides for the appointment of a Commissioner and other officers and employees. Section 7 deals with powers to delegate. Section 8 deals with limitation, while Section 9 deals with the power to frame a Scheme. The Central Government was enjoined to frame a scheme which was to take into account, inter alia, the processing of the claims for securing their enforcement, creation of a fund for meeting expenses in connection with the administration of the scheme and of the provisions of this Act and the amounts which the Central Government might, after due appropriation made by Parliament by law in that behalf, credit to the fund referred to in clauses above and any other amounts which might be credited to such fund. Such scheme was enjoined, as soon as may be after it had been framed, to be laid before each House of Parliament. Section 10 deals with removal of doubts. Section 11 deals with the overriding effect and provides that the provisions of the Act and of any scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act of any instrument having effect by virtue of any enactment other than the Act.

21. A scheme has been framed and was published on September 24, 1985. Clause 3 of the said scheme provides that the Deputy Commissioners appointed under Section 6 of the Act shall be the authorities for registration of claims (including the receipt, scrutiny and proper categorisation of such claims under paragraph 5 of the Scheme) arising within the areas of their respective jurisdiction and they shall be assisted by such other officers as may be appointed by the Central Government under Section 6 of the Act for scrutiny and verification of the claims and other related matters. The Scheme also provides for the manner of filing claims. It enjoins that the Deputy Commissioner shall provide the required forms for filing the applications. It also provides for categorisa-

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tion and registration of claims. Sub-clause (2) of clause 5 enjoins that the claims received for registration shall be placed under different heads.

22. Sub-clause (3) of clause 5 enjoins that on the consideration of claims made under paragraph 4 of the Scheme, if the Deputy Commissioner is of the opinion that the claims fall in any category different from the category 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. Sub-clause (5) of clause 5 enjoins that if the claimant is not satisfied with the order of the Deputy Commissioner, he may prefer an appeal against such order to the Commissioner, who shall decide the same.

23. Clause 9 of the Scheme provides for processing of Claims Account Fund, which the Central Government may, after due appropriation made by Parliament, credit to the said Fund. It provides that there shall also be a Claims and Relief Fund, which will include the amounts received in satisfaction of the claims and any other amounts made available to the Commissioner as donation or for relief purposes. Sub-clause (3) of clause 10 provides that the amount in the said Fund shall be applied by the Commissioner for, disbursal of amounts in settlement of claims, or as relief, or apportionment of part of the Fund for disbursal of amounts in settlement of claims arising in future or for disbursal of amounts to the Government of Madhya Pradesh for the social and economic rehabilitation of the persons affected by the Bhopal gas leak disaster.

24. Clause 11 of the Scheme deals with the disbursal, apportionment of certain amounts, and sub-clause (2) thereof enjoins that the Central Government may determine the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable, in general, in relation to each type of injury or loss. Sub-clause (5) thereto provides that in case of a dispute as to disbursal of the amounts received in satisfaction of claims, an appeal shall lie against the order of the Deputy Commissioner to the Additional Commissioner, who may decide the matter and make such disbursal as he may, for reasons to be recorded in writing, think fit. The other clauses are not relevant for our present purposes.

25. Counsel for different parties in all these matters have canvassed their submissions before us for the gas victims. Mr R.K. Garg, Ms Indira Jaising and Mr Kailash Vasudev have made various submissions challenging the validity of the Act on various grounds. They all have submitted that the Act should be read in the way they suggested and as a whole. Mr Shanti Bhushan, appearing for interveners on behalf of Bhopal Gas Peedit Mahila Udyog Sangathan and following him Mr Prashant Bhushan have urged that the Act should be read in the manner canvassed by them and if the same is not so read then the same would be

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violative of the fundamental rights of the victims, and as such unconstitutional. The learned Attorney General assisted by Mr Gopal Subramanium has on the other hand urged that the Act is valid and constitutional and that the settlement arrived at on February 14-15 is proper and valid.

26. In order to appreciate the background Ms Indira Jaising placed before us the proceedings of the Lok Sabha wherein Mr Virendra Patil, the Hon'ble Minister, stated on March 27, 1985 that the tragedy that had occurred in Bhopal on December 2 and 3, 1984 was unique and unprecedented in character and magnitude not only for our country but for the entire world. It was stated that one of the options available was to settle the case in Indian courts. The second one was to file the cases in American courts. Mr Patil reiterated that the Government wanted to proceed against the parent company and also to appoint a Commission of Inquiry.

27. Mr Garg in support of the proposition that the Act was unconstitutional, submitted that the Act must be examined on the touchstone of the fundamental rights on the basis of the test laid down by this Court in *State of Madras* v. *V.G. Row*[2]. There at page 607 of the report this Court has reiterated that in considering the reasonableness of the law imposing restrictions on the fundamental rights, both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness. And the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. *The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.* (emphasis supplied) Chief Justice Patanjali Sastri reiterated that in evaluating such elusive factors and forming their own conception of what is reasonable, in the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision would play an important role.

28. Hence, whether by Sections 3, 4 and 11 the rights of the victims and the citizens to fight for their own causes and to assert their own grievances have been taken away validly and properly, must be judged in the light of the prevailing conditions at the time, the nature of the right of the citizen, the purpose of the restrictions on their rights to sue for enforcement in the courts of law or for punishment for offences against his person or property, the urgency and extent of the evils sought to be remedied by the Act, and the proportion of the impairment of the rights of the citizen with reference to the intended remedy prescribed. According to Mr Garg, the present position calls for a comprehensive appreciа-

2 1952 SCR 597: AIR 1952 SC 196

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tion of the national and international background in which precious rights to life and liberty were enshrined as fundamental rights and remedy for them was also guaranteed under Article 32 of the Constitution. He sought to urge that multinational corporations have assumed powers or potencies to override the political and economic independence of the sovereign nations which have been used to take away in the last four decades, much wealth out of the Third World. Now these are plundered much more than what was done to the erstwhile colonies by imperialist nations in the last three centuries of foreign rule. The role of courts in cases of conflict between rights of citizens and the vast economic powers claimed by multinational corporations to deny moral and legal liabilities for their corporate criminal activities should not be lost sight of. He, in this background, urged that these considerations assume immense importance to shape human rights jurisprudence under the Constitution, and for the Third World to regulate and control the power and economic interests of multinational corporations and the power of exploitation and domination by developed nations without submitting to due observance of the laws of the developing countries. It therefore appears that the production of, or carrying on trade in dangerous chemicals by multinational industries on the soil of Third World countries calls for strictest enforcement of constitutional guarantees for enjoying human rights in free India, urged Mr Garg. In this connection, our attention was drawn to the Charter of Universal Declaration of Human Rights. Article 1 of the Universal Declaration of Human Rights, 1948 reiterates that all human beings are born free and equal in dignity and rights. Article 3 states that everyone has right to life, liberty and security of person. Article 6 of the Declaration states that everyone has the right to recognition everywhere as a person before the law. Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration of Human Rights and against any incitement to such discrimination. Article 8 states that everyone has the right to an effective remedy by competent national Tribunal for acts violating fundamental rights guaranteed to him by the Constitution or by the law. It is, therefore, necessary to bear in mind that Indian citizens have a right to live which cannot be taken away by the Union of India or the Government of a State, except by a procedure which is just, fair and reasonable. The right to life includes the right to protection of limb against mutilation and physical injuries, and does not mean merely the right to breathe but also includes the right to livelihood. It was urged that this right is available in all its dimensions till the last breath against all injuries to head, heart and mind or the lungs affecting the citizen or his next generation or of genetic disorders. The enforcement of the right to life or limb calls for adequate and appropriate reliefs enforceable in courts of law and of equity with sufficient power to offer adequate deterrence in all cases of corpo-

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rate criminal liability under strict liability, absolute liability, punitive liability and criminal prosecution and punishment to the delinquents. The damages awarded in civil jurisdiction must be commensurate to meet well defined demands of evolved human rights jurisprudence in modern world. It was, therefore, submitted that punishment in criminal jurisdiction for serious offences is independent of the claims enforced in civil jurisdiction and no immunity against it can be granted as part of settlement in any civil suit. If any Act authorises or permits doing of the same, the same will be unwarranted by law and as such bad. The Constitution of India does not permit the same.

29. Our attention was drawn to Article 21 of the Constitution and the principles of international law. Right to equality is guaranteed to every person under Article 14 in all matters like the laws of procedure for enforcement of any legal or constitutional right in every jurisdiction, substantive law defining the rights expressly or by necessary implication, denial of any of these rights to any class of citizens in either field must have nexus with constitutionally permissible object and can never be arbitrary. Arbitrariness is, therefore, antithetical to the right of equality. In this connection, reliance was placed on the observations of this Court in *E.P. Royappa* v. *State of Tamil Nadu*[3], *Maneka Gandhi* v. *Union of India*[4] where it was held that the view that Articles 19 and 21 constitute watertight compartments has been rightly overruled. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at any point of time. They are all parts of an integrated scheme in the Constitution and must be preserved and cannot be destroyed arbitrarily. Reliance was placed on the observations in *R.D. Shetty* v. *International Airport Authority of India*[5]. Hence, the rights of the citizens to fight for remedies and enforce their rights flowing from the breach of obligation in respect of crime cannot be obliterated. The Act and Sections 3, 4 and 11 of the Act insofar as these purport to do so and have so operated, are violative of Articles 14, 19(1)(*g*) and 21 of the Constitution. The procedure envisaged by the said sections deprives the just and legitimate rights of the victims to assert and obtain their just dues. The rights cannot be so destroyed. It was contended that under the law the victims had right to ventilate their rights.

30. It was further contended that Union of India was a joint tort-feasor along with UCC and UCIL. It had negligently permitted the establishment of such a factory without proper safeguards exposing the victims and citizens to great danger. Such a person or authority cannot be entrusted to represent the victims by denying the victims their rights to plead their own cases. It was submitted that the object of the Act was to

3 (1974) 4 SCC 3: 1974 SCC (L&S) 165: (1974) 2 SCR 348
4 (1978) 1 SCC 248: (1978) 2 SCR 621
5 (1979) 3 SCC 489: (1979) 3 SCR 1014

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fully protect people against the disaster of highly obnoxious gas and disaster of unprecedented nature. Such an object cannot be achieved without enforcement of the criminal liability by criminal prosecution. Entering into settlement without reference to the victims was, therefore, bad and unconstitutional, it was urged. If an Act, it was submitted, permits such a settlement or deprivation of the rights of the victims, then the same is bad.

31. Before we deal with the various other contentions raised in this case, it is necessary to deal with the application for intervention and submission made on behalf of the Coal India in Writ Petition No. 268 of 1989 wherein Mr L.N. Sinha in his written submission had urged for the intervener that Article 21 of the Constitution neither confers nor creates nor determines the dimensions nor the permissible limits of restrictions which appropriate legislation might impose on the right to life or liberty. He submitted that provisions for procedure are relevant in judicial or quasi-judicial proceedings for enforcement of rights or obligations. With regard to alterations of rights, procedure is governed by the Constitution directly. He sought to intervene on behalf of Coal India and wanted these submissions to be taken into consideration. However, when this contention was sought to be urged before this Court on April 25, 1989, after hearing all the parties, it appeared that there was no dispute between the parties in the instant writ petitions between the victims and the Government of India that the rights claimed in these cases are referable to Article 21 of the Constitution. Therefore, no dispute really arises with regard to the contention of Coal India and we need not consider the submissions urged by Mr Sinha on behalf of the intervener in this case. It has been so recorded.

32. By the order dated March 3, 1989, Writ Petitions Nos. 268 of 1989 and 164 of 1986 have been directed to be disposed of by this bench. We have heard these two writ petitions along with the other writ petitions and other matters as indicated hereinbefore. The contentions are common. These writ petitions question the validity of the Act and the settlement entered into pursuant to the Act. Writ Petition No. 164 of 1986 is by one Shri Rakesh Shrouti who is an Indian citizen and claims to be a practising advocate having his residence at Bhopal. He says that he and his family members were at Bhopal on December 2/3, 1984 and suffered immensely as a result of the gas leak. He challenges the validity of the Act on various grounds. He contends that the Union of India should not have the exclusive right to represent the victims in suits against the Union Carbide and thereby deprive the victims of their right to sue and deny access to justice. He further challenges the right of the Union of India to represent the victims against Union Carbide because of conflict of interests. The conduct of the Union of India was also deprecated and it was further stated that such conduct did not inspire confidence. In the premises, the said petitioner sought a declaration under Article 32 of the

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Constitution that the Act is void, inoperative and unenforceable as violative of Articles 14, 19 and 21 of the Constitution. Similarly, the second writ petition, namely, Writ Petition No. 268 of 1989 which is filed by Mr Charan Lal Sahu, who is also a practising advocate on behalf of the victims and claims to have suffered damages as a result of the gas leak, challenges the Act. He further challenges the settlement entered into under the Act. He says that the said settlement was violative of principles of natural justice and the fundamental right of the said petitioner and other victims. It is his case that insofar as the Act permits such a course to be adopted, such a course was not permissible under the Constitution. He further asserts that the Union of India was negligent and a joint tortfeasor. In the premises, according to him, the Act is bad, the settlement is bad and these should be set aside.

33. In order to determine the question whether the Act in question is constitutionally valid or not in the light of Articles 14, 19(1)(*g*) and 21 of the Constitution, it is necessary to find out what does the Act actually mean and provide for. The Act in question, as the Preamble to the Act states, was passed in order to confer powers on the Central Government to secure that the claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto. Therefore, securing the claims arising out of or connected with the Bhopal gas leak disaster is the object and purpose of the Act. We have noticed the proceedings of the Lok Sabha in connection with the enactment of the Act. Our attention was also drawn by the learned Attorney General to the proceedings of the Rajya Sabha wherein the Hon'ble Minister, Shri Virendra Patil explained that the Bill enabled the government to assume exclusive right to represent and act, whether within or outside India in place of every person who had made or was entitled to make claim in relation to the disaster and to institute any suit or other proceedings or enter into any compromise as mentioned in the Act. The whole object of the Bill was to make procedural changes to the existing Indian law which would enable the Central Government to take up the responsibility of fighting litigation on behalf of these victims. The first point was that it sought to create a locus standi in the Central Government to file suits on behalf of the victims. The object of the statute, it was highlighted, was that because of the dimension of the tragedy covering thousands of people, large number of whom being poor, would not be able to go to the courts, it was necessary to create the locus standi in the Central Government to start the litigation of payment of compensation in the courts on their behalf. The second aspect of the Bill was that by creating this locus standi in the Central Government, the Central Government became competent to institute judicial proceedings for payment of compensation on behalf of the victims. The next aspect of the Bill was to make a distinction between those on whose behalf suits had already been filed and

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those on whose behalf proceedings had not yet then been instituted. One of the Members emphasised that under Article 21 of the Constitution, the personal liberty of every citizen was guaranteed and it has been widely interpreted as to what was the meaning of the expression 'personal liberty'. It was emphasised that one could not take away the right of a person, the liberty of a person, to institute proceedings for his own benefit and for his protection. It is from this point of view that it was necessary, the member debated, to preserve the right of a claimant to have his own lawyers to represent him along with the Central Government in the proceedings under Section 4 of the Act, this made the Bill constitutionally valid.

34. Before we deal with the question of constitutionality, it has to be emphasised that the Act in question deals with the Bhopal gas leak disaster and it deals with the claims meaning thereby claims arising out of or connected with the disaster for compensation of damages for loss of life or any personal injury which has been or is likely to be caused and also claims arising out of or connected with the disaster for any damages to property or claims for expenses incurred or required to be incurred for containing the disaster or making or otherwise coping with the impact of the disaster and other incidental claims. The Act in question does not purport to deal with the criminal liability, if any, of the parties or persons concerned nor it deals with any of the consequences flowing from those. This position is clear from the provisions and the Preamble to the Act. Learned Attorney General also says that the Act does not cover criminal liability. The power that has been given to the Central Government is to represent the 'claims', meaning thereby the monetary claims. The monetary claims, as was argued on behalf of the victims, are damages flowing from the gas disaster. Such damages, Mr Garg and Ms Jaising submitted, are based on strict liability, absolute liability and punitive liability. The Act does not, either expressly or impliedly, deal with the extent of the damages or liability. Neither Section 3 nor any other section deals with any consequences of criminal liability. The expression "the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person", read as it is, means that Central Government is substituted and vested with the exclusive right to act in place of the victims, i.e., eliminating the victims, their heirs and their legal representatives, in respect of all such claims arising out of or connected with the Bhopal gas leak disaster. The right, therefore, embraces right to institute proceedings within or outside India along with right to institute any suit or other proceedings or to enter into compromise. Sub-section (1) of Section 3 of the Act, therefore, substitutes the Central Government in place of the victims. The victims, or their heirs and legal representatives, get their

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rights substituted in the Central Government along with the concomitant right to institute such proceedings, withdraw such proceedings or suit and also to enter into compromise. The victims or the heirs or the legal representatives of the victims, are substituted and their rights are vested in the Central Government. This happens by operation of Section 3 which is the legislation in question. Sub-section (3) of Section 3 makes it clear that the provisions of sub-section (1) of Section 3 shall also apply in relation to claims in respect of which suits or other proceedings have been instituted in or before any court or other authority (whether within or outside India) before the commencement of this Act, but makes a distinction in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court or other authority outside India, and provides that the Central Government shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits. Therefore, in cases where such suits or proceedings have been instituted before the commencement of the Act in any court or before any authority outside India, the section by its own force will not come into force in substituting the Central Government in place of the victims or the heirs or their legal representatives, but the Central Government has been given the right to act in place of, or along with, such claimant, provided such court or other authority so permits. It is to have adherence and conformity with the procedure of the countries or places outside India, where suits or proceedings are to be instituted or have been instituted. Therefore, the Central Government is authorised to act along with the claimants in respect of proceedings instituted outside India subject to the orders of such courts or the authorities. Is such a right valid and proper?

35. There is the concept known both in this country and abroad, called *parens patriae*. Dr B.K. Mukherjea in his "*Hindu Law of Religious and Charitable Trust*", Tagore Law Lectures, Fifth Edition, at page 404, referring to the concept of *parens patriae*, has noted that in English law, the Crown as *parens patriae* is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. Thus the position is that according to Indian concept *parens patriae* doctrine recognized King as the protector of all citizens and as parent. In *Budhkaran Chaukhani* v. *Thakur Prosad Shah*[6] the position was explained by the Calcutta High Court at page 318 of the report. The same position was reiterated by the said High Court in *Banku Behary Mondal* v. *Banku Behary Hazra*[7] at page 205 of the report. The position was further elaborated and explained by the Madras High Court in *Medai Dalavoi T. Kumaraswami Mudaliar* v. *Medai Dalavoi Rajammal*[8] at page 567 of the report. This Court also recognized the concept of

6 AIR 1942 Cal 331: 46 CWN 425
7 AIR 1943 Cal 203: 47 CWN 89
8 AIR 1957 Mad 563: (1957) 2 MLJ 211

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parens patriae relying on the observations of Dr Mukherjea aforesaid in *Ram Saroop* v. *S.P. Sahi*[9] at pages 598 and 599. In the "*Words and Phrases*" Permanent Edition, Vol. 33 at page 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons *non sui juris*, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby 'the father of the country', were applied originally to the King and are used *to designate the State referring to its sovereign power of guardianship over persons under disability.* (emphasis supplied) *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term *parens patriae* differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the *parens patriae* theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The Preamble to the Constitution, read with the Directive Principles, Articles 38, 39 and 39-A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further. Reference may be made to *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*[10] in this connection. There it was held by the Supreme Court of the United States of America that Commonwealth of Puerto Rico have standing to sue as *parens patriae* to enjoin apple growers' discrimination against Puerto Rico migrant farm workers. This case illustrates in some aspect the scope of *parens patriae*. The Commonwealth of Puerto Rico sued in the United States District Court for the Western District of Virginia, as *parens patriae* for Puerto Rican migrant farmworkers, and against Virginia apple growers, to enjoin discrimination against Puerto Ricans in favour of Jamaican workers in violation of the Wagner-Peyser Act, and the Immigration and Nationality Act. The District Court dismissed the action on the ground that the Commonwealth lacked standing to sue, but the Court of Appeal for the Fourth Circuit reversed it. On certiorari, the United States Supreme Court affirmed. In the opinion by White, J., joined by Burger, C.J. and Brennan, Marshall, Blackmun, Rehnquist,

9 1959 Supp 2 SCR 583: AIR 1959 SC 951
10 73 L Ed 2d 995: 458 US 592: 102 SCR 3260

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Stevens, and O'Connor, JJ., it was held that Puerto Rico had a claim to represent its quasi-sovereign interests in federal court at least which was as strong as that of any State, and that it had *parens patriae* standing to sue to secure its residents from the harmful effects of discrimination and to obtain full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Justice White referred to the meaning of the expression *parens patriae*. According to *Black's Law Dictionary*, 5th edn. 1979, page 10003, it means literally 'parent of the country' and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. Justice White at page 1003 of the report emphasised that the *parens patriae* action had its roots in the common law concept of the "royal prerogative". The royal prerogative included the right or responsibility to take care of persons who were legally unable, on account of mental incapacity, whether it proceeds from non-age, idiocy or lunacy to take proper care of themselves and their property. This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature and is a most beneficent function. After discussing several cases Justice White observed at page 1007 of the report that in order to maintain an action, in *parens patriae*, the State must articulate an interest apart from the interests of particular parties, i.e. the State must be more than a nominal party. The State must express a quasi-sovereign interest. Again an instructive insight can be obtained from the observations of Justice Holmes of the American Supreme Court in the case of *State of Georgia* v. *Tennessee Copper Co.*[11], which was a case involving air pollution in Georgia caused by the discharge of noxious gases from the defendant's plant in Tennesee. Justice Holmes at page 1044 of the report described the State's interest as follows:

> "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power....
>
> ...When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests..."

36. Therefore, conceptually and from the jurisprudential point of view, especially in the background of the Preamble to the Constitution of India and the mandate of the Directive Principles, it was possible to authorise the Central Government to take over the claims of the victims

11 51 L Ed 1038: 206 US 230 (1906). 27 SCR 618

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to fight against the multinational corporation in respect of the claims. Because of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. On its plain terms the State has taken over the exclusive right to represent and act in place of every person who has made or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Whether such provision is valid or not in the background of the requirement of the Constitution and the Code of Civil Procedure, is another debate. But there is no prohibition or inhibition, in our opinion, conceptually or jurisprudentially for the Indian State taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide. The actual meaning of what the Act has provided and the validity thereof, however, will have to be examined in the light of the specific submissions advanced in this case.

37. Ms Indira Jaising as mentioned hereinbefore on behalf of some other victims drew our attention to the background of the passing of the Act in question. She drew our attention to the fact that the Act was to meet a specific situation that had arisen after the tragic disaster and the advent of American lawyers seeking to represent the victims in American courts. The government's view, according to her, as was manifest from the Statement of Objects and Reasons, debates of the Parliament, etc. was that the interests of the victims would be best served if the Central Government was given the right to represent the victims in the courts of United States as they would otherwise be exploited by 'ambulance chasers' working on contingency fees. The government also proceeded initially on the hypothesis that U.S. was the most convenient forum in which to sue UCC. The government however feared that it might not have locus standi to represent the victims in the courts of the United States of America unless a law was passed to enable it to sue on behalf of the victims. The dominant object of the Act, therefore, according to her, was to give to the Government of India locus standi to sue on behalf of the victims in foreign jurisdiction, a standing which it otherwise would not have had. According to her, the Act was never intended to give exclusive rights to the Central Government to sue on behalf of the victims in India or abroad. She drew our attention to the Parliamentary debates as mentioned hereinbefore. She drew our attention to the expression *parens patriae* as appearing in the *Words and Phrases*, Volume 31 page 99. She contended that the Act was passed to provide locus standi only to present in America. She drew our attention to the *American Constitutional Law* by Laurence H. Tribe, 1978 edn. at paragraph 3.24, where it was stated that in its capacity as proprietor, a State may satisfy the requirement of injury to its own interests by an assertion of harm to the State as such. It was further stated by the learned author there that the State may sue under the federal anti-trust laws to redress wrongs suffered by it as the owner of a railroad and as the owner and

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operator of various public institutions. *It was emphasised that in its quasi-sovereign capacity, the State has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain.* It was sought to be suggested that in the instant Act no such right was either asserted or mentioned. The State also in its quasi-sovereign capacity is entitled to bring suit against a private individual to enjoin a corporation not to discharge noxious gases from its out of State plant into the suing State's territory. Finally, it was emphasised that as *parens patriae* on behalf of the citizens, where a State's capacity as *parens patriae* is not negated by the federal structure, the protection of the general health, comfort, and welfare of the State's inhabitants has been held to give the State itself a sufficient interest. Ms Jaising sought to contend that to the extent that the Act was not confined to empowering the government to sue on behalf of those who were not *sui generis* but extended also to representing those who are, this exercise of the power cannot be referable to the doctrine of *parens patriae*. To the extent, it is not confined in enabling the government to represent its citizens in foreign jurisdiction but empowered it to sue in local courts to the exclusion of the victims it cannot be said to be in exercise of doctrine of *parens patriae*, according to her. We are unable to agree. As we have indicated before conceptually and jurisprudentially there is no warrant in the background of the present Act, in the light of circumstances of the Act in question to confine the concept into such narrow field. The concept can be varied to enable the government to represent the victims effectively in domestic forum if the situation so warrants. We also do not find any reason to confine the *parens patriae* doctrine to only quasi-sovereign right of the State independent of and behind the title of the citizen, as we shall indicate later.

38. It was further contended that deprivation of the rights of the victims and denial of the rights of the victims or the rights of the heirs of the victims to access to justice was unwarranted and unconstitutional. She submitted that it has been asserted by the government that the Act was passed pursuant to Entry 13 of List I of the Seventh Schedule to the Constitution. It was therefore submitted that to the extent it was a law relating to civil procedure, it sets up a different procedure for the Bhopal gas victims and denies to them equality before law, violating Article 14 of the Constitution. Even assuming that due to the magnitude of the disaster, the number of claimants and their disability, they constituted a separate class and that it was permissible to enact a special legislation setting up a special procedure for them, the reasonableness of the procedure has still to be tested. Its reasonableness, according to her, will have to be judged on the touchstone of the existing Civil Procedure Code of 1908 and when so tested, it is found wanting in several respects. It was also contended by the government that it was a legislation relating

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to "actionable wrongs" under Entry 8 of the Concurrent List of the Seventh Schedule. But so read, she said, it could only deal with the procedural aspects and not the substantive aspect of "actionable wrongs". If it does, then the reasonableness of a law must be judged with reference to the existing substantive law of actionable wrongs and so judged it is in violation of many constitutional rights as it takes away from the victims the right to sue for actionable wrongs, according to counsel for the victims. According to her, it fails to take into account the law of strict liability for ultra hazardous activity as clarified by this Court in *M.C. Mehta case*[12]. She further submitted that it is a bad Act as it fails to provide for the right to punitive damages and destruction of environment.

39. It was contended on behalf of the Central Government that the Act was passed to give effect to the Directive Principles as enshrined under Article 39-A of the Constitution of India. It was, on the other side, submitted that it is not permissible for the State to grant legal aid on pain of destroying rights that inhere in citizens or on pain of demanding that the citizens surrender their rights to the State. The Act in fact demands a surrender of rights of the citizens to the State. On the interpretation of the Act, Ms Indira Jaising submitted that Sections 3 and 4 as noted above, give exclusive power to the government to represent the victims and there is deprivation of the victims' right to sue for the wrongs done to them which is uncanalised and unguided and the expression "due regard" in Section 4 of the Act does not imply consent and as such is violative of the rights of the victims. The right to be associated with the conduct of the suit is hedged in with so many conditions that it is illusory. According to her, a combined reading of Sections 3 and 4 of the Act lead to the conclusion that the victims are displaced by the Central Government which has constituted itself as the "surrogate" of the claimants, that they have no control over the proceedings, that they have no right to decide whether or not to compromise and if so on what terms and they have no right to be heard by the court before any such compromise is effected. Therefore, Section 3 read with Section 4, according to her, hands over to the government all effective rights of the victims to sue and is a naked usurpation of power. It was submitted that in any event on a plain reading of the Act, Section 3 read with Section 4 did not grant the government immunity from being sued as a joint tort-feasor.

40. It was further urged that Section 9 makes the government the total arbiter in the matter of registration, processing and recording of claims. Reference was made to Section 9(2)(*a*), (*b*) and (*c*) and disbursal of claims under Sections 9(2)(*f*) and 10. It was urged that the Deputy Commissioner and Commissioner appointed under the Act and the Scheme are subordinates and agents of the Central Government. They replace impartial and independent civil court by officers and sub-

12 *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395: 1987 SCC (L&S) 37: (1987) 1 SCR 819

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ordinates of the Central Government. Clause 11 of the Scheme makes the Central Government, according to counsel, judge in its own cause inasmuch as the Central Government could be and was in fact a joint tort-feasor. It was submitted that Sections 5 to 9 of the Act read with the Scheme do not set up a machinery which is constitutionally valid. The Act, it was urged, deprives the victims of their rights out of all proportion to the object sought to be achieved, namely, to sue in foreign jurisdiction or to represent those incapable of representing themselves. The said object could be achieved, according to counsel, by limiting the right to sue in foreign jurisdiction alone and in any event representing only those victims incapable of representing themselves. The victims who wish to sue for and on their own behalf must have power to sue, all proper and necessary parties including Government of India, Government of Madhya Pradesh, UCIL and Shri Arjun Singh‡‡ to vindicate their right to life and liberty and their rights cannot and should not be curtailed, it was submitted. Hence, the Act goes well beyond its objects and imposes excessive restriction amounting to destruction of the rights of the victims, according to counsel. In deciding whether any rights are affected, it is not the object of the Act that is relevant but its direct and inevitable effect on the rights of the victims that is material. Hence no matter how laudable the object of the Act is alleged to be by the Government of India, namely, that it is an Act to give effect to Directive Principles enshrined in Article 39-A of the Constitution, the direct and inevitable effect of Section 3 according to counsel for the victims is to deprive the victims of the right to sue for and on their own behalf through counsel of their choice and instead empower the Central Government to sue for them.

41. The Act is, it was contended, unconstitutional because it deprives the victims of their right to life and personal liberty guaranteed by Article 21. The right to life and liberty includes the right to sue for violations of the right, it was urged. The right to life guaranteed by Article 21 must be interpreted to mean all that makes life livable, life in all its fullness. According to counsel, it includes the right to livelihood. Reference was made to the decision of *Olga Tellis* v. *Bombay Municipal Corpn.*[13] This right, it was contended, is inseparable from the remedy. It was urged that personal liberty includes a wide range of freedoms to decide how to order one's affairs. Reference was made to *Maneka Gandhi* v. *Union of India*[14]. The right to life and liberty also includes the right to healthy environment free from hazardous pollutants. The right to life and liberty, it was submitted, is inseparable from the remedy to judicial vindication of the violation of that right — the right of access to justice must be deemed to be part of that right. Therefore, the importance is given to the right to file a suit for an actionable wrong. See

‡‡ Ed.: The then Chief Minister of Madhya Pradesh
13 (1985) 3 SCC 545: 1985 Supp 2 SCR 51, 78-83

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Ganga Bai v. *Vijay Kumar*[14]. According to counsel appearing for the victims, the Act read strictly infringes the right to life and personal liberty because the right to sue by the affected person for damages flowing from infringement of their rights is taken away. Thus, it was submitted that not just some incidents of the right to life, but the right itself in all its fullness is taken away. Such deprivation, according to counsel, of the right is not in accordance with procedure established by law inasmuch as the law which takes away the right, i.e., impugned Act is neither substantively nor procedurally just, fair or reasonable. A law which divests the victims of the right to sue to vindicate for life and personal liberty and vests the said right in the Central Government is not just, fair or reasonable. The victims are sui generis and able to decide for themselves how to vindicate their claims in accordance with law. There is, therefore, no reason shown to exist for divesting them of that right and vesting that in the Central Government.

42. All the counsel for the victims have emphasised that vesting of the right in the Central Government is bad and unreasonable because there is conflict of interests between the Central Government and the victims. It was emphasised that the conflict of interest has already prejudiced the victims in the conduct of the case inasmuch as a compromise unacceptable to the victims has been entered into in accordance with the order of this Court of February 14/15, 1989[1] without hearing the victims. This conflict of interest will continue, it was emphasised, to adversely affect the victims inasmuch as Section 9 of the Act read with clauses 5, 10 and 11 of the Scheme empower the Central Government to process claims, determine the category into which these fall, determine the basis on which damages will be payable to each category and determine the amount of compensation payable to each claimant. Learned counsel urged that the right to a just, fair and reasonable procedure was itself a guaranteed fundamental right under Article 14 of the Constitution. This included right to natural justice. Reference was made to *Olga Tellis case*[13] and *S.L. Kapoor* v. *Jagmohan*[15]. The right to natural justice is included in Article 14.[16] Reference was also made to *Maneka Gandhi case*[4]. It was contended by counsel that the right to natural justice is the right to be heard by court at the pre-decisional stage, i.e., before any compromise is effected and accepted. Reference was made to the decision of this Court in *Swadeshi Cotton Mills* v. *Union of India*[17]. It was submitted that natural justice is a highly effective tool devised by the courts to ensure that a statutory authority arrives at a just decision. It is calculated to act as a healthy check on the abuse of power. Natural justice is not dispensable nor is it an empty formality. Denial of

14 (1974) 2 SCC 393, 397: (1974) 3 SCR 882, 886
15 (1980) 4 SCC 379, 385, 395: (1981) 1 SCR 746, 753, 766
16 *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: 1985 Supp 2 SCR 131
17 (1981) 1 SCC 664: (1981) 2 SCR 533: (1981) 51 Com Cas 210

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that right can and has led to the miscarriage of justice in this case. According to counsel, if the victims had been given an opportunity to be heard, they would, inter alia, have pointed out that the amount agreed to be paid by UCC was hopelessly inadequate and that UCC, its officer and agents ought not to be absolved of criminal liability, that the Central Government itself was liable to have been sued as a joint tort-feasor and, according to counsel, had agreed to submit to a decree if found liable under the order dated December 31, 1985, that suits had been filed against the State of Madhya Pradesh, Shri Arjun Singh and UCIL which said suits cannot be deemed to have been settled by the compromise/order of February 14/15, 1989. It was also pointed out that Union of India was under a duty to sue UCIL, which it had failed and neglected to do. It was submitted that to the extent that the statute does not provide for a pre-decisional hearing on the fairness of the proposed settlement or compromise by court, it is void as offending natural justice hence Articles 14 and 21 of the Constitution. Alternatively, it was contended by the counsel that since the statute neither expressly nor by necessary implication bars the right to be heard by court before any compromise is effected such a right to a pre-decisional hearing by court must be read into Section 3(2)(*b*) of the Act. Admittedly, it does not expressly exclude the right to a hearing by court prior to any settlement being entered into. Far from excluding such a right by necessary implication, having regard to the nature of the rights affected, i.e., the right to life and personal liberty, such a right to hearing must be read into the Act in order to ensure that justice is done to the victims, according to all the counsel. The Act sets up a procedure different from the ordinary procedure established by law, namely, Civil Procedure Code. But it was submitted that the Act should be harmoniously read with the provisions of Civil Procedure Code and if it is not so read, then the Act in question would be unreasonable and unfair. In this connection, reliance was placed on the provisions of Order I Rule 4, Order XXIII Rule I proviso, Order XXIII Rule 3-B and Order XXXII Rule 7 of CPC and it was submitted that these are not inconsistent with the Act. On the contrary these are necessary and complementary, intended to ensure that there is no miscarriage of justice. Hence these must be held to apply to the facts and circumstances of the case and the impugned Act must be read along with these provisions. Assuming that the said provisions do not directly apply then, provisions analogous to the said provisions must be read with Section 3(2)(*b*) to make the Act reasonable, it was submitted. It was urged that if these are not so read then the absence of such provisions would vest arbitrary and unguided powers in the Central Government making Section 3(2)(*b*) unconstitutional. The said provisions are intended to ensure the machinery of accountability to the victims and to provide to them, an opportunity to be heard by court before any compromise is arrived at. In this connection, reference was made to Rule

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23(3) of the Federal Rules of Civil Procedure in America which provides for a hearing to the victims before a compromise is effected. The victims as plaintiffs in an Indian court cannot be subjected to a procedure which is less fair than that provided by a U.S. forum initially chosen by the Government of India, it was urged.

43. Counsel submitted that Section 6 of the Act is unreasonable because it replaces an independent and impartial civil court of competent jurisdiction by an officer known as the Commissioner to be appointed by the Central Government. No qualification, according to counsel, had been prescribed for the appointment of a Commissioner and clause 5 of the Scheme framed under the Act vests in the Commissioner the judicial function of deciding appeals against the order of the Deputy Commissioner registering or refusing to register a claim. It was further submitted that clause 11(2) of the Scheme is unreasonable because it replaces an independent and impartial civil court of competent jurisdiction with the Central Government, which is a joint tort-feasor for the purpose of determining the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable for each type of injury or loss. It was submitted that the said function is a judicial function and if there is any conflict of interest between the victims and the Central Government, vesting such a power in the Central Government amounts to making it a judge in its own cause. It was urged that having regard to the fact that amount received in satisfaction of the claims is ostensibly pre-determined, namely, 470 million dollars unless the order of February 14/15 is set aside which ought to be done, according to counsel, the Central Government would have a vested interest in ensuring that the amount of damages to be disbursed does not exceed the said amount. Even otherwise, according to counsel the Government of India has been sued as a joint tort-feasor, and as such they would have a vested interest in depressing the quantum of damages, payable to the victims. This would, according to counsel, result in a deliberate underestimation of the extent of injuries and compensation payable.

44. Clause 11(4) of the Scheme, according to counsel, is unreasonable inasmuch as it does not take into account the claims of the victims to punitive and exemplary damages and damages for loss and destruction of environment. Counsel submitted that in any event the expression "claims" in Section 2(*b*) cannot be interpreted to mean claims against the Central Government, the State of Madhya Pradesh, UCIL, which was not sued in Suit No. 1113 of 1986 and Shri Arjun Singh, all of whom have been sued as joint tort-feasors in relation to the liability arising out of the disaster. Counsel submitted that if Section 3 is to be held to be intra vires, the word "exclusive" should be severed from Section 3 and on the other hand, if Section 3 is held ultra vires, then victims who have already filed suits or those who had lodged claims should be entitled

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to continue their own suits as well as Suit No. 1113 of 1986 as plaintiffs with leave under Order I Rule 8. Counsel submitted that interim relief as decided by this Court can be paid to the victims even otherwise also, according to counsel, under clause 10(2)(*b*) of the Scheme.

45. Counsel submitted that the balance of 470 million dollars after deducting interim relief as determined by this Court should be attached. In any event, it was submitted that, it be declared that the word "claim" in Section 2 does not include claims against Central Government or State of Madhya Pradesh or UCIL. Hence, it was urged that the rights of the victims to sue the Government of India, the State of Madhya Pradesh or UCIL would remain unaffected by the Act or by the compromise effected under the Act. Machinery to decide suit expeditiously has to be devised, it was submitted. Other suits filed against UCC, UCIL, State of Madhya Pradesh and Arjun Singh should be transferred to the Supreme Court for trial and disposal, according to counsel. It was submitted that the court should fix the basis of damages payable to different categories, namely, death and disablement mentioned under clause 5(2) of the Scheme. Counsel submitted that this Court should set up a procedure which would ensure that an impartial judge assisted by medical experts and assessors would adjudicate the basis on which an individual claimant would fall into a particular category. It was also urged that this Court should quantify the amount of compensation payable to each category of claimant in clause 5(2) of the Scheme. This decision cannot, it was submitted, be left to the Central Government as is purported to be done by clause 11(2) of the Scheme.

46. This Court must set up, it was urged, a trust with independent trustees to administer the trust and trustees to be accountable to this Court. An independent census should be carried out of number of claimants, nature and extent of injury caused to them, the category into which they fall. Apportionment of amounts should be set aside or invested for future claimants, that is the category in clause 5(2)(*a*) of the Scheme, which is, according to counsel, of utmost importance since the injuries are said to be carcinogenic and ontogenic and wide affecting persons yet unborn.

47. Shri Garg, further and on behalf of some of the victims counsel, urged before us that deprivation of the rights of the victims and vesting of those rights in the State in violative of the rights of the victims and cannot be justified or warranted by the Constitution. Neither Section 3 nor Section 4 of the Act gives any right to the victims; on the other hand, it is a complete denial of access to justice for the victims, according to him. This, according to counsel, is arbitrary. He also submitted that Section 4 of the Act, as it stands, gives no right to the victims and as such even assuming that in order to fight for the rights of the victims, it was necessary to substitute the victims even then insofar as the victims have been denied the right of say, in the conduct of the proceedings, this is

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disproportionate to the benefit conferred upon the victims. Denial of rights to the victims is so great and deprivation of the right to natural justice and access to justice is so tremendous that judged by the well settled principles by which yardsticks provisions like these should be judged in the constitutional framework of this country, the Act is violative of the fundamental rights of the victims. It was further submitted by him that all the rights of the victims by the process of this Act, the right of the victims to enforce full liability against the multinationals as well as against the Indian companies, absolute liability and criminal liability have all been curtailed.

48. All the counsel submitted that in any event, the criminal liability cannot be the subject matter of this Act. Therefore, the government was not entitled to agree to any settlement on the ground that criminal prosecution would be withdrawn and this being a part of the consideration or inducement for settling the civil liability, he submitted that the settlement arrived at on February 14/15, 1989 as recorded in the order of this Court[1] is wholly unwarranted, unconstitutional and illegal.

49. Mr Garg additionally further urged that by the procedure of the Act, each individual claim had to be first determined and the government could only take over the aggregate of all individual claims and that could only be done by aggregating the individual claims of the victims. That was not done, according to him. Read in that fashion, according to Shri Garg, the conduct of the government in implementing the Act is wholly improper and unwarranted. It was submitted by him that the enforcement of the right of the victims without a just, fair and reasonable procedure which is vitally necessary for representing the citizens or victims was bad. It was further urged by him that the Bhopal gas victims have been singled out for hostile discrimination resulting in total denial of all procedures of approach to competent courts and tribunals. It was submitted that the Central Government was incompetent to represent the victims in the litigations or for enforcement of the claims. It was then submitted by him that the claims of the victims must be enforced fully against the Union Carbide Corporation carrying on commercial activities for profit resulting in unprecedented gas leak disaster responsible for a large number of deaths and severe injuries to others. It was submitted that the liability of each party responsible, including the Government of India, which is a joint tort-feasor along with the Union Carbide, has to be ascertained in appropriate proceedings. It was submitted on behalf of the victims that Union of India owned 22 per cent of the shares in Union Carbide and therefore, it was incompetent to represent the victims. There was conflict of interest between the Union of India and the Union Carbide and so the Central Government was incompetent. It is submitted that pecuniary interest however small disqualifies a person to be a judge in his own cause. The settlement accepted by the Union of India, according to various counsel is vitiated by the pecuniary bias as holders of its shares to the extent of 22 per cent.

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50. It was submitted that the pleadings in the court of the United States and in the Bhopal Court considered in the context of the settlement order of this Court accepted by the Union of India establish that the victims' individuality were sacrificed wantonly and callously and, therefore, there was violation, according to some of the victims, both in the Act and in its implementation of Articles 14, 19(1)(*g*) and 21 of the Constitution.

51. The principles of the decision of this Court in *M.C. Mehta* v. *Union of India*[12] must be so interpreted that complete justice is done and it in no way excludes the grant of punitive damages for wrongs justifying deterrents to ensure the safety of citizens in free India. No multinational corporation, according to Shri Garg, can claim the privilege of the protection of Indian law to earn profits without meeting fully the demands of civil and criminal justice administered in India with this Court functioning as the custodian. Shri Garg urged that the liability for damages, in India and the Third World countries, of the multinational companies cannot be less but must be more because the persons affected are often without remedy for reasons of inadequate facilities for protection of health or property. Therefore, the damages sustainable by Indian victims against the multinationals dealing with dangerous gases without proper security and other measures are far greater than damages suffered by the citizens of other advanced and developed countries. It is, therefore, necessary to ensure by damages and deterrent remedies that these multinationals are not tempted to shift dangerous manufacturing operations intended to advance their strategic objectives of profit and war to the Third World countries with little respect for the right to life and dignity of the people of sovereign Third World countries. The strictest enforcement of punitive liability also serves the interest of the American people. The Act, therefore, according to Shri Garg, is clearly unconstitutional and therefore, void.

52. It was urged that the settlement is without jurisdiction. This Court was incompetent to grant immunity against criminal liabilities in the manner it has purported to do by its order dated February 14/15, 1989, it was strenuously suggested by counsel. It was further submitted that to hold the Act to be valid, the victims must be heard before the settlement and the Act can only be valid if it is so interpreted. This is necessary further, according to Shri Garg, to lay down the scope of hearing. Shri Garg also drew our attention to the Scheme of disbursement of relief to the victims. He submitted that the Scheme of disbursement is unreasonable and discriminatory because there is no procedure in it which is just, fair and reasonable in accordance with the provisions of Civil Procedure Code. He further submitted that the Act does not lay down any guidelines for the conduct of the Union of India in advancing the claims of the victims. There were no essential legislative guidelines for determining the rights of the victims, the conduct of the proceedings

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on behalf of the victims and for the relief claimed. Denial of access to justice to the victims through an impartial judiciary is so great a denial that it can only be consistent with the situation which calls for such a drastic provision. The present circumstances were not such. He drew our attention to the decision of this Court in *Basheshar Nath* v. *CIT*[18], *Re Special Courts Bill, 1978*[19], *A.R. Antulay* v. *R.S. Nayak*[20], *Ram Krishna Dalmia* v. *S.R. Tendulkar*[21], *Ambika Prasad Mishra* v. *State of U.P.*[22] and *Budhan Choudhary* v. *State of Bihar*[23]. Shri Garg further submitted that Article 21 must be read with Article 51 of the Constitution and other Directive Principles. He drew our attention to *Lakshmi Kant Pandey* v. *Union of India*[24], *Mackinnon Mackenzie & Co. Ltd.* v. *Audrey D'Costa*[25] and *Sheela Barse* v. *Secretary, Children Aid Society*[26]. Shri Garg submitted that in India, the national dimensions of human rights and the international dimensions are both congruent and their enforcement is guaranteed under Articles 32 and 226 to the extent these are enforceable against the State, these are also enforceable against transnational corporations inducted by the State on conditions of due observance of the Constitution and all laws of the land. Shri Garg submitted that in the background of an unprecedented disaster resulting in extensive damage to life and property and the destruction of the environment affecting large number of people and for the full protection of the interests of the victims and for complete satisfaction of all claims for compensation, the Act was passed empowering the Government of India to take necessary steps for processing of the claims and for utilisation of disbursal of the amount received in satisfaction of the claims. The Central Government was given the exclusive right to represent the victims and to act in place of, in United States or in India, every citizen entitled to make a claim. Shri Garg urged that on a proper reading of Section 3(1) of the Act read with Section 4, exclusion of all victims for all purpose is incomplete and the Act is bad. He submitted that the decree for adjudication of the court must ascertain the magnitude of the damages and should be able to grant reliefs required by law under heads of strict liability, absolute liability and punitive liability.

53. Shri Garg submitted that it is necessary to consider that the Union of India is liable for the torts. In several decisions to which Shri Garg drew our attention, it has been clarified that government is not liable only if the tortious act complained has been committed by its ser-

18 AIR 1959 SC 149: (1959) 35 ITR 190: 1959 Supp 1 SCR 528
19 (1979) 1 SCC 380: (1979) 2 SCR 476
20 (1988) 2 SCC 602: 1988 SCC (Cri) 372
21 1959 SCR 279: AIR 1958 SC 538: 61 Bom LR 192
22 (1980) 3 SCC 719: (1980) 3 SCR 1159
23 (1955) 1 SCR 1045: AIR 1955 SC 191: 1955 Cri LJ 374
24 (1984) 2 SCC 244: (1984) 2 SCR 795
25 (1987) 2 SCC 469: 1987 SCC (L&S) 100
26 (1987) 3 SCC 50: 1987 SCC (Cri) 458: (1987) 1 SCR 870

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vants in exercise of its sovereign powers by which it is meant powers that can be lawfully exercised under sovereign rights only vide *Nandram Heeralal* v. *Union of India*[27]. There is a real and marked distinction between the sovereign functions of the government and those which are non-sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertakings. Sovereign functions are such acts which are of such a nature as cannot be performed by a private individual or association unless powers are delegated by sovereign authority of State.

54. According to Shri Garg, the Union and the State Governments under the Constitution and as per laws of the Factories, Environment Control, etc. are bound to exercise control on the factories in public interest and public purpose. These functions are no sovereign functions, according to Shri Garg, and the government in this case was guilty of negligence. In support of this, Shri Garg submitted that the offence of negligence on the part of the government would be evident from the fact that —

(*a*) the government allowed the Union Carbide factory to be installed in the heart of the city;

(*b*) the government allowed habitation in the front of the factory knowing that the most dangerous and lethal gases were being used in the manufacturing processes;

(*c*) the gas leakage from this factory was a common affair and it was agitated continuously by the people, journalists and it was agitated in the Vidhan Sabha right from 1980 to 1984. These features firmly proved, according to Shri Garg, the grossest negligence of the governments. Shri Garg submitted that the gas victims had legal and moral right to sue the governments and so it had full right to implead all the necessary and proper parties like Union Carbide, UCIL, and also the then Chief Minister Shri Arjun Singh of the State. He drew our attention to Order II Rule 3 of the Civil Procedure Code. In suits on joint torts, according to Shri Garg, each of the joint tort-feasors is responsible for the injury sustained for the common acts and they can all be sued together. Shri Garg's main criticism has been that the most crucial question of corporate responsibility of the peoples' right to life and their right to guard it as enshrined in Article 21 of the Constitution were sought to be gagged by the Act. Shri Garg tried to submit that this was an enabling Act only but not an Act which deprived the victims of their right to sue. He submitted that in this Act, there is denial of natural justice both in the institution under Section 3 and in the conduct of the suit under Section 4. It must be seen that justice is done to all (*R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Wajid*[28]. It was urged that it was necessary to give a

27 AIR 1978 MP 209, 212: 1978 ACJ 215
28 (1963) 3 SCR 22: AIR 1963 SC 1

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reasonable notice to the parties. He referred to *M. Narayanan Nambiar* v. *State of Kerala*[29].

55. Shri Shanti Bhushan appearing for Bhopal Gas Peedit Mahila Udyog Sangathan submitted that if the Act is to be upheld, it has to be read down and construed in the manner urged by him. It was submitted that when the Bhopal gas disaster took place, which was the worst industrial disaster in the world which resulted in the deaths of several thousands of people and caused serious injuries to lakhs of others, there arose a right to the victims to get not merely damages under the law of the torts but also arose clearly, by virtue of right to life guaranteed as fundamental right by Article 21 of the Constitution a right to get full protection of life and limb. This fundamental right also, according to Shri Shanti Bhushan, embodied within itself a right to have the claim adjudicated by the established courts of law. It is well settled that right of access to courts in respect of violation of their fundamental rights itself is a fundamental right which cannot be denied to the people. Shri Shanti Bhushan submitted that there may be some justification for the Act being passed. He said that the claims against the Union Carbide are covered by the Act. The claims of the victims against the Central Government or any other party who is also liable in tort to the victims is not covered by the Act. The second point that Shri Shanti Bhushan made was that the Act so far as it empowered the Central Government to represent and act in place of the victims is in respect of the civil liability arising out of disaster and not in respect of any right in respect of criminal liability. The Central Government, according to Shri Shanti Bhushan, cannot have any right or authority in relation to any offences which arose out of the disaster and which resulted in criminal liability. It was submitted that there cannot be any settlement or compromise in relation to non-compoundable criminal cases and in respect of compoundable criminal cases the legal right to compound these could only be possessed by the victims alone and the Central Government could not compound those offences on their behalf. It was submitted by Shri Shanti Bhushan that even this Court has no jurisdiction whatsoever to transfer any criminal proceedings to itself either under any provision of the Constitution or under any provision of the Criminal Procedure Code or under any other provision of law and, therefore, if the settlement in question was to be treated not as a compromise but as an order of the court, it would be without jurisdiction and liable to be declared so on the principles laid down, according to Shri Bhushan, by this Court in *Antulay case*[20]. Shri Shanti Bhushan submitted that even if under the Act, the Central Government is considered to be able to represent the victims and to pursue the litigation on their behalf and even to enter into compromise on their behalf, it would be a gross violation of the constitutional rights of the victims to enter into a settlement with the Union Carbide without giving the victims opportunities to express their views about the

29 1963 Supp 2 SCR 724: AIR 1963 SC 1116: (1963) 2 Cri LJ 186: (1963) 2 LLJ 660

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fairness or adequacy of the settlement before any court could permit such a settlement to be made.

56. Shri Shanti Bhushan submitted that the suit which may be brought by the Central Government against Union Carbide under Section 3 of the Act would be a suit of the kind contemplated by the Explanation to Order XXIII Rule 3 of the Code of Civil Procedure since the victims are not parties and yet the decree obtained in the suit would bind them. It was, therefore, urged by Shri Shanti Bhushan that the provisions of Section 3(1) of the Act merely empowers the Central Government to enter into a compromise but did not lay down the procedure which was to be followed for entering into any compromise. Therefore, there is nothing which is inconsistent with the provisions of Order XXIII Rule 3-B of the CPC to which the provisions of Section 11 of the Act be applied. If, however, by any stretch of argument the provisions of the Act could be construed so as to override the provisions of Order XXIII Rule 3-B CPC, it was urged, the same would render the provisions of the Act violative of the victims' fundamental rights and the actions would be rendered unconstitutional. If it empowered the Central Government to compromise the victims' rights, without even having to apply the principles of natural justice, then it would be unconstitutional and as such bad. Shri Shanti Bhushan, Ms Jaising and Shri Garg submitted that these procedures must be construed in accordance with the provisions contained in Order XXIII Rule 3-B CPC and an opportunity must be given to those whose claims are being compromised to show to the court that the compromise is not fair and should not accordingly be permitted by the court. Such a hearing in terms, according to counsel, of Order XXIII Rule 3-B CPC has to be before the compromise is entered into. It was then submitted that Section 3 of the Act only empowers the Central Government to represent and act in place of the victims and to institute suits on behalf of the victims or even to enter into compromise on behalf of the victims.

57. The Act does not create new causes of action or create special courts. The jurisdiction of the civil court to entertain suit would still arise out of Section 9 of the CPC and the substantive cause of action and the nature of the reliefs available would also continue to remain unchanged. The only difference produced by the provisions of the Act would be that instead of the suit being filed by the victims themselves the suit would be filed by the Central Government on their behalf.

58. Shri Shanti Bhushan then argued that the cause of action of each victim is separate and entitled him to bring a suit for separate amount according to the damages suffered by him. He submitted that even where the Central Government was empowered to file suits on behalf of all the victims it could only ask for a decree of the same kind as could have been asked for by the victims themselves, namely, a decree awarding various specified amounts to different victims whose names had to be disclosed.

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According to Shri Shanti Bhushan, even if all the details were not available at the time when the suit was filed, the details of the victims damages had to be procured and specified in the plaint before a proper decree could be passed in the suit. Even if the subject matter of the suit had to be compromised between the Central Government and the Union Carbide the compromise had to indicate as to what amount would be payable to each victim, in addition to the total amount which was payable by Union Carbide, submitted Shri Shanti Bhushan. It was submitted that there was nothing in the Act which permitted the Central Government to enter into any general compromise with Union Carbide providing for the lump sum amount without disclosure as to how much amount is payable to each victim.

59. If the Act in question had not been enacted, the victims would have been entitled to not only sue Union Carbide themselves but also to enter into any compromise or settlement of their claims with the Union Carbide immediately. The provisions of the Act, according to Shri Shanti Bhushan, deprive the victims of their legal right and such deprivation of their rights and creation of a corresponding right in the Central Government can be treated as reasonable only if the deprivation of their rights imposed a corresponding liability on the Central Government to continue to pay such interim relief to the victims as they might be entitled to till the time that the Central Government is able to obtain the whole amount of compensation from the Union Carbide. He submitted that the deprivation of the right of the victims to sue for their claims and denial of access to justice and to assert their claims and the substitution of the Central Government to carry on the litigation for or on their behalf can only be justified, if and only if the Central Government is enjoined to provide for such interim relief or continue to provide in the words of Judge Keenan, as a matter of fundamental human decency, such interim relief, necessary to enable the victims to fight the battle. Counsel submitted that the Act must be so read. Shri Shanti Bhushan urged that if the Act is construed in such a manner that it did not create such an obligation on the Central Government, the Act cannot be upheld as a reasonable provision when it deprived the victims of their normal legal rights of immediately obtaining compensation from Union Carbide. He referred to Section 10(*b*) of the Act and clauses 10 and 11(1) of the Scheme to show that the legislative policy underlying the Bhopal Act clearly contemplated payment of interim relief to the victims from time to time till such time as the Central Government was able to recover from Union Carbide full amount of compensation from which the interim reliefs paid by the Central Government were to be deducted from the amount payable to them by way of final disbursal of the amounts recovered.

60. The settlement is bad, according to Shri Shanti Bhushan if part of the bargain was giving up of the criminal liability against UCIL and

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UCC. Shri Shanti Bhushan submitted that this Court should not hesitate to declare that the settlement is bad because the fight will go on and the victims should be provided reliefs and interim compensation by the Central Government to be reimbursed ultimately from the amount to be realised by the Central Government. This obligation was over and above the liability of the Central Government as a joint tort-feasor, according to Shri Shanti Bhushan.

61. Shri Kailash Vasdev, appearing for the petitioners in Writ Petition No. 1551 of 1986 submitted that the Act displaced the claimants in the matter of their right to seek redressal and remedies of the actual injury and harm caused individually to the claimants. The Act in question by replacing the Central Government in place of the victims, by conferment of exclusive right to sue in place of victims, according to him, contravened the procedure established by law. The right to sue for the wrong done to an individual was exclusive to the individual. It was submitted that under the civil law of the country, individuals have rights to enforce their claims and any deprivation would place them into a different category from the other litigants. The right to enter into compromise, it was further submitted, without consultation of the victims, if that is the construction of Section 3 read with Section 4 of the Act, then it is violative of procedure established by law. The procedure substituted, if that be the construction of the Act, would be in violation of the principles of natural justice and as such bad. It was submitted that the concept of *parens patriae* would not be applicable in these case. It was submitted that traditionally, sovereigns can sue under the doctrine of *parens patriae* only for violations of their "quasi-sovereign" interests. Such interests do not include the claims of individual citizens. It was submitted that the Act in question is different from the concept of *parens patriae* because there was no special need to be satisfied and a class action, according to Shri Vasdev, would have served the same purpose as a suit brought under the statute and ought to have been preferred because it safeguarded claimants' right to procedural due process. In addition, a suit brought under the statute would threaten the victims' substantive due process rights. It was further submitted that in order to sustain an action, it was necessary for the Government of India to have standing.

62. Counsel submitted that doctrine of *parens patriae* has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals. He may be right to that extent but the doctrine of *parens patriae* has been used in India in varying contexts and contingencies.

63. We are of the opinion that the Act in question was passed in recognition of the right of the sovereign to act as *parens patriae* as contended by the learned Attorney General. The Government of India in order to effectively safeguard the rights of the victims in the matter of the conduct of the case was entitled to act as *parens patriae*, which posi

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tion was reinforced by the statutory provisions, namely, the Act. We have noted the several decisions referred to hereinbefore, namely, *Budhkaran Chaukhani* v. *Thakur Prosad Shah*[6], *Banku Behary Mondal* v. *Bankur Behari Mazra*[7], *Medai Dalavoi T. Kumaraswami Mudaliar* v. *Medai Dalavoi Rajammal*[8] and to the decision of this Court in *Mahant Ram Saroop Dasji* v. *S.P. Sahi*[9] and the decision of the American Supreme Court in *Alfred Schnapp* v. *Puerto Rico*[10]. It has to be borne in mind that conceptually and jurisprudentially, the doctrine of *parens patriae* is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilised in America so far. In our opinion, learned Attorney General was right in contending that where citizens of a country are victims of a tragedy because of the negligence of any multinational, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian State because of its constitutional commitment is obliged to take upon itself the claims of the victims and to protect them in their hour of need. Learned Attorney General was also right in submitting that the decisions of the Calcutta and Madras High Courts and U.S. Supreme Court clearly indicate that *parens patriae* doctrine can be invoked by sovereign State within India, even if it be contended that it has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational. In our opinion, conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to *parens patriae* to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case seems to us to be an expression of its sovereign power. This power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the State. Sovereignty is difficult to define. (See in this connection, Weaver on *Constitutional Law*, p. 490). By the nature of things, the State sovereignty in these matters cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered by legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim *salus populi suprema lex* — regard for public welfare is the highest law. It is not a rule, it is an evolution. This power has always been as broad as public welfare and as strong as the arm of the State, this can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid. Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. It has to be borne in mind, as was stressed by the learned Attorney General, that conferment of power and the manner of its exercise are two different matters. It was submitted that

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the power to conduct the suit and to compromise, if necessary, was vested in the Central Government for the purpose of the Act. The power to compromise and to conduct the proceedings are not uncanalised or arbitrary. These were clearly exercisable only in the ultimate interests of the victims. The possibility of abuse of a statute does not impart to it any element of invalidity. In this connection, the observations of Viscount Simonds in *Belfast Corporation* v. *O.D. Cars Ltd.*[30] are relevant where it was emphasised that validity of a measure is not to be determined by its application to particular cases. This Court in *Collector of Customs, Madras* v. *Nathella Sampathu Chetty*[31] emphasised that the constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. It has to be borne in mind that if upon being so judged it passes the test of reasonableness, then the possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid. See in this connection also the observations in *P.J. Irani* v. *State of Madras*[32] and *D.K. Trivedi* v. *State of Gujarat*[33].

64. Sections 3 and 4 of the Act should be read together as contended by the learned Attorney General, along with other provisions of the Act and in particular Sections 9 and 11 of the Act. These should be appreciated in the context of the object sought to be achieved by the Act as indicated in the Statement of Objects and Reasons and the Preamble to the Act. The Act was so designed that the victims of the disaster are fully protected and the claims of compensation of damages or loss of life or personal injuries or in respect of other matters arising out of or connected with the disaster are processed speedily, effectively, equitably and to the best advantage of the claimants. Section 3 of the Act is subject to other provisions of the Act which includes Sections 4 and 11. Section 4 of the Act opens with non-obstante clause, vis-a-vis, Section 3 and therefore, overrides Section 3. Learned Attorney General submitted that the right of the Central Government under Section 3 of the Act was to represent the victims exclusively and act in the place of the victims. The Central Government, it was urged, in other words, is substituted in the place of the victims and is the *dominus litis*. Learned Attorney General submitted that the *dominus litis* carries with it the right to conduct the suit in the best manner as it deems fit, including, the right to withdraw and the right to compromise. The right to withdraw and the right to compromise conferred by Section 3(2) of the Act cannot be exercised to defeat the rights of the victims. As to how the rights should be exercised is guided by the objects and reasons contained in the Preamble, namely, to speedily and effectively process the claims of the victims and to protect their claims. The Act was passed replacing the Ordinance at a

30 1960 AC 490, 520-21: (1960) 2 WLR 148: (1960) 1 All ER 65 (HL)
31 (1962) 3 SCR 786, 825: AIR 1962 SC 316
32 (1962) 2 SCR 169, 178-81: AIR 1961 SC 1731
33 1986 Supp SCC 20, 60-61: (1986) 1 SCR 479

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time when many private plaintiffs had instituted complaints/suits in the American courts. In such a situation, the Government of India acting in place of the victims necessarily should have right under the statute to act in all situations including the position of withdrawing the suit or to enter into compromise. Learned Attorney General submitted that if the UCC were to agree to pay a lump sum amount which would be just, fair and equitable, but insists on a condition that the proceedings should be completely withdrawn, then necessarily there should be power under the Act to so withdraw. According to him, therefore, the Act engrafted a provision empowering the government to compromise. The provisions under Section 3(2)(*b*) of the Act to enter into compromise was consistent with the powers of *dominus litis*. In this connection, our attention was drawn to the definition of '*Dominus Litis*' in *Black's Law Dictionary*, Fifth Edition, p. 437, which states as follows:

> " '*Dominus litis*'. The master of the suit; i.e. the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. But the term is also applied to one who, though not originally a party, has made himself such, by intervention or otherwise, and has assumed entire control and responsibility for one side and is treated by the court as liable for costs. *Virginia Electric & Power Co.* v. *Bowers*[34]."

65. Learned Attorney General sought to contend that the victims had not been excluded entirely either in the conduct of proceedings or in entering into compromise, and he referred to the proceedings in detail emphasising the participation of some of the victims at some stage. He drew our attention to the fact that the victims had filed separate consolidated complaints in addition to the complaint filed by the Government of India. Judge Keenan of the District Court of New York had passed orders permitting the victims to be represented not only by the private attorneys but also by the Government of India. Hence, it was submitted that it could not be contended that the victims had been excluded. Learned Attorney General further contended that pursuant to the orders passed by Judge Keenan imposing certain conditions against the Union Carbide and allowing the motion for *forum non conveniens* of the UCC that the suit came back to India and was instituted before the District Court of Bhopal. In those circumstances, it was urged by the learned Attorney General that the private plaintiffs who went to America and who were represented by the contingency lawyers fully knew that they could also have joined in the said suit as they were before the American court along with the Government of India. It was contended that in the proceedings at any point of time or stage including when the compromise was entered into, these private plaintiffs could have participated in the court proceedings and could have made their representation, if they so desired. Even in the Indian suits, these private parties have been permitted to continue as parties represented by separate counsel even

34 181 Va 542: 25 SE 2d 361, 363

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though the Act empowers the Union to be the sole plaintiff. Learned Attorney General submitted that Section 4 of the Act clearly enabled the victims to exercise their right of participation in the proceedings. The Central Government was enjoined to have due regard to any matter which such person might require to be urged. Indeed, the learned Attorney General urged very strenuously that in the instant case, Zehreeli Gas Kand Sangharsh Morcha and Jana Swasthya Kendra (Bhopal) had filed before the District Judge, Bhopal, an application under Order I Rule 8 read with Order I Rule 10 and Section 151 of the CPC for their intervention on behalf of the victims. They had participated in the hearing before the learned District Judge, who referred to their intervention in the order. It was further emphasised that when the UCC went up in revision to the High Court of Madhya Pradesh at Jabalpur against the interim compensation ordered to be paid by the District Court, the intervener through its advocate, Shri Vibhuti Jha had participated in the proceedings. The aforesaid association had also intervened in the civil appeals preferred pursuant to the special leave granted by this Court to the Union of India and Union Carbide against the judgment of the High Court for interim compensation. In those circumstances, it was submitted that there did not exist any other gas victim intervening in the proceedings, claiming participation under Section 4. Hence, the right to compromise provided for by the Act, could not be held to be violative of the principles of natural justice. According to the learned Attorney General, this Court first proposed the order to counsel in court and after they agreed thereto, dictated the order on February 14, 1989. On February 15, 1989 after the Memorandum of Settlement was filed pursuant to the orders of the court, further orders were passed. The said association, namely, Zehreeli Gas Kand Sangharsh Morcha was present, according to the records, in the court on both the dates and did not apparently object to the compromise. Shri Charan Lal Sahu, one of the petitioners in the writ petition, had watched the proceedings and after the court had passed the order on February 15, 1989 mentioned that he had filed a suit for Rs 100 crores. Learned Attorney General submitted that Shri Sahu neither protested against the settlement nor did he make any prayer to be heard. Shri Charan Lal Sahu, in the petition of opposition in one of these matters has prayed that a sum of Rs 100 million (*sic*) should be paid over to him for himself as well as on behalf of those victims whom he claimed to represent. In the aforesaid background on the construction of the section, it was urged by the learned Attorney General that Section 3 of the Act cannot be held to be unconstitutional. The same provided a just, fair and reasonable procedure and enabled the victims to participate in the proceedings at all stages — those who were capable and willing to do so. Our attention was drawn to the fact that Section 11 of the Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any

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other enactment other than the Act. It was, therefore, urged that the provisions of the Civil Procedure Code stood overridden in respect of the areas covered by the Act, namely, (*a*) representation; (*b*) powers of representation; and (*c*) compromise.

66. According to the learned Attorney General, the Act did not violate the principles of natural justice. The provisions of the CPC could not be read into the Act for Section 11 of the Act provides that the application of the provision of the Civil Procedure Code insofar as those were inconsistent with the Act should be construed as overridden in respect of areas covered by it. Furthermore, inasmuch as Section 4 had given a qualified right of participation to the victims, there cannot be any question of violation of the principles of natural justice. The scope of the application of the principles of natural justice cannot be judged by any strait-jacket formula. According to him, the extension of the principles of natural justice beyond what is provided by the Act in Sections 3 and 4, was unwarranted and would deprive the provisions of the statute of their efficacy in relation to the achievement of 'speedy' relief, which is the object intended to be achieved. He emphasised that the process of notice, consultation and exchange of information, informed decision-making process, the mobilities of assessing a consensus of opinion would involve such time that the government would be totally unable to act in the matter efficiently, effectively and purposefully on behalf of the victims for realisation of the just dues of the victims. He further urged that the Civil Procedure Code before its amendment in 1976 did not have the provisions of Order I Rules 8(4), (5) and (6) and Explanations etc. nor Order XXIII Rules 3-A and 3-B. Before the amendment the High Court had taken a view against the requirement of hearing the parties represented in the suit under Order I Rule 8 before it before settling or disposing of the suit. Our attention was drawn to the decision of the Calcutta High Court in *Chintaharan Ghose* v. *Gujaraddi Sheik*[36], wherein it was held by the learned Single Judge that the plaintiff in a representative suit had right to compromise subject to the conditions that the suit was properly filed in terms of the provisions of that Rule and the settlement was agreed bona fide. Learned Attorney General in that context contended that when the suit was validly instituted, the plaintiff had a right to compromise the suit and there need not be any provision for notice to the parties represented before entering into any compromise. Reliance was placed on the decision of the Allahabad High Court in *Ram Sarup* v. *Nanak Ram*[37] where it was held that a compromise entered into in a suit filed under Order I Rule 8 of the CPC was binding on all persons as the plaintiffs who had instituted the suit in representative capacity had the authority to compromise. He further submitted that most, if not all, of the victims had given their power of attorney which were duly filed in favour of the Union of India. These powers of attorney have neither

36 AIR 1951 Cal 456, 457-59 .
37 AIR 1952 All 275: 1951 AWR 155 .

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been impeached nor revoked or withdrawn. By virtue of the powers of attorney the Union of India, it was stated, had the authority to file the suits and to compromise the interests of the victims if so required. The Act in question itself contemplates settlement as we have noted, and a settlement would need a common spokesman.

67. It was submitted that the Government of India as the statutory representative discharged its duty and is in a centralised position of assessing the merits and demerits of any proposed course of action. So far as the act of compromise, abridging or curtailing the ambit of the rights of the victims, it was submitted that in respect of liabilities of UCC and UCIL, be it corporate, criminal or tortious, it was open to an individual to take a decision of enforcing the liability to its logical extent or stopping short of it and acceding to a compromise. Just as an individual can make an election in the matter of adjudication of liability so can a statutory representative make an election. Therefore, it is wholly wrong to contend, it was urged, that Section 3(ii)(*b*) is inconsistent with individual's right of election and at the same time it provides the centralised decision-making processes to effectively adjudge and secure the common good. It was only a central agency like the Government of India, who could have a perspective of the totality of the claims and a vision of the problems of individual plaintiffs in enforcing these, it was urged. It was emphasised that it has to be borne in mind that a compromise is a legal act. In the present case, it is a part of the conduct of the suit. It is, therefore, imperative that the choice of compromise is made carefully, cautiously and with a measure of discretion, it was submitted. But if any claimant wished to be associated with the conduct of the suit, he would necessarily have been afforded an opportunity for that purpose, according to the learned Attorney General. In this connection, reference was made to Section 4 of the Act. On the other hand, an individual who did not participate in the conduct of the suit and who is unaware of the various intricacies of the case, could hardly be expected to meaningfully partake in the legal act of settlement either in conducting the proceedings or entering into compromise, it was urged. In those circumstances, the learned Attorney General submitted that the orders of February 14/15, 1989 and the Memorandum of Settlement were justified both under the Act and the Constitution. According to him, the terms of settlement might be envisaged as pursuant to Section 3(ii)(*b*) of the Act, which was filed according to him pursuant to judicial direction. He sought more than once to emphasise, that the order was passed by the highest court of the land in exercise of extraordinary jurisdiction vested in it under the Constitution.

68. Our attention was drawn to several decisions for the power of this Court under Articles 136 and 142 of the Constitution. Looked at closely the provisions of the Act, it was contended that taking into consideration all the factors, namely, possibilities of champerty, exploitation,

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unconscionable agreements and the need to represent the dead and the disabled, the course of events would reveal a methodical and systematic protection and vindication of rights to the largest possible extent. It was observed that the rights are indispensably valuable possessions, but the right is something which a man can stand on, something which must be demanded or insisted upon without embarrassment or shame. When rights are curtailed, permissibility of such a measure can be examined only upon the strength, urgency and the pre-eminence of rights and the largest good of the largest number sought to be served by curtailment. Under the circumstances which were faced by the victims of Bhopal gas tragedy, the justifying basis, according to the learned Attorney General, or ground of human rights is that every person morally ought to have something to which he or she is entitled. It was emphasised that the statute aimed at it. The Act provides for assumption of rights to sue with the aim of securing speedy, effective and equitable results to the best advantage of the claimants. The Act and the Scheme, according to the learned Attorney General, sought to translate that profession into a system of faith and possible association when in doubt. Unless such a profession is shown to be unconscionable under the circumstances or strikes judicial conscience as a subversion of the objects of the Act, a declaredly fair, just and equitable exercise of a valid power would not be open to challenge. He disputed the submission that the right to represent victims postulated as contended mainly by the counsel on behalf of the petitioners, a pre-determination of each individual claim as a sine qua non for proceeding with the action. Such a construction would deplete the case of its vigour, urgency and sense of purpose, he urged. In this case, with the first of the cases having been filed in U.S. Federal Court on December 7, 1984 a settlement would have been reached for a much smaller sum to the detriment of the victims. Learned Attorney General emphasised that this background has to be kept in mind while adjudging the validity of the Act and the appropriateness of the conduct of the suit in the settlement entered into.

69. He submitted that it has to be borne in mind that if the contentions of the petitioners are entertained, the rights theoretically might be upheld but the ends of justice would stand sacrificed. It is in those circumstances that it was emphasised that the claimant is an individual and is the best person to speak about his injury. The knowledge in relation to his injury is relevant for the purpose of compensation, whose distribution and disbursement is the secondary stage. It is fallacious to suggest that the plaint was not based upon necessary data. He insisted that the figures mentioned in the plaint although tentative were not mentioned without examination or analysis.

70. It was further submitted by the learned Attorney General that while the Government of India had proceeded against the UCC, it had to represent the victims as a class, and it was not possible to define each

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individual's right after careful scrutiny, nor was it necessary or possible to do so in a mass disaster case. The settlement was a substitute for adjudication since it involved a process of reparation and relief. The relief and reparation cannot be said to be irrelevant for the purpose of the Act. It was stated that the alleged liability of the Government of India or any claim asserted against the alleged joint tort-feasor should not be allowed to be a constraint on the Government of India to protect the interests of its own citizens. Any counter-claim by UCC or any claim by a citizen against the government cannot vitiate the action of the State in the collective interest of the victims, who are the citizens. Learned Attorney General submitted that any industrial activity, normally, has to be licensed. The mere regulation of any activity does not carry with it legally a presumption of liability for injury caused by the activity in the event of a mishap occurring in the course of such an activity. In any event, the learned Attorney General submitted the Government of India enjoys sovereign immunity in accordance with settled law. If this were not the case, the sovereign will have to abandon all regulatory functions including the licensing of drivers of automobiles. Hence, we have to examine the question whether even on the assumption that there was negligence on the part of the Government of India in permitting licensing of the industry set up by the Union Carbide in Bhopal or permitting the factory to grow up, such permission or conduct of the Union of India was responsible for the damage which has been suffered as a result of Bhopal gas leakage. It is further to be examined whether such conduct was in discharge of the sovereign functions of the Government, and as such damages, if any, resulting therefrom are liable to be proceeded against the government as a joint tort-feasor or not. In those circumstances, it was further asserted on behalf of the Union of India that though calculation of damages in a precise manner is a logical consequence of a suit in progress it cannot be said to be a condition precedent for the purpose of settling the matter. Learned Attorney General urged that the accountability to the victims should be through the court. He urged that the allegation that a large number of victims did not give consent to the settlement entered into, is really of no relevance in the matter of a compromise in a mass tort action. It was highlighted that it is possible that those who do not need urgent relief or are uninformed of the issues in the case, may choose to deny consent and may place the flow of relief in jeopardy. Thus, consent based upon individual subjective opinion can never be correlated to the proposal of an overall settlement in an urgent matter. Learned Attorney General urged further that if indeed consent were to be insisted upon as a mandatory requirement of a statute, it would not necessarily lead to an accurate reflection of the victims' opinion as opinions may be diverse. No individual would be in a position to relate himself to a lump sum figure and would not be able to define his expectations on a global criteria. In such circumstances the

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value of consent is very much diminished. It was urged that if at all consent was to be insisted it should not be an expression of the mind without supporting information and response. To make consent meaningful it is necessary that it must be assertion of a right to be exercised in a meaningful manner based on information and comprehension of collective welfare and individual good. In a matter of such dimensions the insistence upon consent will lead to a process of enquiry which might make effective consideration of any proposal impossible. For the purpose of affording consent, it would also be necessary that each individual not only assesses the damages to himself objectively and places his opinion in the realm of fair expectation, but would also have to do so in respect of others. The learned Attorney General advanced various reasons why it is difficult now or impossible to have the concurrence of all.

71. In answer to the criticism by the petitioners, it was explained on behalf of the Union of India that UCIL was not impleaded as a party in the suit because it would have militated against the plea of multinational enterprise liability and the entire theory of the case in the plaint. It was highlighted that the power to represent under the Act was exclusive, the power to compromise for the Government of India is without reference to the victims, yet it is a power guided by the sole object of the welfare of the victims. The presence and ultimately the careful imprimatur of the judicial process is the best safeguard to the victims. Learned Attorney General insisted that hearing the parties after the settlement would also not serve any purpose. He urged that it can never be ascertained with certainty whether the victims or groups have authorised what was being allegedly spoken on their behalf; and that the victims would be unable to judge a proposal of this nature. A method of consensus need not be evolved like in America where every settlement made by contingency fee lawyers who are anxious to obtain their share automatically become adversaries of the victims and the court should therefore be satisfied. Here the court arrived at the figure and directed the parties to file a settlement on the basis of its order of February 14, 1989 and the interveners were heard, it was urged. It was also urged that notice to the victims individually would have been a difficult exercise and analysis of their response time-consuming.

72. The learned Attorney General urged that neither the Central Government nor the State Government of Madhya Pradesh is liable for the claim of the victims. He asserted that, on the facts of the present case, there is and can be no liability on their part as joint tort-feasors. For the welfare of the community several socio-economic activities will have to be permitted by the government. Many of these activities may have to be regulated by licensing provisions contained in statutes made either by Parliament or by State legislatures. Any injury caused to a person, to his life or liberty in the conduct of a licensed authority so as to make the said

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licensing authority or the government liable to damages would not be in conformity with jurisprudential principle. If in such circumstances, it was urged on behalf of the government, the public exchequer is made liable, it will cause great public injury and may result in drainage of the treasury. It would terrorise the welfare State from acting for development of the people, and will affect the sovereign governmental activities which are beneficial to the community not being adequately licensed and would thereby lead to public injury. In any event, it was urged on behalf of the government, that such licensing authorities even assuming without admitting could be held to be liable as joint tort-feasors, it could be so held only on adequate allegations of negligence with full particulars and details of the alleged act or omission of the licensing authority alleged and its direct nexus to the injury caused to the victims. It had to be proved by cogent and adequate evidence. On some conjecture or surmise without any foundation on facts, government's right to represent the victims cannot be challenged. It was asserted that even if the government is considered to be liable as a joint tort-feasor, it will be entitled to claim sovereign immunity on the law as it now stands.

73. Reference was made to the decision of this Court in *Kasturilal Ralia Ram Jain* v. *State of U.P.*[37] where the conduct of some police officer in seizing gold in exercise of their statutory powers was held to be in discharge of the sovereign functions of the State and such activities enjoyed sovereign immunities. The liability of the Government of India under the Constitution has to be referred to Article 300, which takes us to Sections 15 and 18 of the Indian Independence Act, 1947 and Section 176(1) of the Government of India Act, 1935. Reference was also made to the observations of this Court in *State of Rajasthan* v. *Mst. Vidhyawati*[38].

74. We have noted the shareholding of UCC. The circumstances that financial institutions held shares in the UCIL would not disqualify the Government of India from acting as *parens patriae* and in discharging of its statutory duties under the Act. The suit was filed only against the UCC and not against UCIL. On the basis of the claim made by the Government of India, UCIL was not a necessary party. It was suing only the multinational based on several legal grounds of liability of the UCC, inter alia, on the basis of enterprise liability. If the Government of India had instituted a suit against UCIL to a certain extent it would have weakened its case against UCC in view of the judgment of this Court in *M.C. Mehta case*[12]. According to learned Attorney General, the Union of India in present case was not proceeding on the basis of lesser liability of UCC predicated in *Mehta case*[12] but on a different jurisprudential principle to make UCC strictly and absolutely liable for the entire damages.

75. The learned Attorney General submitted that even assuming for the purpose of argument without conceding that any objection can be

37 (1965) 1 SCR 375: AIR 1965 SC 1039: (1965) 2 LLJ 583
38 1962 Supp 2 SCR 989: AIR 1962 SC 933

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raised for the Government of India representing the victims, to the present situation the doctrine of necessity applied. The UCC had to be sued before the American courts. The tragedy was treated as a national calamity, and the Government of India had the right, and indeed the duty, to take care of its citizens, in the exercise of its *parens patriae* jurisdiction or on principle analogous thereto. After having statutorily armed itself in recognition of such *parens patriae* right or on principles analogous thereto, it went to the American courts. No other person was properly designed for representing the victims as a foreign court had to recognise a right of representation. The Government of India was permitted to represent the victims before the American courts. Private plaintiffs were also represented by their attorneys. A committee of three attorneys was formed before the case proceeded before Judge Keenan. It was highlighted that the order of Judge Keenan permitted the Government of India to represent the victims. If there was any remote conflict of interest between the Union of India and the victims from the theoretical point of view the doctrine of necessity would override the possible violation of the principles of natural justice — that no man should be a judge in his own cause. Reference may be made to *Halsbury's Laws of England*, Vol. 1, 4th edn., page 89, para 73, where it was pointed out that if all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. Reference was also made to de Smith's *Judicial Review of Administrative Action*, 4th edn. pages 276-77. See also G.A. Flick, *Natural Justice*, 1979, pages 138-41. Reference was also made to the observations of this Court in *J. Mohapatra & Co.* v. *State of Orissa*[39] where at page 112 of the report, the court recognised the principle of necessity. It was submitted that these were situations where on the principle of doctrine of necessity a person interested was held not disqualified to adjudicate on his rights. The present is a case where the Government of India only represented the victims as a party and did not adjudicate between the victims and the UCC. It is the court which would adjudicate the rights of the victims. The representation of the victims by the Government of India cannot be held to be bad, and there is and there was no scope of violation of any principle of natural justice. We are of the opinion in the facts and the circumstances of the case that this contention urged by Union of India is right. There was no scope of violation of the principle of natural justice on this score.

76. It was also urged that the doctrine of de facto representation will also apply to the facts and the circumstances of the present case. Reliance was placed on the decision of this Court in *Gokaraju Rangaraju* v. *State of A.P.*[40] where it was held that the doctrine of de facto representation envisages what acts performed within the scope of

39 (1984) 4 SCC 103
40 (1981) 3 SCC 132: 1981 SCC (Cri) 652: (1981) 3 SCR 474

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assumed official authority in the interest of public or third persons and not for one's own benefit, are generally to be treated as binding as if they were the acts of officers de jure. This doctrine is founded on good sense, sound policy and practical expediency. It is aimed at the prevention of public and private mischief and protection of public and private interest. It avoids endless confusion and needless chaos. Reference was made to the observations of this Court in *Pushpadevi M. Jatia* v. *M.L. Wadhawan*[41] and *Beopar Sahayak (P) Ltd.* v. *Vishwa Nath*[42]. Apart from the aforesaid doctrine, doctrine of bona fide representation was sought to be resorted to in the circumstances. In this connection, reference was made to *Dharampal Singh* v. *Director of Small Industries Services*[43], *N.K. Mohammad Sulaiman* v. *N.C. Mohammad Ismail*[44] and *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*[45].

77. It was further submitted that the initiation of criminal proceedings and then quashing thereof, would not make the Act ultra vires so far as is concerned. Learned Attorney General submitted that the Act only authorised the Government of India to represent the victims to enforce their claims of damages under the Act. 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 Constitution. In this connection, reference was made to *State of U.P.* v. *Poosu*[46] and *K.M. Nanavati* v. *State of Bombay*[47]. According to the learned Attorney General, there is also power in the Supreme Court to suggest a settlement and give relief as in *Ram Gopal* v. *Smt. Sarubai*[48] and *India Mica & Micanite Industries Ltd.* v. *State of Bihar*[49].

78. Learned Attorney General urged that the Supreme Court is empowered to act even outside a statute and give relief in addition to what is contemplated by the latter in exercise of its plenary power. This Court acts not only as a court of appeal but is also a court of equity. See *Roshanlal Kuthiala* v. *R.B. Mohan Singh Oberoi*[50]. During the course of hearing of the petitions, he informed this Court that the Government of India and the State Government of Madhya Pradesh refuted and denied any liability, partial or total, of any sort in the Bhopal gas leak disaster,

41 (1987) 3 SCC 367, 389-90: 1987 SCC (Cri) 526
42 (1987) 3 SCC 693, 702-03: 1987 SCC (Cri) 641
43 1980 Supp SCC 505: AIR 1980 SC 1888
44 (1966) 1 SCR 937: AIR 1966 SC 792
45 27 IA 216: ILR 25 Bom 337: 2 Bom LR 927
46 (1976) 3 SCC 1: 1976 SCC (Cri) 368: (1976) 3 SCR 1005
47 (1961) 1 SCR 497: AIR 1961 SC 112: (1961) 1 Cri LJ 173
48 (1981) 4 SCC 505
49 (1982) 3 SCC 182
50 (1974) 4 SCC 628: (1975) 2 SCR 491

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and this position is supported by the present state of law. It was, however, submitted that any claim against the Government of India for its alleged tortious liability was outside the purview of the Act and such claims, if any, are not extinguished by reason of the orders dated February 14/15, 1989 of this Court.

79. Learned Attorney General further stated that the amount of 470 million U.S. dollars which was secured as a result of the memorandum of settlement and the said orders of this Court would be meant exclusively for the benefit of the victims who have suffered on account of the Bhopal gas leak disaster. The Government of India would not seek any reimbursement on account of the expenditure incurred suo motu for relief and rehabilitation of the Bhopal gas victims nor will the government or its instrumentality make any claim on its own arising from this disaster. He further assured this Court that in the event of disbursement of compensation being initiated either under the Act or under the orders of this Court, a notification would be instantaneously issued under Section 6(3) of the Act authorising the Commissioner or any other officers to discharge functions and exercise all or any powers which the Central Government may exercise under Section 5 to enable the victims to place before the Commissioner or the Deputy Commissioner any additional evidence that they would like to be considered.

80. The Constitution Bench of this Court presided over by the learned Chief Justice R.S. Pathak has pronounced an order on May 4, 1989[51] giving reasons for the orders passed on February 14/15, 1989. Inasmuch as good deal of criticism was advanced before this Court during the hearing of the arguments on behalf of the petitioners about the propriety and validity of the settlement dated February 14/15, 1989 even though the same was not directly in issue before us, it is necessary to refer briefly to what the Constitution Bench has stated in the said order dated May 4, 1989. After referring to the facts leading to the settlement, the court has set out the brief reasons on the following points:

(*a*) How did the court arrive at the sum of 470 million U.S. dollars for an overall settlement?, (*b*) Why did the court consider the sum of 470 million U.S. 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 monolithic, economically entrenched multinational companies operating with inherently dangerous technologies in the developing countries of the Third World? These questions were said to be of great contemporary relevance to the democracies of the Third World. This Court recognised that there was another aspect of the review pertaining to the part of the settlement which terminated the criminal proceedings. The questions raised on the point in the review petitions, the court was of the view,

51 *Union Carbide Corpn.* v. *Union of India*, (1989) 3 SCC 38

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prima facie merit consideration and therefore, abstained from saying anything which might tend to prejudge this issue one way or the other.

81. The basic consideration, as this court recorded, motivating the conclusion of the settlement was the compelling need for urgent relief, and the court set out the law's delays duly considering that there was a compelling duty both judicial and humane, to secure immediate relief to the victims. In doing so, the court did not enter upon any forbidden ground, the court stated. The court noted that indeed efforts had already been made in this direction by Judge Keenan and the learned District Judge of Bhopal. Even at the opening of the arguments in the appeals, the court had suggested to learned counsel to reach a just and fair settlement. And when counsel met for rescheduling of the hearings the suggestion was reiterated. The court recorded that the response of learned counsel was positive in attempting a settlement but they expressed a certain degree of uneasiness and scepticism at the prospects of success in view of their past experience of such negotiations when, as they stated, there has been uninformed and even irresponsible criticism of the attempts at settlement.

82. Learned Attorney General had made available to the court the particulars of offers and counter-offers made on previous occasions and the history of settlement. In those circumstances, the court examined the prima facie material as the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the US for the purpose of execution and directed that 470 million U.S. dollars, which upon immediate payment with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate to nearly 500 million U.S. dollars or its rupee equivalent of approximately Rs 750 crores which the learned Attorney General had suggested, be made the basis of settlement, and both the parties accepted this direction.

83. The court reiterated that the settlement proposals were considered on the premise that the government had the exclusive statutory authority to represent and act on behalf of the victims and neither counsel had any reservation on this. The order was also made on the premise that the Act was a valid law. The court declared that in the event the Act is declared void in the pending proceedings challenging its validity, the order dated February 14, 1989 would require to be examined in the light of that decision. The court also reiterated that if any material was placed before it from which a reasonable inference was possible that the UCC had, at any time earlier, offered to pay any sum higher than an outright down payment of 470 million U.S. dollars, this Court would straightway initiate suo motu action requiring the concerned parties to show cause why the order dated February 14, 1989 should not be set aside and the parties relegated to their original positions. The court

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reiterated that the reasonableness of the sum was based not only on independent quantification but the idea of reasonableness for the present purpose was necessarily a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication. The court stated that the question was, how good or reasonable it was as a settlement, which would avoid delay, uncertainties and assure immediate payment. An estimate in the very nature of things, would not have the accuracy of an adjudication. The court recorded the offers, counter offers, reasons and the numbers of the persons treated and the claims already made. The court found that from the order of the High Court and the admitted position on the plaintiff's side, a reasonable prima facie estimate of the number of fatal cases and serious personal injury cases, was possible to be made. The court referred to the High Court's assessment and procedure to examine the task of assessing the quantum of interim compensation. The Court referred to *M.C. Mehta case*[12] reiterated by the High Court, bearing in mind the factors that if the suit proceeded to trial the plaintiff-Union of India would obtain judgment in respect of the claims relating to deaths and personal injuries in the following manner: (*a*) Rs 2 lakhs in each case of death; (*b*) Rs 2 lakh in each case of total permanent disability; (*c*) Rs 1 lakh in each case of permanent partial disablement; and (*d*) Rs 50,000 in each case of temporary partial disablement.

84. Half of these amounts were awarded as interim compensation by the High Court.

85. The figures adopted by the High Court in regard to the number of fatal cases and cases of serious personal injuries did not appear to have been disputed by anybody before the High Court, this Court observed. From those figures, it came to the conclusion that the total number of fatal cases was about 3000 and of grievous and serious personal injuries, as verifiable from the records was 30,000. This Court also took into consideration that about 8 months after the occurrence a survey had been conducted for the purpose of identification of cases. These figures indicated less than 10,000. In those circumstances, as a rough and ready estimate, this Court took into consideration the prima facie findings of the High Court and estimated the number of fatal cases at 3000 where compensation could range from Rs 1 lakh to Rs 3 lakhs. This would account for Rs 70 crores, nearly 3 times higher than what would have otherwise been awarded in comparable cases in motor vehicles accident claims.

86. The court recognised the effect of death and reiterated that loss of precious human lives is irreparable. The law can only hope to compensate the estate of a person whose life was lost by the wrongful act of another only in the way the law was equipped to compensate i.e. by monetary compensation calculated on certain well recognised principles. "Loss to the estate" which is the entitlement of the estate and the "loss

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of dependency" estimated on the basis of capitalised present value awardable to the heirs and dependents, this Court considered, were the main components in the computation of compensation in fatal accident actions, but the High Court adopted a higher basis. The court also took into account the personal injury cases, and stated that these apportionments were merely broad considerations generally guiding the idea of reasonableness of the overall basis of settlement, and reiterated that this exercise was not a predetermination of the quantum of compensation amongst the claimants either individually or categorywise; and that the determination of the actual quantum of compensation payable to the claimants has to be done by the authorities under the Act. These were the broad assessments and on that basis the court made the assessment. The court believed that this was a just and reasonable assessment based on the materials available at that time. So far as the other question, namely, the vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multinationals in this case, the court recognised that these were great problems and reiterated that there was need to evolve a national policy to protect national interests from such ultra-hazardous pursuits of economic gain; and that jurists, technologists and other experts in economics, environmentology, futurology, sociology and public health should identify the area of common concern and help in evolving proper criteria which might receive judicial recognition and legal sanction. The Court reiterated that some of these problems were referred to in *M.C. Mehta case*[12]. But in the present case, the compulsions of the need for immediate relief to tens of thousands of suffering victims could not wait till these questions vital though these be, were resolved in due course of judicial proceedings; and the tremendous suffering of thousands of persons compelled this Court to move into the direction of immediate relief which, this Court thought, should not be subordinated to the uncertain promises of the law, and when the assessment of fairness of the amount was based on certain factors and assumptions not disputed even by the plaintiffs.

87. Before considering the question of constitutional validity of the Act, in the light of the background of the facts and circumstances of this case and submissions made, it is necessary to refer to the order dated March 3, 1989 passed by the Constitution Bench in respect of Writ Petitions Nos. 164 of 1986 and 268 of 1989, consisting of five learned judges presided over by the Hon'ble the Chief Justice of India. The order stated that these matters would be listed on March 8, 1989 before a Constitution Bench for decision "on the sole question whether the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 is ultra vires". This is a judicial order passed by the said Constitution Bench. This is not an administrative order. Thus, these matters are before this Court. The

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question, therefore, arises: what are these matters? The aforesaid order specifically states that these matters were placed before this bench on the "sole question" whether the Act is ultra vires. Hence, these matters are not before this Bench for disposal of these writ petitions. If as a result of the determination, one way or the other, it is held, good and bad, and that some relief becomes necessary, the same cannot be given or an order cannot be passed in respect thereof, except declaring the Act or any portion of the Act, valid or invalid constitutionally as the decision might be.

88. In Writ Petition No. 268 of 1989 there is consequential prayer to set aside the order dated February 14/15, 1989. But since the order dated March 3, 1989 above only suggests that these matters have been placed before this bench 'on the sole question' whether the Bhopal Act is ultra vires or not, it is not possible by virtue of that order to go into the question whether the settlement is valid or liable to be set aside as prayed for in the prayers in these applications.

89. The provisions of the Act have been noted and the rival contentions of the parties have been set out before. It is, however, necessary to reiterate that the Act does not in any way circumscribe the liability of the UCC, UCIL or even the Government of India or Government of Madhya Pradesh if they are jointly or severally liable. This follows from the construction of the Act, from the language that is apparent. The context and background do not indicate to the contrary. Counsel for the victims plead that this is so. The learned Attorney General accepts that position. The liability of the government is, however, disputed. This Act also does not deal with any question of criminal liability of any of the parties concerned. On an appropriate reading of the relevant provisions of the Act, it is apparent that the criminal liability arising out of Bhopal gas leak disaster is not the subject matter of this Act and cannot be said to have been in any way affected, abridged or modified by virtue of this Act. This was the contention of learned counsel on behalf of the victims. It is also the contention of the learned Attorney General. In our opinion, it is the correct analysis and consequence of the relevant provisions of the Act. Hence, the submissions made on behalf of some of the victims that the Act was bad as it abridged or took away the victims' right to proceed criminally against the delinquent, be it UCC or UCIL or jointly or severally the Government of India, Government of Madhya Pradesh or Shri Arjun Singh, the erstwhile Chief Minister of Madhya Pradesh, is on a wrong basis. There is no curtailment of any right with respect to any criminal liability. Criminal liability is not the subject matter of the Act. By the terms of the Act and also on the concessions made by the learned Attorney General, if that be so, then can non-prosecution in criminal liability be a consideration or valid consideration for settlement of claims under the Act? This is a question which has been suggested and articulated by learned counsel appearing for the victims. On the other hand, it

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has been asserted by the learned Attorney General that that part of the order dated February 14/15, 1989 dealing with criminal prosecution or the order of this Court was by virtue of the inherent power of this Court under Articles 136 and 142 of the Constitution. These, the learned Attorney General said, were in the exercise of plenary powers of this Court. These are not considerations which induced the parties to enter into settlement. For the purpose of determination of constitutional validity of the Act, it is however necessary to say that criminal liability of any of the delinquents or of the parties is not the subject matter of this Act and the Act does not deal with either claims or rights arising out of such criminal liability. This aspect is necessary to be reiterated on the question of validity of the Act.

90. We have set out the language and the purpose of the Act, and also noted the meaning of the expression 'claim' and find that the Act was to secure the claims connected with or arising out of the disaster so that these claims might be dealt with speedily, effectively, equitably and to the best advantage of the claimants. In our opinion, clause (*b*) of Section 2 includes all claims of the victims arising out of and connected with the disaster for compensation and damages or loss of life or personal injury or loss to the business and flora and fauna.What, however, is the extent of liability, is another question. This Act does not purport to or even to deal with the extent of liability arising out of the said gas leak disaster. Hence, it would be improper or incorrect to contend as did Ms Jaising, Shri Garg and other learned counsel appearing for the victims, that the Act circumscribed the liability — criminal, punitive or absolute of the parties in respect of the leakage. The Act provides for a method or procedure for the establishment and enforcement of that liability. Good deal of argument was advanced before this Court on the question that the settlement has abridged the liability and this Court has lost the chance of laying down the extent of liability arising out of disaster like the Bhopal gas leak disaster. Submissions were made that we should lay down clearly the extent of liability arising out of these types of disasters and we should further hold that the Act abridged such liability and as such curtailed the rights of the victims and was bad on that score. As mentioned hereinbefore, this is an argument under a misconception. The Act does not in any way except to the extent indicated in the relevant provisions of the Act circumscribe or abridge the extent of the rights of the victims so far as the liability of the delinquents are concerned. Whatever are the rights of the victims and whatever claims arise out of the gas leak disaster for compensation, personal injury, loss of life and property, suffered or likely to be sustained or expenses to be incurred or any other loss are covered by the Act and the Central Government by operation of Section 3 of the Act has been given the exclusive right to represent the victims in their place and stead. By the Act, the extent of liability is not in any way abridged and, therefore, if in case of any

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industrial disaster like the Bhopal gas leak disaster, there is right in victims to recover damages or compensation on the basis of absolute liability, then the same is not in any manner abridged or curtailed.

91. Over 120 years ago *Rylands* v. *Fletcher*[52] was decided in England. There *A*; was the lessee of certain mines. *B*, was the owner of a mill standing on land adjoining that under which the mines were worked. *B*, desired to construct a reservoir, and employed competent persons, such as engineers and a contractor, to construct it. *A*, had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care had been taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passage and flooded *A*'s mine. It was held by the House of Lords in England that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. In the background of the facts it was held that *A* was entitled to recover damages from *B*, in respect of the injury. The question of liability was highlighted by this Court in *M.C. Mehta case*[12] where a Constitution Bench of this Court had to deal with the rule of strict liability. This Court held that the rule in *Rylands* v. *Fletcher*[52] laid down a principle that if a person who brings on his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and 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 things which escape are present by the consent of the person injured or in certain cases where there is a statutory authority. There, this Court observed that the rule in *Rylands* v. *Fletcher*[52] evolved in the 19th century at a time when all the developments of science and technology had not taken place, and the same 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. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental process, courts should not feel inhibited by this rule merely because the new law does not recognise

52 (1868) 3 LR 3 HL 330: 19 LT 220: 33 JP 70

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the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity. This Court noted that 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. Law cannot afford to remain static. This Court reiterated there that if it is found 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 hazardous or inherently dangerous industries which are concomitant to an industrial economy; the court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry which poses 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 community to ensure that no harm results to anyone. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands* v. *Fletcher*[52]. If the enterprise is permitted to carry on a hazardous or dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resources to discover and guard against hazards or dangers and to provide warning against potential hazards. This Court reiterated that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The determination of actual damages payable would depend upon various facts and circumstances of the particular case.

92. It was urged before us that there was an absolute and strict liability for an enterprise which was carrying on dangerous operations with gases in this country. It was further submitted that there was evidence on record that sufficient care and attention had not been given to safeguard against the dangers of leakage and protection in case of leakage. Indeed, the criminal prosecution that was launched against the

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Chairman of Union Carbide Mr Warren Anderson and others, as indicated before, charged them along with the defendants in the suit with delinquency in these matters and criminal negligence in conducting the toxic gas operations in Bhopal. As in the instant adjudication, this Court is not concerned with the determination of the actual extent of liability, we will proceed on the basis that the law enunciated by this Court in *M.C. Mehta case*[12] is the decision upon the basis of which damages will be payable to the victims in this case. But then the practical question arises: what is the extent of actual damages payable, and how would the quantum of damages be computed? Indeed, in this connection, it may be appropriate to refer to the order passed by this Court on May 4, 1989[†††] giving reasons why the settlement was arrived at at the figure indicated. This Court had reiterated that it had proceeded on certain prima facie undisputed figures of death and substantially compensating personal injury. This Court has referred to the fact that the High Court had proceeded on the broader principle in *M.C. Mehta case*[12] and on the basis of the capacity of the enterprise because the compensation must have deterrent effect. On that basis the High Court had proceeded to estimate the damages on the basis of Rs 2 lakhs for each case of death and of total permanent disability, Rs 1 lakh for each case of partial permanent disability and Rs 50,000 for each case of temporary partial disability. In this connection, the controversy as to what would have the damages been if the action had proceeded, is another matter. Normally, in measuring civil liability, the law has attached more importance to the principle of compensation than that of punishment. Penal redress, however, involves both compensation to the person injured and punishment as deterrence. These problems were highlighted by the House of Lords in England in *Rookes* v. *Barnard*[53], which indicate the difference between aggravated and exemplary damages. Salmond on the *Law of Torts*, 15th edn. at page 30 emphasises that the function of damages is compensation rather than punishment, but punishment cannot always be ignored. There are views which are against exemplary damages on the ground that these infringe in principle the object of law of torts, namely, compensation and not punishment and these tend to impose something equivalent to fine in criminal law without the safeguards provided by the criminal law. In *Rookes* v. *Barnard*[53], the House of Lords in England recognised three classes of cases in which the award of exemplary damages was considered to be justifiable. Awards must not only, it is said, compensate the parties but also deter the wrongdoers and others from similar conduct in future. The question of awarding exemplary or deterrent damages is said to have often confused civil and criminal functions of law. Though it is considered by many that it is a legitimate encroachment of punishment in the realm of civil liability, as it operates a restraint on the transgression of law which is for the ultimate benefit of the society. Perhaps, in this case,

††† *Union Carbide Corpn.* v. *Union of India*, (1989) 3 SCC 38
53 1964 AC 1129: (1964) 1 All ER 367

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had the action proceeded, one would have realised that the fall out of this gas disaster might have been the formulation of a concept of damages, blending both civil and criminal liabilities. There are, however, serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task might have been, it is still very uncertain how far decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards. There were difficulties in that attempt. But as the provisions stand these considerations do not make the Act constitutionally invalid. These are matters on the validity of settlement. The Act, as such does not abridge or curtail damage or liability whatever that might be. So the challenge to the Act on the ground that there has been curtailment or deprivation of the rights of the victims which is unreasonable in the situation is unwarranted and cannot be sustained.

93. Shri Garg tried to canvass before us the expanding of horizons of human rights. He contended that the conduct of the multinational corporations dealing with dangerous gases for the purpose of development specially in the conditions prevailing in the Third World countries requires closer scrutiny and vigilance on the part of emerging nations. He submitted that unless courts are alert and active in preserving the rights of the individuals and in enforcing criminal and strict liability and in setting up norms compelling the government to be more vigilant and enforcing the sovereign will of the people of India to oversee that such criminal activities which endanger even for the sake of developmental work, economy and progress of the country, the health and happiness of the people and damage the future prospects of health, growth and affect and pollute the environment, should be curbed and, according to him, these could only be curbed by insisting through the legal adjudication, punitive and deterrent punishment in the form of damages. He also pleaded that norms should be set up indicating how these kinds of dangerous operations are to be permitted under conditions of vigilance and surveillance. While we appreciate the force of these arguments, and endorse his plea that norms and deterrence should be aspired for, it is difficult to correlate that aspect with the present problem in this decision.

94. We do reiterate, as mentioned in the Universal Declaration of Human Rights that people are born free and the dignity of the persons must be recognised and an effective remedy by competent tribunal is one of the surest methods of effective remedy. If, therefore, as a result of this tragedy new consciousness and awareness on the part of the people of this country to be more vigilant about measures and the necessity of ensuring more strict vigilance for permitting the operations of such dangerous and poisonous gases dawn, then perhaps the tragic experience of Bhopal would not go in vain.

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95. The main question, however, canvassed by all learned counsel for the victims was that so far as the Act takes away the right of the victims to fight or establish their own rights, it is a denial of access to justice, and it was contended that such denial is so great a deprivation of both human dignity and right to equality that it cannot be justified because it would be affecting right to life, which again cannot be deprived without a procedure established by law which is just, fair and reasonable.

96. On this aspect, Shri Shanti Bhushan tried to urge before us that Sections 3 and 4 of the Act, insofar as these enjoin and empower the Central Government to institute or prosecute proceedings was only an enabling provision for the Central Government and not depriving or disabling provisions for the victims. Ms Jaising sought to urge in addition, that in order to make the provisions constitutionally valid, we should eliminate the concept of exclusiveness to the Central Government and give the victims right to sue along with the Central Government. We are unable to accept these submissions.

97. In our opinion, Sections 3 and 4 are categorical and clear. When the expression is explicit, the expression is conclusive, alike in what it says and in what it does not say. These give to the Central Government an exclusive right to act in place of the persons who are entitled to make claim or have already made claim. The expression 'exclusive' is explicit and significant. The exclusivity cannot be whittled down or watered down as suggested by counsel. The said expression must be given its full meaning and extent. This is corroborated by the use of the expression 'claim' for all purposes. If such duality of rights are given to the Central Government along with the victims in instituting or proceeding for the realisation or the enforcement of the claims arising out of Bhopal gas leak disaster, then that would be so cumbersome that it would not be speedy, effective or equitable and would not be the best or more advantageous procedure for securing the claims arising out of the leakage. In that view of the matter and in view of the language used and the purpose intended to be achieved, we are unable to accept this aspect of the arguments advanced on behalf of the victims. It was then contended that by the procedure envisaged by the Act, the victims have been deprived and denied their rights and property to fight for compensation. The victims, it has been asserted, have been denied access to justice. It is a great deprivation, it was urged. It was contended that the procedure evolved under the Act for the victims is peculiar and having good deal of disadvantages for the victims. Such special disadvantageous procedure and treatment is unequal treatment, it was suggested. It was, therefore, violative of Article 14 of the Constitution, that is the argument advanced.

98. The Act does provide a special procedure in respect of the rights of the victims and to that extent the Central Government takes upon itself the rights of the victims. It is a special Act providing a special procedure for a kind of special class of victims. In view of the enormity of

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the disaster the victims of the Bhopal gas leak disaster, as they were placed against the multinational and a big Indian corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. There indubitably is differentiation. But this differentiation is based on a principle which has rational nexus with the aim intended to be achieved by this differentiation. The disaster being unique in its character and in the recorded history of industrial disasters situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, in our opinion, there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorised by the Constitution, Article 14 is not breached. We are, therefore, unable to accept this criticism of the Act.

99. The second aspect canvassed on behalf of the victims is that the procedure envisaged is unreasonable and as such not warranted by the situation and cannot be treated as a procedure which is just, fair and reasonable. The argument has to be judged by the yardstick, as mentioned hereinbefore, enunciated by this Court in *State of Madras* v. *V.G. Rao*[2]. Hence, both the restrictions or limitations on the substantive and procedural rights in the impugned legislation will have to be judged from the point of view of the particular statute in question. No abstract rule or standard of reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed in this case, the extent and urgency of the evil sought to be remedied, disproportionate imposition, prevailing conditions at the time, all these facts will have to be taken into consideration. Having considered the background, the plight of the impoverished, the urgency of the victims' need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in mass action, the strength for the foreign multinationals, the nature of injuries and damages, and the limited but significant right of participation of the victims as contemplated by Section 4 of the Act, the Act cannot be condemned as unreasonable.

100. In this connection, the concept of *parens patriae* in jurisprudence may be examined. It was contended by the learned Attorney General that the State had taken upon itself this onus to effectively come in as *parens patriae*. We have noted the long line of Indian decisions where, though in different contexts, the concept of State as the parent of people who are not quite able to or competent to fight for their rights or assert their rights, have been utilised. It was contended that the doctrine of *parens patriae* cannot be applicable to the victims. How the

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concept has been understood in this country as well as in America has been noted. Legal dictionaries have been referred to as noted before. It was asserted on behalf of the victims by learned counsel that the concept of *parens patriae* can never be invoked for the purpose of suits in domestic jurisdiction of any country. This can only be applied in respect of the claims out of the country in foreign jurisdiction. It was further contended that this concept of *parens patriae* can only be applied in case of persons who are under disability and would not be applicable in respect of those who are able to assert their own rights. It is true that victims or their representatives are sui generis and cannot as such due to age, mental capacity or other reason not legally incapable for suing or pursuing the remedies for the rights yet they are at a tremendous disadvantage in the broader and comprehensive sense of the term. These victims cannot be considered to be any match to the multinational companies or the government with whom in the conditions that the victims or their representatives were after the disaster physically, mentally, financially, economically and also because of the position of litigation would have to contend. In such a situation of predicament the victims can legitimately be considered to be disabled. They were in no position by themselves to look after their own interests effectively or purposefully. In that background, they are the people who needed the State's protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrongdoers in this mass disaster. In that perspective, it is jurisprudentially possible to apply the principle of *parens patriae* doctrine to the victims. But quite apart from that, it has to be borne in mind that in this case the State is acting on the basis of the statute itself. For the authority of the Central Government to sue for and on behalf of or instead in place of the victims, no other theory, concept or any jurisprudential principle is required than the Act itself. The Act empowers and substitutes the Central Government. It displaces the victims by operation of Section 3 of the Act and substitutes the Central Government in its place. The victims have been divested of their rights to sue and such claims and such rights have been vested in the Central Government. The victims have been divested because the victims were disabled. The disablement of the victims vis-a-vis their adversaries in this matter is a self-evident factor. If that is the position then, in our opinion, even if the strict application of the *parens patriae* doctrine is not in order, as a concept it is a guide. The jurisdiction of the State's power cannot be circumscribed by the limitations of the traditional concept of *parens patriae*. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the State had to assume the role of a parent protecting the rights of the victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. As we have noted the Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation

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that had arisen. We must recognize and accept it as such.

101. But this right and obligation of the State has another aspect. Shri Shanti Bhushan has argued and this argument has also been adopted by other learned counsel appearing for the victims that with the assumption by the State of the jurisdiction and power as a parent to fight for the victims in the situation there is an incumbent obligation on the State, in the words of Judge Keenan, 'as a matter of fundamental human decency' to maintain the victims until the claims are established and realised from the foreign multinationals. The major inarticulate premise apparent from the Act and the Scheme and the spirit of the Act is that so long as the rights of the victims are prosecuted the State must protect and preserve the victims. Otherwise the object of the Act would be defeated, its purpose frustrated. Therefore, continuance of the payments of the interim maintenance for the continued sustenance of the victims is an obligation arising out of State's assumption of the power and temporary deprivation of the rights of the victims and divestiture of the rights of the victims to fight for their own rights. This is the only reasonable interpretation which is just, fair and proper. Indeed, in the language of the Act there is support for this interpretation. Section 9 of the Act gives power to the Central Government to frame by notification, a scheme for carrying into effect the purposes of the Act. Sub-section (2) of Section 9 provides for the matters for which the Scheme may provide. Amongst others, clause (*d*) of Section 9(2) provides for creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of the Act; and clause (*e*) of Section 9(2) covers the amounts which the Central Government "may after due appropriation made by Parliament by law in that behalf, credit to the fund referred to in clause (*d*) and any other amounts which may be credited to such fund". Clause (*f*) of Section 9(2) speaks of the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims. These provisions are suggestive but not explicit. Clause (*b*) of Section 10 which provides that in disbursing under the Scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by the government before the disbursal of such amount. The Scheme framed is also significant. Clause 10 of the Scheme provides for the claims and relief funds and includes disbursal of amounts as relief including interim relief to persons affected by the Bhopal gas leak disaster and clause 11(1) stipulates that disbursal of any amounts under the Scheme shall be made by the Deputy Commissioner to each claimant through credit in a bank or postal saving account, stressing that the legislative policy underlying the Bhopal Act contemplated payment of interim relief till such time as the Central Government was able to recover from the Union Carbide full amount of compensation

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from which the interim reliefs already paid were to be deducted from the amount payable to them for the final disbursal. The Act should be construed as creating an obligation on the Central Government to pay interim relief as the Act deprives the victims of normal and immediate right of obtaining compensation from the Union Carbide. Had the Act not been enacted, the victims could have and perhaps would have been entitled not only to sue the Union Carbide themselves, but also to enter into settlement or compromise of some sort with them. The provisions of the Act deprived the victims of that legal right and opportunity, and that deprivation is substantial deprivation because upon immediate relief depends often the survival of these victims. In that background, it is just and proper that this deprivation is only to be justified if the Act is read with the obligation of granting interim relief or maintenance by the Central Government until the full amount of the dues of the victims is realised from the Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. As submitted by learned Attorney General, it is true that there is no actual expression used in the Act itself which expressly postulates or indicates such a duty or obligation under the Act. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. In our opinion, this is the true basis and will be in consonance with the spirit of the Act. It must be, to use the well known phrase 'the major inarticulate premise' upon which though not expressly stated, the Act proceeds. It is on this promise or premise that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can be held to be constitutionally valid. It has to be borne in mind that the language of the Act does not militate *against this construction but on the contrary, Sections 9, 10 and the* Scheme of the Act suggest that the Act contains such an obligation. If it is so read, then only meat can be put into the skeleton of the Act making it meaningful and purposeful. The Act must, therefore, be so read. This approach to the interpretation of the Act can legitimately be called the 'constructive intuition' which, in our opinion, is a permissible mode of viewing the Acts of Parliament. The freedom to search for 'the spirit of the Act' or the quantity of the mischief at which it is aimed (both synonymous for the intention of the Parliament) opens up the possibility of liberal interpretation "that delicate and important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the Parliament and fulfil the object of the Act. After all, the Act was passed to give relief to the victims who, it was thought, were unable to establish their own rights and fight for themselves. It is common knowledge that the victims were poor and impoverished. How could they survive the long ordeal of litiga-

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tion and ultimate execution of the decree or the orders unless provisions be made for their sustenance and maintenance, especially when they have been deprived of the right to fight for these claims themselves? We, therefore, read the Act accordingly.

102. It was, then, contended that the Central Government was not competent to represent the victims. This argument has been canvassed on various grounds. It has been urged that the Central Government owns 22 per cent share in UCIL and as such there is a conflict of interest between the Central Government and the victims, and on that ground the former is disentitled to represent the latter in their battle against UCC and UCIL. A large number of authorities on this aspect were cited. However, it is not necessary in the view we have taken to deal with these because factually the Central Government does not own any share in UCIL. These are the statutory independent organisations, namely, Unit Trust of India and Life Insurance Corporation, who own 20 to 22 per cent shares in UCIL. The Government has certain amount of say and control in LIC and UTI. Hence, it cannot be said, in our opinion, that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Government and the victims. Secondly, in a situation of this nature, the Central Government is the only authority which can pursue and effectively represent the victims. There is no other organisation or unit which can effectively represent the victims. Perhaps, theoretically, it might have been possible to constitute another independent statutory body by the government under its control and supervision in whom the claim of the victims might have been vested and substituted and that body could have been entrusted with the task of agitating or establishing the same claims in the same manner as the Central Government has done under the Act. But the fact that that has not been done, in our opinion, does not in any way affect the position. Apart from that, lastly, in our opinion, this concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature, does not apply in the instant situation. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a judge in his own cause. The Central Government was not judging any claim, but was fighting and advancing the claims of the victims. In those circumstances, it cannot be said that there was any violation of the principles of natural justice and such entrustment to the Central Government of the right to ventilate for the victims was improper or bad. The adjudication would be done by the courts, and therefore there is no scope of the violation of any principle of natural justice.

103. Along with this submission, the argument was that the power and the right given to the Central Government to fight for the claims of the victims, is unguided and uncanalised. This submission cannot be

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accepted. Learned Attorney General is right that the power conferred on the Central Government is not uncanalised. The power is circumscribed by the purpose of the Act. If there is any improper exercise or transgression of the power then the exercise of that power can be called in question and set aside, but the Act cannot be said to be violative of the rights of the victims on that score. We have noted the relevant authorities on the question that how power should be exercised is different and separate from the question whether the power is valid or not. The next argument on behalf of the victims was that there was conflict of interest between the victims and the government viewed from another aspect of the matter. It has been urged that the Central Government as well as the Government of Madhya Pradesh along with the erstwhile Chief Minister of the State of Madhya Pradesh Shri Arjun Singh were guilty of negligence, malfeasance and non-feasance, and as such were liable for damages along with Union Carbide and UCIL. In other words, it has been said that the Government of India and the Government of Madhya Pradesh along with Shri Arjun Singh are joint tort-feasors and joint wrongdoers. Therefore, it was urged that there is conflict of interest in respect of the claims arising out of the gas leak disaster between the Government of India and the victims and in such a conflict, it is improper, rather illegal and unjust to vest in the Government of India the rights and claims of the victims. As noted before, the Act was passed in a particular background and, in our opinion, if read in that background, it only covers claims against Union Carbide or UCIL. "Bhopal gas leak disaster" or "disaster" has been defined in clause (*d*) of Section (2) as the occurrence on the 2nd and 3rd days of December, 1984 which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the UCIL, a subsidiary of the UCC of USA) and which resulted in loss of life and damage to property on an extensive scale.

104. In this context, the Act has to be understood that it is in respect of the person responsible, being the person in charge of the UCIL and the parent company UCC. This interpretation of the Act is further strengthened by the fact that a "claimant" has been defined in clause (*c*) of Section 2 as a person who is entitled to make a claim and the expression "person" in Section 2(*e*) includes the government. Therefore, the Act proceeded on the assumption that the government could be a claimant being a person as such. Furthermore, this construction and the perspective of the Act is strengthened if a reference is made to the debate both in the Lok Sabha and Rajya Sabha to which references have been made.

105. The question whether there is scope for the Union of India being responsible or liable as a joint tort-feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature, the learned Attorney

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General was right in contending that it was only proper that the Central Government should be able and authorised to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural justice. The doctrine of necessity would be applicable in a situation of this nature. The doctrine has been elaborated, in *Halsbury's Laws of England*, 4th edn., page 89, paragraph 73, where it was reiterated that even if all the members of the Tribunal competent to determine a matter were subject to disqualification, they might be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent tribunal can be constituted. In the circumstances of the case, as mentioned hereinbefore, the Government of India is only capable to represent the victims as a party. The adjudication, however, of the claims would be done by the court. In those circumstances, we are unable to accept the challenge on the ground of the violation of principles of natural justice on this score. The learned Attorney General, however, sought to advance, as we have indicated before, his contention on the ground of de facto validity. He referred to certain decisions. We are of the opinion that this principle will not be applicable. We are also not impressed by the plea of the doctrine of bona fide representation of the interests of victims in all these proceedings. We are of the opinion that the doctrine of bona fide representation would not be quite relevant and as such the decisions cited by the learned Attorney General need not be considered.

106. There is, however, one other aspect of the matter which requires consideration. The victims can be divested of their rights i.e. these can be taken away from them provided those rights of the victims are ensured to be established and agitated by the Central Government following the procedure which would be just, fair and reasonable. Civil Procedure Code is the guide which guides civil proceedings in this country and in other countries procedure akin to Civil Procedure Code. Hence, these have been recognised and accepted as being in consonance with the fairness of the proceedings and in conformity with the principles of natural justice. Therefore, the procedure envisaged under the Act has to be judged whether it is so consistent. The Act, as indicated before, has provided the procedure under Sections 3 and 4. Section 11 provides that the provisions of the Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act. Hence, if anything is inconsistent with the Act for the time being, it will not have force and the Act will override those provisions to the extent it does. The Act has not

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specifically contemplated any procedure to be followed in the action to be taken pursuant to the powers conferred under Section 3 except to the extent indicated in Section 4 of the Act. Section 5, however, authorises the Central Government to have the powers of a civil court for the purpose of discharging the functions pursuant to the authority vested under Sections 3 and 4 of the Act. There is no question of Central Government acting as a court in respect of the claims which it should enforce for or on behalf or instead of the victims of the Bhopal gas leak disaster. In this connection, it is necessary to note that it was submitted that the Act, so far as it deals with the claims of the victims, should be read in conformity with Civil Procedure Code and/or with the principles of natural justice; and unless the provisions of the Act are so read it would be violative of Articles 14 and 21 of the Constitution in the sense that there will be deprivation of rights to life and liberty without following a procedure which is just, fair and reasonable. That is the main submission and contention of the different counsel for the victims who have appeared. The different viewpoints from which this contention has been canvassed have been noted before. On the other hand, on behalf of the government, the learned Attorney General has canvassed before us that there were sufficient safeguards consistent with the principles of natural justice within this Act and beyond what has been provided for in a situation for which the Act was enacted, nothing more could be provided and further reading down the provisions of the Act in the manner suggested would defeat the purpose of the Act. The aforesaid Section 3 provides for the substitution of the Central Government with the right to represent and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim in respect of the disaster. The State has taken over the rights and claims of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed needed the umbrella of protection. Thus, the State has the power and jurisdiction and for this purpose unless the Act is otherwise unreasonable or violative of the constitutional provisions, no question of giving a hearing to the parties for taking over these rights by the State arises. For legislation by the Parliament, no principle of natural justice is attracted provided such legislation is within the competence of the legislature, which indeed the present Act is within the competence of the Parliament. We are in agreement with the submission of the learned Attorney General that Section 3 makes the Central Government the *dominus litis* and it has the carriage (*sic*) of the proceedings, but that does not solve the problem of by what procedure the proceedings should be carried.

107. The next aspect is that Section 4 of the Act, which, according to the learned Attorney General give limited rights to the victims in the sense that it obliges the Central Government to "have due regard to any matters which such person may require to be urged with respect to his

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just, fair and reasonable. See in this connection, the observations of this Court in *Maneka Gandhi case*[4] and *Olga Tellis case*[13]. Some of these aspects were noticed in the decision of this Court in *Swadeshi Cotton Mills* v. *Union of India*[17]. That was a decision which dealt with the question of taking over of the industries under the Industries (Development and Regulation) Act, 1951. The question that arose was whether it was necessary to observe the rules of natural justice before issuing a notification under Section 18-A(1) of the Act. It was held by the majority of judges that in the facts of that case there had been non-compliance with the implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The order in that case could be struck down as invalid on that score but the court found that in view of the concession that a hearing would be afforded to the company, the case was remitted to the Central Government to give a full, fair and effective hearing. It was held that the phrase 'natural justice' is not capable of static and precise definition. It could not be imprisoned in the strait-jacket of a cast-iron formula. Rules of natural justice are not embodied rules. Hence, it was not possible to make an exhaustive catalogue of such rules. This Court reiterated that audi alteram partem is a highly effective rule devised by the courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not in terms exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good.

110. The principles of natural justice have been examined by this Court in *Union of India* v. *Tulsiram Patel*[16]. It was reiterated, that the principles of natural justice are not the creation of Article 14 of the Constitution. Article 14 is not the begetter of the principles of natural justice but their constitutional guardian. The principles of natural justice consist, inter alia, of the requirement that no man should be condemned unheard. If, however, a legislation or a statute expressly or by necessary implication excludes the application of any particular principle of natural justice then it requires close scrutiny by the court.

111. It has been canvassed on behalf of the victims 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 unreasonable if there is exclusion of the victims to vindicate properly their views and rights. This exclusion may amount to denial

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of justice. In any case, it has been suggested and in our opinion there is 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. After all, it has to be borne in mind that injustice consists in the sense in the minds of the people affected by any act or inaction a feeling that their grievances, views or claims have gone unheeded or not considered. Such a feeling is in itself an injustice or a wrong. The law must be so construed and implemented that such a feeling does not generate among the people for whose benefit the law is made. Right to a hearing or representation 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 this connection, reference may be made to the decision of this Court in *Sangram Singh* v. *Election Tribunal, Kotah*[54]. The Representation of the Peoples Act, 1951 contains Section 90 and the procedure of Election Tribunals under the Act was governed by the said provision. Sub-section (2) of Section 90 provides that "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits". Justice Bose speaking for the court said that it is procedure, something designed to facilitate justice and further its ends, and cannot be considered as a penal enactment for punishment or penalties; not a thing designed to trip people up rather than help them. It was reiterated that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there may be exceptions and where they are clearly defined these must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. At page 9 of the report, Justice Bose observed as under:

> "But that a law of natural justice exists in the sense that a party must be heard in a court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in *T.A. Balakrishna Udayar* v. *Vasudeva Ayyar*[55] and especially in *T.B. Barret* v. *African Products Ltd.*[56] where Lord Buckmaster said "no forms or procedure should

54 (1955) 2 SCR 1: AIR 1955 SC 425: 10 ELR 293
55 ILR 40 Mad 793, 800: AIR 1917 PC 71
56 AIR 1928 PC 261: 29 MLW 72

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ever be permitted to exclude the presentation of a litigant's defence". Also *Hari Vishnu case*[57] which we have just quoted.

In our opinion, Wallace J. was right in *Venkatasubbiah* v. *D. Lakshminarasimham*[58] in holding that "One cardinal principle to be observed in trials by a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing", and that "It follows that a party should not be deprived of that right and in fact the court has no option to refuse that right, *unless the Code of Civil Procedure deprives him of it*".

112. All civilised countries accept the right to be heard as part of the due process of law where questions affecting their rights, privileges or claims are considered or adjudicated.

113. In *S.L. Kapoor* v. *Jagmohan*[15] (at SCC pp. 394-95), Chinnappa Reddy, J. speaking for this Court observed that the concept that justice must not only be done but must manifestly be seen to be done, is basic to our system. It has been reiterated that the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary and it has been said that it ill comes from a person who has denied justice that the person who has been denied justice, is not prejudiced. Principles of natural justice must, therefore, be followed. That is the normal requirement.

114. 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 magnitude and nature, when the victims have been given some say by Section 4 of the Act, in order to make that opportunity contemplated by Section 4 of the Act, meaningful and effective, it should be so read that the victims have to be given an opportunity of making their representation before the court comes to any conclusion in respect of any settlement. How that opportunity should be given, would depend upon the particular situation. Fair procedure should be followed in a representative mass tort action. There are instances and some of these were also placed before us during the hearing of these matters indicating how the courts regulate giving of the notice in respect of a mass action where large number of people's views have to be ascertained. Such procedure should be evolved by the court when faced with such a situation.

115. The Act does not expressly include the application of the Code of Civil Procedure. Section 11 of the Act provides the overriding effect indicating that anything inconsistent with the provisions of the Act in other law including the Civil Procedure Code should be ignored and the Act should prevail. Our attention was drawn to the provisions of Order I

57 *Hari Vishnu Kamath* v. *Ahmed Syed Ishaque*, AIR 1955 SC 233
58 AIR 1925 Mad 1274: 49 MLJ 273

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Rule 8(4) of the Code. Strictly speaking, Order I 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 Government has replaced and divested the victims.

116. Learned Attorney General submitted that as the provisions of the Code stood before 1976 Amendment, the High Courts had taken the view that hearing of the parties represented in the suit, was not necessary, before compromise. Further reference was made to proviso to Order XXIII Rule 1. As in this case there is no question, in our opinion, of abandonment as such of the suit or part of the suit, the provisions of this rule would also not strictly apply. However, Order XXIII Rule 3-B of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. The said Rule 3-B provides that no agreement or compromise in a representative suit shall be entered into without the leave of the court expressly recorded in the proceedings; and sub-rule (2) of Rule 3-B 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 3-B 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 4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome", as canvassed by the learned Attorney General.

117. In our opinion, the constitutional requirements, the language of the section, the purpose 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 proposed or contemplated settlement, notice should be given to the victims who are affected or whose rights are to be affected to ascertain their views. Section 4 is significant. It enjoins the Central Government only to have "due regard to any matters which such person may require to be urged". So, the obligation is on the Central Government in the situation contemplated by Section 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 Government 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.

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If the victims want to advert to certain aspect of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities 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.

118. Our attention was drawn to similar situations in other lands where in mass disaster actions of the present type or mass calamity actions affecting large number of people, notices have been given in different forms and it may be possible to invite the views of the victims by announcement in the media, press, radio, and TV etc. intimating the victims that a certain settlement is proposed or contemplated and inviting views of the victims within a stipulated period. And having regard to the views, the Central Government may proceed with the settlement of the action. Consent of all is not a precondition as we read the Act under Section 4. Hence, the difficulties suggested by the learned Attorney General in having the consent of all and unanimity, do not really arise and should not deter us from construing the section as we have.

119. The next aspect of the matters is, whether in the aforesaid light Section 4 has been complied with. The fact that there was no specific notice given to the victims as such in this case, is undisputed. Learned Attorney General, however, sought to canvass 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 3-B of the Code. It is not enough to say that the victims must keep vigil and watch the proceeding. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the court cannot presume that the victims were a lot, capable and informed to be able to have comprehended or contemplated the settlement. In the aforesaid view of the matter, in our opinion, notice was necessary. The victims at large did not have the notice.

120. The question, however, is that the settlement had been arrived at after great deal of efforts to give immediate relief to the victims. We have noticed the order dated May 4, 1989 passed by this Court[51] indicating the reasons which impelled the court to pass the orders on February 14/15, 1989 in terms and manner as it did. It has been urged before us on behalf of some of the victims that justice has not been done to their views and claims in respect of the damages suffered by them. It appears to us by reading the reasons given by this Court on May 4, 1989 that justice perhaps has been done but the question is, has justice appeared to have been done and more precisely, the question before this Court is: does the Act envisage a procedure or contemplate a procedure which ensures not only that justice is done but justice appears to have been done. If the

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procedure does not ensure that justice appears to have been done, is it valid? Therefore, in our opinion, in the background of this question we must hold that Section 4 means and entails that before entering into any settlement affecting the rights and claims of the victims some kind of notice or information should be given to the victims; we need not now spell out the actual notice and the manner of its giving to be consistent with the mandate and purpose of Section 4 of the Act.

121. This Court in its order dated May 4, 1989 has stated that in passing orders in February 14/15, 1989 this Court was impelled by the necessity of urgent relief to the victims rather than to depend upon the uncertain promise of law. The Act, as we have construed, requires notice to be given in what form and in what manner, it need not be spelled out, before entering into any settlement of the type with which we are concerned. 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 Section 4 of the Act was required to be given. Then arises the question of consequences of not giving the notice. In this adjudication, we are not strictly concerned with the validity or otherwise of the settlement, as we have indicated hereinbefore. But constitutional adjudication cannot be divorced from the reality of a situation, or the impact of an adjudication. 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 pull asunder what others have put together. It is well to remember, as did 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. It is true that notice was required to be given and notice has not been given. The notice which we have contemplated is a notice before the settlement or what is known in legal terminology as 'pre-decisional notice'. 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 requirements of principles of natural justice as embodied under Section 4 of the Act. The reasons that impelled this Court to pass the orders of February 14/15, 1989 are significant and compelling. If notice was given, then what would have happened? It has been suggested on behalf of the victims by counsel that if the victims had been given an opportunity to be heard, then they would have perhaps pointed out, inter

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alia, that the amount agreed to be paid through the settlement was hopelessly inadequate. We have noted the evidence available to this Court which this Court has recorded in its order dated May 4, 1989 to be the basis for the figure at which the settlement was arrived at. It is further suggested that if an opportunity had been given before the settlement, then the victims would have perhaps again pointed out that criminal liability could not be absolved in the manner in which this Court has done on February 14/15, 1989. It was then contended that the Central Government was itself sued as a joint tort-feasor. The Central Government would still be liable to be proceeded in respect of any liability to the victims if such a liability is established; that liability is in no way abridged or effected by the Act or the settlement entered into. It was submitted on behalf of the victims that if an opportunity had been given, they would have perhaps pointed out that the suit against the Central Government, Government of Madhya Pradesh and UCIL could not have been settled by the compromise. It is further suggested that if given an opportunity, it would have been pointed out that the UCIL should have also been sued. One of the important requirements of justice is that people affected by an action or inaction should have opportunity to have their say. That opportunity the victims have got when these applications were heard and they were heard after utmost publicity and they would have further opportunity when review application against the settlement would be heard.

122. On behalf of the victims, it was suggested that the basis of damages in view of the observations made by this Court in *M.C. Mehta case*[12] against the victims of UCC or UCIL would be much more than normal damages suffered in similar case against any other company or party which is financially not so solvent or capable. It was urged that it is time in order to make damages deterrent the damages must be computed on the basis of the capacity of a delinquent made liable to pay such damages and on the monetary capacity of the delinquent the quantum of the damages awarded would vary and not on the basis of actual consequences suffered by the victims. This is an uncertain promise of law. On the basis of evidence available and on the basis of the principles so far established, it is difficult to foresee any reasonable possibility of acceptance of this yardstick. And even if it is accepted, there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law. These, however, are within the realm of possibility.

123. It was contended further by Shri Garg, Shri Shanti Bhushan and Ms Jaising that all the further particulars upon which the settlement had been entered into should have been given in the notice which was required to be given before a settlement was sanctified or accepted. We are unable to accept this position. It is not necessary that all other particulars for the basis of the proposed settlement should be disclosed

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in a suit of this nature before the final decision. Whatever data was already there have been disclosed, that, in our opinion, would have been sufficient for the victims to be able to give their views, if they want to. Disclosure of further particulars are not warranted by the requirement of principles of natural justice. Indeed, such disclosure in this case before finality might jeopardise future action, if any, necessary so consistent with justice of the case.

124. So on the materials available, the victims would have had to express their views. 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. Therefore, in our opinion, though settlement without notice is not quite proper, on the materials so far available, we are of the opinion that justice has been done to the victims but justice has not appeared to have been done. In view of the magnitude of the misery involved and the problems in this case, we are also of the opinion that the setting aside of the settlement on this ground in view of the facts and the circumstances of this case keeping the settlement in abeyance and giving notice to the victims for a post-decisional hearing would not be in the ultimate interest of justice. It is true that not giving notice, was not proper because principles of natural justice are fundamental in the constitutional set up of this country. 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 viewpoint by having an opportunity of vindication of their viewpoint before the forum or the authority enjoined or obliged to take a decision affecting their right. Yet, in the particular 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. "To 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 rare occasions. Though entering into a settlement without the required notice is wrong. In the facts and the circumstances of this case, therefore, 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 this Court. Had it been necessary for this Bench to have passed such a consequential order, we would not have passed any such consequential order in respect of the same.

125. The sections and the Scheme dealing with the determination of damages and distribution of the amount have also been assailed as indicated before. Our attention was drawn to the provisions of the Act dealing with the payment of compensation and the scheme framed therefor. It was submitted that Section 6 of the Act enjoins appointment by the

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Central Government of an officer known as the Commissioner for the welfare of the victims. It was submitted that this does not give sufficient judicial authority to the officer and would be really leaving the adjudication under the Scheme by an officer of the executive nature. Learned Attorney General has, however, submitted that for disbursement of the compensation contemplated under the Act or under the orders of this Court, a notification would be issued under Section 6(3) of the Act authorising the Commissioner or other officers to exercise all or any of the powers which the Central Government may exercise under Section 5 to enable the victims to place before the Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. We direct so, and such appropriate notification be issued. We further direct that in the Scheme categorisation to be done by the Deputy Commissioner should be appealable to an appropriate judicial authority and the Scheme should be modified at accordingly. We reiterate that the basis of categorisation and the actual categorisation should be justiciable and judicially reviewable — the provisions in the Act and the Scheme should be so read. There were large number of submissions made on behalf of the victims about amending the Scheme. Apart from and to the extent indicated above, in our opinion, it would be unsafe to tinker with the Scheme piecemeal. The Scheme is an integrated whole and it would not be proper to amend it piecemeal. We, however, make it clear that in respect of categorisation and claim, the authorities must act on principles of natural justice and act quasi-judicially.

126. As mentioned hereinbefore, good deal of arguments were advanced before us as to whether the clause in the settlement that criminal proceedings would not be proceeded with and the same will remain quashed is valid or invalid. We have held that these are not part of the proceedings under the Act. So the orders on this aspect in the order of February 14/15, 1989[1] are not orders under the Act. Therefore, on the question of the validity of the Act, this aspect does not arise. Whether the settlement of criminal proceedings or quashing the criminal proceedings could be a valid consideration for settlement or whether if it was such a consideration or not is a matter which the court reviewing the settlement has to decide.

127. In the premise, we hold that the Act is constitutionally valid in the manner we read it. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of Section 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, was necessary. In some cases, however, post-decisional notice might be sufficient but in the

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facts and the 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[5] and having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending review proceedings. No further order on this aspect is necessary. The sections dealing with the payment of compensation and categorisation should be implemented in the manner indicated before.

128. The Act was conceived on the noble promise of giving relief and succour to the dumb, pale, meek and impoverished victims of a tragic industrial gas leak disaster, a concomitant evil in this industrial age of technological advancement and development. The Act had kindled high hopes in the hearts of the weak and worn, wary and forlorn. The Act generated hope of humanity. The implementation of the Act must be with justice. Justice perhaps has been done to the victims situated as they were, but it is also true that justice has not appeared to have been done. That is a great infirmity. That is due partly to the fact that procedure was not strictly followed as we have understood it and also partly because of the atmosphere that was created in the country, attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court. This was unfortunate. This was perhaps due to misinformed public opinion and also due to the fact that victims were not initially taken into confidence in reaching the settlement. This is a factor which emphasises the need for adherence to the principles of natural justice. The credibility of judiciary is as important as the alleviation of the suffering of the victims, great as these were. We hope these adjudications will restore that credibility. Principles of natural justice are integrally embedded in our constitutional framework and their pristine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situations or cases. This Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time, these must be applied in a particular manner in particular cases having regard to the particular circumstances. It is, therefore, necessary to reiterate that the promises made to the victims and hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realised to the victims in accordance with the Scheme as indicated above. That would be a redemption to a certain extent. It will also be necessary to reiterate that attempts should be made to formulate the principles of law guiding the government and the authorities to permit carrying on of trade dealing with materials and things which have

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dangerous consequences within sufficient specific safeguards especially in case of multinational corporations trading in India. An awareness on these lines has dawned. Let action follow that awareness. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies.

129. The Bhopal gas leak disaster and its aftermath emphasise the need for laying down certain norms and standards for the government to follow before granting permissions or licences for the running of industries dealing with materials which are of dangerous potentialities. The government should, therefore, examine or have the problem examined by an expert committee as to what should be the conditions on which future licences and/or permission for running industries on Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measures should be formulated and scheme of enforcement indicated. The government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such should also provide for deterrent or punitive damages, the basis for which should be formulated by a proper expert committee or by the government. For this purpose, the government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

130. This case has taken some time. It was argued extensively. We are grateful to counsel who have assisted in all these matters. We have reflected. We have taken some time in pronouncing our decision. We wanted time to lapse so that the heat of the moment may calm down and proper atmosphere restored. Justice, it has been said, is the constant and perpetual disposition to render every man his due. But what is a man's due in a particular situation and in a particular circumstance is a matter for appraisement and adjustment. It has been said that justice is balancing. The balances have always been the symbol of even-handed justice.

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But as said Lord Denning in *Jones* v. *National Coal Board*[59] — let the advocates one after the other put the weights into the scales — the 'nicely calculated less or more' — but the judge at the end decides which way the balance tilts, be it ever so slightly. This is so in every case and every situation.

131. The applications are disposed of in the manner and with the direction, we have indicated above.

SINGH, J.—I have gone through the proposed judgment of my learned brother, Sabyasachi Mukharji, C.J. I agree with the same but I consider it necessary to express my opinion on certain aspects.

133. Five years ago between the night of December 2-3, 1984 one of the most tragic industrial disasters in the recorded history of mankind occurred in the city of Bhopal in the State of Madhya Pradesh, as a result of which several persons died and thousands were disabled and physically incapacitated for life. The ecology in and around Bhopal was adversely affected and air, water and the atmosphere was polluted, its full extent has yet to be determined. Union Carbide India Limited (UCIL) a subsidiary of Union Carbide Corporation (a Transnational Corporation of United States) has been manufacturing pesticides at its plant located in the city of Bhopal. In the process of manufacture of pesticide the UCIL had stored stock of Methyl Isocyanate commonly known as MIC a highly toxic gas. On the night of the tragedy, the MIC leaked from the plant in substantial quantity causing death and misery to the people working in the plant and those residing around it. The unprecedented catastrophe demonstrated the dangers inherent in the production of hazardous chemicals even though for the purpose of industrial development. A number of civil suits for damages against the UCC were filed in the United States of America and also in this country. The cases filed in USA were referred back to the Indian courts by Judge Keenan details of which are contained in the judgment of my learned brother Mukharji, C.J. Since those who suffered in the catastrophe, were mostly poor, ignorant, illiterate and ill-equipped to pursue their claims for damages either before the courts in USA or in Indian courts; Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (hereinafter referred to as 'the Act') conferring power on the Union of India to take over the conduct of litigation in this regard in place of the individual claimants. The facts and circumstances which led to the settlement of the claims before this Court have already been stated in detail in the judgment of Mukharji, C.J., and therefore, I need not refer to those facts and circumstances. The constitutional validity of the Act has been assailed before us in the present petitions. If the Act is declared unconstitutional, the settlement which was recorded in this Court, under which the UCC has already deposited a sum of Rs 750 crores for meeting the claims of Bhopal gas victims, would fall and the amount of money which is already

59 (1957) 2 QB 55, 64: (1957) 2 All ER 155: (1957) 2 WLR 760 (CA)

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in deposit with the Registry of this Court would not be available for relief to the victims. Long and detailed arguments were advanced before us for a number of days and on an anxious consideration and having regard to the legal and constitutional aspects and especially the need for immediate help and relief to the victims of the gas disaster, which is already delayed, we have upheld the constitutional validity of the Act. Mukharji, CJ. has rendered a detailed and elaborate judgment with which I respectfully agree. However, I consider it necessary to say few words with regard to the steps which should be taken by the executive and the legislature to prevent such tragedy in future, and to avoid the prolonged misery of victims of an industrial disaster.

134. We are a developing country, our national resources are to be developed in the field of science, technology, industry and agriculture. The need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and undertakings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a number of laws of our country, i.e. the Factories Act, Industries (Development and Regulation) Act and Workmen's Compensation Act etc. there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident. As the law stands today, affected persons have to approach civil courts for obtaining compensation and damages. In civil courts, the determination of amount of compensation or damages as well the liability of the enterprise has been bound by the shackles of conservative principles laid down by the House of Lords in *Rylands* v. *Fletcher*[52]. The principles laid therein made it difficult to obtain adequate damages from the enterprise and that too only after the negligence of the enterprise was proved. This continued to be the position of law, till a Constitution Bench of this Court in *M.C. Mehta* v. *Union of India*[12], commonly known as *Sri Ram Oleum Gas Leak case* evolved principles and laid down new norms to deal adequately with the new problems arising in a highly industrialised economy. This Court made judicial innovation in laying down principles with regard to liability of enterprises carrying hazardous or inherently dangerous activities departing from the rule laid down in *Rylands* v. *Fletcher*[52]. The Court held as under: (SCC p. 420, para 31)

> "We are of the view that an enterprise which is engaged in a hazardous 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 community 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

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be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such 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 must be 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 an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise 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 inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous 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 dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, 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 in *Rylands* v. *Fletcher*.[52]"

The law so laid down made a landmark departure from the conservative principles with regard to the liability of an enterprise carrying on hazardous or inherently dangerous activities.

135. In the instant cases there is no dispute that UCIL a subsidiary of UCC was carrying on activity of manufacturing pesticide and in that process it had stored MIC a highly toxic and dangerous gas which leaked causing vast damage not only to human life but also to the flora and fauna and ecology in and around Bhopal. In view of this Court's decision in *M.C. Mehta case*[12] there is no scope for any doubt regarding the liability of the UCC for the damage caused to the human beings and nature in and around Bhopal. While entering into the settlement the UCC has accepted its liability and for that reason it has deposited a sum of Rs 750 crores in this Court. The inadequacy of the amount of com-

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pensation under the settlement was assailed by the counsel for the petitioners but it is not necessary for us to express any opinion on that question as review petitions are pending before another Constitution Bench and more so, as in the present cases we are concerned only with the constitutional validity of the Act.

136. The Bhopal gas tragedy has raised several important questions regarding the functioning of multinationals in Third World countries. After the Second World War colonial rule came to end in several parts of the globe, as a number of nations secured independence from foreign rule. The political domination was over but the newly born nations were beset with various problems on account of lack of finances and development. A number of multinationals and transnational corporations offered their services to the underdeveloped and developing countries to provide finances and technical know-how by setting up their own industries in those countries on their own terms that brought problems with regard to the control over the functioning of the transnational corporations. Multinational companies in many cases exploited the underdeveloped nations and in some cases they influenced political and economic policies of host countries which subverted the sovereignty of those countries. There have been complaints against the multinationals for adopting unfair and corrupt means to advance their interests in the host countries. Since this was a worldwide phenomena the United Nations took up the matter for consideration. The Economic and Social Council of the United Nations established a Commission on Transnational Corporations to conduct research on various political, economic and social aspects relating to transnational corporations. On a careful and detailed study the Commission submitted its report in 1985 for evolving a Code of Conduct for Transnational Corporations. The Code was adopted in 1986 to which large number of countries of the world are signatories. Although it has not been fully finalised as yet, the Code presents a comprehensive instrument formulating the principles of Code of Conduct for transnational corporations carrying on their enterprises in underdeveloped and developing countries. The Code contains provisions regarding ownership and control designed to strike balance between the competing interests of the Transnational Corporations and the host countries. It extensively deals with the political, economic, financial, social and legal questions. The Code provides for disclosure of information to the host countries and it also provides guidelines for nationalisation and compensation, obligations to international law and jurisdiction of courts. The Code lays down provisions for settlement of disputes between the host States and an affiliate of a Transnational Corporation. It suggests that such disputes should be submitted to the national courts or authorities of host countries unless amicably settled between the parties. It provides for the choice of law and means for dispute settlement arising out of contracts. The Code has also laid down guidelines for the determination of settle-

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ment of disputes arising out of accident and disaster and also for liability of Transnational Corporations and the jurisdiction of the courts. The Code is binding on the countries which formally accept it. It was stated before us that India has accepted the Code. If that be so, it is necessary that the government should take effective measures to translate the provisions of the Code into specific actions and policies backed by appropriate legislation and enforcing machinery to prevent any accident or disaster and to secure the welfare of the victims of any industrial disaster.

137. In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48-A and 51(*g*), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by clauses 9 and 13 of UN Code of Conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long-drawn litigation. Under the existing civil law, damages are determined by the civil courts, after a long-drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation, to avoid delay and to ensure immediate relief to the victims we would suggest that the law made by Parliament should provide for constitution of tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeal against which may lie to this Court on limited ground of questions of law only after depositing the amount determined by the tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. These steps would minimise the misery and agony of victims of hazardous enterprises.

138. There is yet another aspect which needs consideration by the government and the Parliament. Industrial development in our country and the hazards involved therein, pose a mandatory need to constitute a

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statutory "Industrial Disaster Fund", contributions to which may be made by, the government, the industries whether they are transnational corporations or domestic undertakings, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. This may avoid delay, as has happened in the instant case in providing effective relief to the victims. The government and the Parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines as contained in the United Nations Code of Conduct on Transnational Corporations.

139. With these observations, I agree with the order proposed by my learned brother, Sabyasachi Mukharji, CJ.

RANGANATHAN, J. (*for Ahmadi, J. and himself*) (*partly dissenting*)—Five years ago, this country was shaken to its core by a national catastrophe,second in magnitude and disastrous effects only to the havoc wrought by the atomic explosions in Hiroshima and Nagasaki. Multitudes of illiterate and poverty-stricken people in and around Bhopal suffered damage to life and limb due to the escape of poisonous Methyl Isocyanate (MIC) gas from one of the storage tanks at the factory of the Union Carbide (India) Limited (UCIL) in Bhopal, a wholly owned subsidiary of the multinational giant, the Union Carbide Corporation (UCC). A number of civil suits claiming damages from the UCC were filed in the United States of America and similar litigation also followed in Indian courts. Fearing the possibilities of the exploitation of the situation by vested interests, the Government of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 ('the Act') to regulate the course of such litigation. Briefly speaking, it empowered the Union of India to take over the conduct of all litigation in this regard and conduct it in place of, or in association with, the individual claimants. It also enabled the Union to enter into a compromise with the UCC and UCIL and arrive at a settlement. The writ petitions before us have been filed challenging the constitutional validity of this statute on the ground that the divestiture of the claimants' individual rights to legal remedy against the multinational for the consequences of carrying on dangerous and hazardous activities on our soil violates the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution.

141. In consequence of certain proceedings before Judge Keenan of the US District Courts, the venue of the litigation shifted to India. In the principal suit filed in India by the Union (Civil Suit No. 1113 of 1986) orders were passed by the trial court in Bhopal directing the UCC to deposit Rs 370 crores (reduced to Rs 250 crores by the Madhya Pradesh High Court) as interim payment to the gas victims pending the disposal of the suit. There were appeals to this Court in which the UCC contested

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the court's jurisdiction to pass an order for an interim payment in a suit for money, while the Union pleaded that a much higher interim payment should have been granted. When the matter was being argued in this Court, a settlement was arrived at between the Union and the UCC under which a sum of Rs 750 crores has been received by the Union in full settlement of all the claims of all victims of the gas leak against the UCC. The Union also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection. This settlement received the imprimatur of this Court in its orders dated February 14/15, 1989[1].

142. It is unfortunate that, though the writ petitions before us were pending in this Court at that time, neither their contents nor the need for considering first the issue of the validity of the Act before thinking of a settlement in pursuance of its provisions seem to have been effectively brought to the notice of the bench which put an end to all the litigation on this topic in terms of the settlement. The settlement thus stood approved while the issue of validity of the Act under which it was effected stood undecided. When this was brought to the notice of the above bench, it directed these writ petitions to be listed before a different bench to avoid any possible feeling that the same bench may be coloured in its views on the issue by reason of the approval it had given to the *fait accompli* viz. the settlement. That is how these matters come before us.

143. The petitioners, claiming to represent a section of the victims are, firstly, against any settlement at all being arrived at with the UCC. According to them, it is more important to ensure by penal action that multinational corporations do not play with the lives of people in developing and underdeveloped countries than to be satisfied with mere compensation for injury and that the criminal prosecutions initiated in this case should have been pursued. Secondly, they are of the view that the amount for which the claims have been settled is a pittance, far below the amount of damages they would have been entitled to, on the principles of strict, absolute and punitive liability enunciated by this Court in *Mehta case*[12]. Thirdly, their grievance is that no publicity at all was given, before this Court passed its order, to enable individual claimants or groups of them to put forward their suggestions or objections to the settlement proposed. Their interests were sealed, they say, without complying with elementary principles of natural justice. They contend that the provisions of an Act which has made such a settlement possible cannot be constitutionally valid.

144. The arguments before us ranged over a very wide ground, covered several issues and extended to several days. This bench has been placed in somewhat of a predicament as it has to pronounce on the validity of the provisions of the Act in the context of an implementation of its provisions in a particular manner and, though we cannot (and do

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not) express any views regarding the merits of the settlement, we are asked to consider whether such settlement can be consistent with a correct and proper interpretation of the Act tested on the touchstone of the fundamental rights guaranteed under the Constitution. Mukharji, C.J., has outlined the issues, dealt elaborately with the contentions urged, and given expression to his conclusions in a learned, elaborate and detailed judgment which we have had the advantage of perusing in draft. Our learned brother K.N. Singh, J., has also highlighted certain aspects in his separate judgment. We are, in large measure, in agreement with them, but should like to say a few words on some of the issues in this case, particularly those in regard to which our approach has been somewhat different:

(*1*). **145.** The issue regarding the validity of the Act turns principally on the construction of Sections 3 and 4 of the Act. We are inclined to hold that the fact that a settlement has been effected, or the circumstances in which or the amount for which the claims of the victims have been settled, do not have a bearing on this question of interpretation and have to be left out of account altogether except as providing a contextual background in which the question arises. Turning therefore to the statute and its implications, the position is this. Every person who suffered as a consequence of the gas leak had a right to claim compensation from the persons who, according to him, were liable in law for the injury caused to him and also a right to institute a suit or proceeding before any court or authority with a view to enforce his right to claim damages. In the normal course of events, such a claimant who instituted a suit or proceeding would have been at complete liberty to withdraw the said suit or proceeding or enter into any compromise he may choose in that regard. Section 3 undoubtedly takes away this right of the claimant altogether: (*a*) except to the limited extent specified in the proviso to Section 3(3) and (*b*) subject to the provisions of Section 4, for this section clearly states that it is the Central Government and the Central Government alone which has the right to represent and act in place of the claimants, whether within or outside India, for all purposes in connection with the enforcement of his claims. We may first consider how far the main provision in Section 3 (leaving out of account the proviso as well as Section 4) is compatible with the Constitution.

146. The first question that arises is whether the legislature is justified in depriving the claimants of the right and privilege of enforcing their claims and prosecuting them in such manner as they deem fit and in compulsorily interposing or substituting the government in their place. We think that, to this question, there can be only one answer. As pointed out by our learned brother, the situation was such that the victims of the tragedy needed to be protected against themselves as their adversary was a mighty multinational corporation and proceedings to a considerable extent had been initiated in a foreign country, where the conduct of the

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cases was entrusted to foreign lawyers under a system of litigation which is unfamiliar to us here. In the stark reality of the situation, it cannot even be plausibly contended that the large number of victims of the gas leak disaster should have been left to fend for itself and merely provided with some legal aid of one type or another. It is necessary to remember that, having regard to the identity of the principal ground of claim of all the victims, even if a single victim was not diligent in conducting his suit or entered into a compromise or submitted to a decree judging the issues purely from his individual point of view, such a decision or decree could adversely affect the interests of the innumerable other victims as well. In fact, it appears that a settlement between one set of claimants and the adversary corporation was almost imminent and would perhaps have been through but for the timely intervention of the Government of India. The battle for the enforcement of one's rights was bound to be not only prolonged but also very arduous and expensive and the decision of the legislature that the fight against the adversary should be consolidated and its conduct handed over to the Government of India — it may perhaps have been better if it had been handed over to an autonomous body independent of the government but, as pointed out by our learned brother, the course adopted was also not objectionable — was perhaps the only decision that could have been taken in the circumstances. This is indeed a unique situation in which the victims, in order to realise to the best advantage their rights against UCC, had to be helped out by transposing that right to be enforced by the government.

147. We did not indeed understand any learned counsel before us to say that the legislature erred in entrusting the Government of India with the responsibility of fighting for the victims. The only grievance is that in the process their right to take legal proceedings should not have been completely taken away and that they should also have had the liberty of participating in the proceedings right through. In fact, though the Act contemplates the Central Government to completely act in place of the victims, the Government of India has not in fact displaced them altogether. In all the proceedings pending in this country, as well as those before Judge Keenan, the Government of India has conducted the proceedings but the other victims or such of them as chose to associate themselves in these proceedings by becoming parties were not shut out from taking part in the proceedings. In fact, as the learned Attorney General pointed out, one of the groups of litigants did give great assistance to the trial judge at Bhopal. But even if the provisions of Section 3 had been scrupulously observed and the names of all parties, other than the Central Government, had been got deleted from the array of parties in the suits and proceedings pending in this country, we do not think that the result would have been fatal to the interests of the litigants. On the contrary, it enabled the litigants to obtain the benefit of all legal expertise at the command of the Government of India in exercis-

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ing their rights against the Union Carbide Corporation. Such representation can well be justified by resort to a principle analogous to, if not precisely the same as that of "*parens patriae*". A victim of the tragedy is compelled to part with a valuable right of his in order that it might be more efficiently and satisfactorily exploited for his benefit than he himself is capable of. It is of course possible that there may be an affluent claimant or lawyer engaged by him, who may be capable of fighting the litigation better. It is possible that the Government of India as a litigant may or may not be able to pursue the litigation with as much determination or capability as such a litigant. But in a case of the present type one should not be confounded by such a possibility. There are more indigent litigants than affluent ones. There are more illiterates than enlightened ones. There are very few of the claimants, capable of finding the financial wherewithal required for fighting the litigation. Very few of them are capable of prosecuting such a litigation in this country not to speak of the necessity to run to a foreign country. The financial position of UCIL was negligible compared to the magnitude of the claim that could arise and, though eventually the battle had to be pitched on our own soil, an initial as well as final recourse to legal proceedings in the United States was very much on the cards, indeed inevitable. In this situation, the legislature was perfectly justified in coming to the aid of the victims with this piece of legislation and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act had provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still been contended that such deprivation was necessary in larger public interest.

148. But the Act is not so draconian in its content. Actually, as we have said a little earlier, the grievance of the petitioners is not so much that the government was entrusted with the functions of a *dominus litis* in this litigation. Their contention is that the whole object and purpose of the litigation is to promote the interests of the claimants, to enable them to fight the UCC with greater strength and determination, to help them overcome limitations of time, money and legal assistance and to realise the best compensation possible consistent not only with the damage suffered by them but also consistent with national honour and prestige. It is suggested that the power conferred on the government should be construed as one hedged in by this dominant object. A divestiture of the claimant's rights in this situation would be reasonable, it is said, only if the claimant's rights are supplemented by the government and not supplanted by it.

149. Assuming the correctness of the argument, the provisions of the proviso to Section 3(3) and of Section 4 furnish an answer to this contention. While the provision contained in the main part of Section 3

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may be sufficient to enable the Government of India to claim to represent the claimants and initiate and conduct suits or proceeding on their behalf, the locus standi of the Government of India in suits filed by other claimants before the commencement of the Act outside India would naturally depend upon the discretion of the court enquiring into the matter. That is why the proviso to Section 3 makes the right of the Government of India to represent and act in place of the victims in such proceedings subject to the permission of the court or authority where the proceedings are pending. It is of course open to such court to permit the Central Government even to displace the claimants if it is satisfied that the authority of the Act is sufficient to enable it to do so. In the present case it is common ground that the proceedings before Judge Keenan were being prosecuted by the Central Government along with various individual claimants. Not only did Judge Keenan permit the association of the Government of India in these proceedings but the Government of India did have a substantial voice in the course of those proceedings as well.

150. Again Section 4 mandates that, notwithstanding anything contained in Section 3, the Central Government, in representing and acting in place of any person in relation to any claim, shall have due regard to any matters which such person may require to be urged with respect to his claim. It also stipulates that if such persons so desires, the Central Government shall permit, at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim. In other words, though, perhaps, strictly speaking, under Section 3 the Central Government can totally exclude the victim himself or his legal practitioner from taking part in the proceedings (except in pending suits outside India), Section 4 keeps the substance of the rights of the victims intact. It enables, and indeed obliges, the government to receive assistance from individual claimants to the extent they are able to offer the same. If any of the victims or their legal advisers have any specific aspect which they would like to urge, the Central Government shall take it into account. Again if any individual claimant at his own expense retains a legal practitioner of his own choice, such legal practitioner will have to be associated with the government in the conduct of any suit or proceeding relating to his claim. Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as well as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims or their legal advisers as are in a position to offer any such assistance. Though Section 3 denies the claimants the benefit of being *eo nomine* parties in such suits or proceedings, Section 4 preserves to them substantially all that they can achieve by proceeding on their own. In other

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words, while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Sections 3 and 4 would, in our opinion, therefore, show that there has been no real total deprivation of the right of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground.

151. The next angle from which the validity of the provision is attacked is that the provision enabling the government to enter into a compromise is bad. The argument runs thus: The object of the legislation can be furthered only if it permits the government to prosecute the litigation more effectively and not if it enables the government to withdraw it or enter into a compromise. According to them, the Act fails the impecunious victims in this vital aspect. The authority conferred by the Act on the government to enter into a settlement or compromise, it is said, amounts to an absolute negation of the rights of the claimants to compensation and is capable of being so exercised to render such rights totally valueless, as in fact, it is said, has happened.

152. It appears to us that this contention proceeds on a misapprehension. It is common knowledge that any authority given to conduct a litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. There were possibilities that the litigation may have to be fought out to the bitter finish. There were possibilities that the UCC might be willing to adequately compensate the victims either on their own or at the insistence of the governments concerned. There was also the possibility, which had already been in evidence before Judge Keenan, that the proceedings might ultimately have to end in a negotiated settlement. One notices that in most of the mass disaster cases reported, proceedings finally end in a compromise if only to avoid an indefinite prolongation of the agonies caused by such litigation. The legislation, therefore, cannot be considered to be unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the government to withdraw the proceedings or enter into a compromise.

153. Some misgivings were expressed, in the course of the hearing, of the legislative wisdom (and, hence the validity) of entrusting the carriage of these proceedings and, in particular, the power of settling it out of court, to the Union of India. It was contended that the Union is itself a joint tort-feasor (sued as such by some of the victims) with an interest (adverse to the victims) in keeping down the amount of compensation payable to the minimum so as to reduce its own liability as a joint tort-

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feasor. It seems to us that this contention is misconceived. As pointed out by Mukharji, C.J., the Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and the other victims. It is, therefore, the best agency in the circumstances that could be looked up to for fighting the UCC on its own as well as on behalf of the victims. The suggestion that the Union is a joint tort-feasor has been stoutly resisted by the learned Attorney General. But, even assuming that the Union has some liability in the matter, we fail to see how it can derive any benefit or advantage by entering into a low settlement with the UCC. As is pointed out later in this judgment and by Mukharji, C.J., the Act and Scheme thereunder have provided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. There is no basis for the fear expressed during the hearing that the officers of the government may not be objective and may try to cut down the amounts of compensation, so as not to exceed the amount received from the UCC. It is common ground and, indeed, the learned Attorney General fairly conceded, that the settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victims' rights, if any, to proceed against the Union, the State of Madhya Pradesh or the ministers and officers thereof, if so advised. If the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC at as high a figure as possible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. We are, therefore, unable to see any vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, if thought fit.

154. Nor is there basis for the contention that the Act enables a settlement to be arrived at without a proper opportunity to the claimants to express their views on any proposals for settlement that may be mooted. The right of the claimant under Section 4 to put forward his suggestions or to be represented by a legal practitioner to put forth his own views in the conduct of the suit or other proceeding certainly extends to everything connected with the suit or other proceeding. If, in the course of the proceedings there should arise any question of compromise or settlement, it is open to the claimants to oppose the same and to urge the Central Government to have regard to specific aspects in arriving at a settlement. Equally it is open to any claimant to employ a legal practitioner to ventilate his opinions in regard to such proposals for settlement. The provisions of the Act, read by themselves, therefore,

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guarantee a complete and full protection to the rights of the claimants in every respect. Save only that they cannot file a suit themselves, their right to acquire redress has not really been abridged by the provisions of the Act. Sections 3 and 4 of the Act properly read, in our opinion, completely vindicate the objects and reasons which compelled Parliament to enact this piece of legislation. Far from abridging the rights of the claimants in any manner, these provisions are so worded as to enable the government to prosecute the litigation with the maximum amount of resources, efficiency and competence at its command as well as with all the assistance and help that can be extended to it by such of those litigants and claimants as are capable of playing more than a mere passive role in the litigation.

155. But then, it is contended, the victims have had no opportunity of considering the settlement proposals mooted in this case before they were approved by the court. This aspect is dealt with later.

(*2*). **156.** One of the contentions before us was that the UCC and UCIL are accountable to the public for the damages caused by their industrial activities not only on a basis of strict liability but also on the basis that the damages to be awarded against them should include an element of punitive liability and that this has been lost sight of while approving of the proposed settlement. Reference was made in this context to *M.C. Mehta case*[12]. Whether the settlement should have taken into account this factor is, in the first place, a moot question. Mukharji, C.J. has pointed out — and we are inclined to agree — that this is an "uncertain province of the law" and it is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of its international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country. Secondly, whether the settlement took this into account and, if not, whether it is bad for not having kept this basis in view are questions that touch the merits of the settlement with which we are not concerned. So we feel we should express no opinion here on this issue. It is too far-fetched, it seems to us, to contend that the provisions of the Act permitting the Union of India to enter into a compromise should be struck down as unconstitutional because they have been construed by the Union of India as enabling it to arrive at such a settlement.

157. The argument is that the Act confers a discretionary and enabling power in the Union to arrive at a settlement but lays down no guidelines or indications as to the stage at which, or circumstances in which, a settlement can be reached or the type of settlement that can be arrived at; the power conferred should, therefore, be struck down as unguided, arbitrary and uncanalised. It is difficult to accept this contention. The power to conduct a litigation, particularly in a case of this type, must, to be effective necessarily carry with it a power to settle it at any stage. It is impossible to provide statutorily any detailed catalogue of the

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situations that would justify a settlement or the basis or terms on which a settlement can be arrived at. The Act, moreover, cannot be said to have conferred any unguided or arbitrary discretion to the Union in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which make it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the object. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged. We, therefore, think it necessary to clarify, for our part, that we are not called upon to express any view on the observations in *Mehta case*[12] and should not be understood as having done so.

(*3*). **158.** Shri Shanti Bhushan, who supported the Union's stand as to the validity of the Act, however, made his support conditional on reading into its provisions an obligation on the part of the Union to make interim payments towards their maintenance and other needs consequent on the tragedy, until the suits filed on their behalf ultimately yield tangible results. That a modern welfare State is under an obligation to give succour and all kinds of assistance to people in distress cannot at all be gainsaid. In point of fact also, as pointed out by the learned Chief Justice, the provisions of the Act and scheme thereunder envisage interim payments to the victims; so, there is nothing objectionable in this Act on this aspect. However, our learned brother has accepted the argument addressed by Shri Shanti Bhushan which goes one step further viz. that the Act would be unconstitutional unless this is read as "a major inarticulate premise" underlying the Act. We doubt whether this extension would be justified for the hypothesis underlying the argument is, in the words of Shri Shanti Bhushan, that had the victims been left to fend for themselves, they would have had an "immediate and normal right of obtaining compensation from the Union Carbide" and, as the legislation has vested their rights in this regard in the Union, the Act should be construed as creating an obligation on the Central Government to provide interim relief. Though we would emphatically reiterate that grant of interim relief to ameliorate the plight of its subjects in such a situation is a matter of imperative obligation on the part of the State and not merely 'a matter of fundamental human decency' as Judge Keenan put it, we think that such obligation flows from its character as a welfare State and would exist irrespective of what the statute may or may not provide. In our view the validity of the Act does not depend upon its explicitly or implicitly providing for interim payments. We say this for two reasons. In the first place, it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed, the main point on which the interim orders in this case were challenged before this Court

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and, in the context of the events that took place, remains undecided. It may be mentioned here that no decided case was brought to our notice in which interim payment was ordered pending disposal of an action in tort in this country. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation — which it did — and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. As we agree that the Act and the Scheme thereunder envisage interim relief to the victims, the point is perhaps only academic. But we felt that we should mention this as we are not in full agreement with Mukharji, C.J., on this aspect of the case.

(*4*). **159.** The next important aspect on which much debate took place before us was regarding the validity of the Act qua the procedure envisaged by it for a compromise or settlement. It was argued that if the suit is considered as a representative suit no compromise or settlement would be possible without notice in some appropriate manner to all the victims of the proposed settlement and an opportunity to them to ventilate their views thereon (vide Order XXIII Rule 3-B CPC). The argument runs thus: Section 4 of the Act either incorporates the safeguards of these provisions in which event any settlement effected without compliance with the spirit, if not the letter, of these provisions would be *ultra vires* the Act. Or it does not, in which event, the provisions of Section 4 would be bad as making possible an arbitrary deprivation of the victims' rights being inconsistent with, and derogatory of, the basic rules established by the ordinary law of the land viz. the Code of Civil Procedure. We are inclined to take the view that it is not possible to bring the suits brought under the Act within the categories of representative action envisaged in the Code of Civil Procedure. The Act deals with a class of action which is sui generis and for which a special formula has been found and encapsulated in Section 4. The Act divests the individual claimants of their right to sue and vests it in the Union. In relation to suits in India, the Union is the sole plaintiff, none of the others are envisaged as plaintiffs or respondents. The victims of the tragedy were so numerous that they were never defined at the stage of filing the plaint nor do they need to be defined at the stage of a settlement. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a *parens patriae*. In the case of a litigation

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by a karta of a Hindu undivided family or by a guardian on behalf of a ward, who is *non-sui juris*, for example, the junior members of the family or the wards, are not to be consulted before entering into a settlement. In such cases, the court acts as guardian of such persons to scrutinise the settlement and satisfy itself that it is in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be open to the junior members of the family or the wards to call the karta or guardian to account but, barring such a contingency, the settlement would be effective and binding. In the same way, the Union as *parens patriae* would have been at liberty to enter into such settlement as it considered best on its own and seek the court's approval therefor.

160. However, realising that the litigation is truly fought on behalf and for the benefit of innumerable, though not fully identified, victims the Act has considered it necessary to assign a definite role to the individual claimants and this is spelt out in Section 4. This section directs—

(*i*) that the Union *shall* have due regard to any matters which such person may require to be urged with respect to his claim; and

(*ii*) that the Union *shall*, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

This provision adequately safeguards the interests of individual victims. It enables each one of them to bring to the notice of the Union any special features or circumstances which he would like to urge in respect of any matter and if any such features are brought to its notice the Union is obliged to take it into account. Again, the individual claimants are also at liberty to engage their own counsel to associate with the State counsel in conducting the proceedings. If the suits in this case had proceeded, in the normal course, either to the stage of a decree or even to one of settlement the claimants could have kept themselves abreast of the developments and the statutory provisions would have been more than adequate to ensure that the points of view of all the victims are presented to the court. Even a settlement or compromise could not have been arrived at without the court being apprised of the views of any of them who chose to do so. Advisedly, the statute has provided that though the Union of India will be the *dominus litis* in the suit, the interests of all the victims and their claims should be safeguarded by giving them a voice in the proceedings to the extent indicated above. This provision of the statute is an adaptation of the principle of Order I Rule 8 and of Order XXIII Rule 3-B of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially

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speaking, it does incorporate the principles of natural justice to the extent possible in the circumstances. The statute cannot, therefore, be faulted, as has been pointed out earlier also, on the ground that it denies the victims an opportunity to present their views or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise.

161. The difficulty in this case has arisen, as we see it, because of a fortuitous circumstance viz. that the talks of compromise were mooted and approved in the course of the hearing of an appeal from an order for interim payments. Though compromise talks had been in the air right from the beginning of this episode, it is said that there was an element of surprise when they were put forward in court in February 1989. This is not quite correct. It has been pointed out that even when the issue regarding the interim relief was debated in the courts below, attempts were made to settle the whole litigation. The claimants were aware of this and they could — perhaps should — have anticipated that similar attempts would be made in this Court also. Though certain parties had been associated with the conduct of the proceedings in the trial court — and the trial judge did handsomely acknowledge their contribution to the proceedings — they were apparently not alert enough to keep a watching brief in the Supreme Court, may be under the impression that the appeal here was concerned only with the quantum of interim relief. One set of parties was present in the court but, apart from praying that he should be forthwith paid a share in the amount that would be deposited in court by the UCC in pursuance of the settlement, no attempt appears to have been made to put forward a contention that the amount of settlement was inadequate or had not taken into account certain relevant considerations. The Union also appears to have been acting on the view that it could proceed ahead on its own both in its capacity as "*parens patriae*" as well as in view of the powers of attorney held by it from a very large number of the victims though the genuineness of this claim is now contested before us. There was a day's interval between the enunciation of the terms of the settlement and their approval by the court. Perhaps the court could have given some more publicity to the proposed settlement in the newspapers, radio and television and also permitted some time to lapse before approving it, if only to see whether there were any other points of view likely to emerge. Basically speaking, however, the Act has provided an adequate opportunity to the victims to speak out and if they or the counsel engaged by some of them in the trial court had kept in touch with the proceedings in this Court, they could have most certainly made themselves heard. If a feeling has gained ground that their voice has not been fully heard, the fault was not with the statute but was rather due to the developments leading to the finalisation of the settlement when the appeal against the interim order was being heard in this Court.

162. One of the points of view on which considerable emphasis was laid in the course of the arguments was that in a case of this type the

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offending parties should be dealt with strictly under the criminal law of the land and that the inclusion, as part of the settlement, of a term requiring the withdrawal of the criminal prosecutions launched was totally unwarranted and vitiates the settlement. It has been pointed out by Mukharji, C.J., — and we agree — that the Act talks only of the civil liability of, and the proceedings against, the UCC or UCIL or others for damages caused by the gas leak. It has nothing to say about the criminal liability of any of the parties involved. Clearly, therefore, this part of the settlement comprises a term which is outside the purview of the Act. The validity of the Act cannot, therefore, be impugned on the ground that it permits — and should not have permitted — the withdrawal of criminal proceedings against the delinquents. Whether in arriving at the settlement, this aspect could also have been taken into account and this term included in it, is a question concerning the validity of the settlement. This is a question outside the terms of reference to us and we, therefore, express no opinion in regard thereto.

(*5*). **163.** A question was mooted before us as to whether the actual settlement — if not the statutory provision — is liable to be set aside on the grounds that the principles of natural justice have been flagrantly violated. The merits of the settlement as such are not in issue before us and nothing we say can or should fetter the hands of the bench hearing a review petition which has already been filed, from passing such orders thereon as it considers appropriate.

164. Our learned brother, however, has, while observing that the question referred to us is limited to the validity of the Act alone and not the settlement, incidentally discussed this aspect of the case too. He has pointed out that justice has in fact been done and that all facts and aspects relevant for a settlement have been considered. He has pointed out that the grievance of the petitioners that the order of this Court did not give any basis for the settlement has since been sought to be met by the order passed on May 4, 1989[51] giving detailed reasons. This shows that the court had applied its mind fully to the terms of the settlement in the light of the data as well as all the circumstances placed before it and had been satisfied that the settlement proposed was a fair and reasonable one that could be approved. In actions of this type, the court's approval is the true safety valve to prevent unfair settlements and the fact is that the highest court of the land has given thought to the matter and seen it fit to place its seal of approval to the settlement. He has also pointed out that a post-decisional hearing in a matter like this will not be of much avail. He has further pointed out that a review petition has already been filed in the case and is listed for hearing. The court has already given an assurance in its order of May 4, 1989[51], that it will only be too glad to consider any aspects that may have been overlooked in considering the terms of the settlement. Can it be said, in the circumstances, that there has been a failure of justice which compels us to set aside the settlement as

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totally violative of fundamental rights? Mukharji, C.J., has pointed out that the answer to this question should be in the negative. It was urged that there is a feeling that the maxim: "Justice must not only be done but must also appear to be done" has not been fully complied with and that perhaps, if greater publicity had attended the hearing, many other facts and aspects could have been highlighted resulting in a higher settlement or no settlement at all. That feeling can be fully ventilated and that deficiency can be adequately repaired, it has been pointed out by Mukharji, C.J., in the hearing on the review petition pending before this Court. 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 practical complications that may arise as the 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.

165. There is one more aspect which we may perhaps usefully refer to in this context. The scheme of the Act is that on the one hand the Union of India pursues the litigation against the UCC and the UCIL; on the other all the victims of the tragedy are expected to file their claims before the prescribed authority and have their claims for compensation determined by such authority. Certain infirmities were pointed out on behalf of the petitioners in the statutory provisions enacted in this regard. Our learned brother has dealt with these aspects and given appropriate directions to ensure that the claims will be gone into by a quasi-judicial authority (unfettered by executive prescriptions of the amounts of compensation by categorising the nature of injuries) with an appeal to an officer who has judicial qualifications. In this manner the Scheme under the Act provides for a proper determination of the compensation payable to the various claimants. Claims have already been filed and these are being scrutinised and processed. A correct picture as to whether the amount of compensation for which the claims have been settled is meagre, adequate or excessive will emerge only at that stage when all the claims have been processed and their aggregate is determined. In these circumstances, we feel that no useful purpose will be served by a post-decisional hearing on the quantum of compensation to be considered adequate for settlement.

166. For these reasons, it would seem more correct and proper not to disturb the orders of February 14/15, 1989[1] on the ground that the rules of natural justice have not been complied with, particularly in view of the pendency of the review petition.

(*6*). **167.** Before we conclude, we would like to add a few words on the state of the law of torts in this country. Before we gained independence, on account of our close association with Great Britain, we were governed by the common law principles. In the field of torts, under

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the common law of England, no action could be laid by the dependents or heirs of a person whose death was brought about by the tortious act of another on the maxim *actio personalis moritur cum persona*, although a person injured by a similar act could claim damages for the wrong done to him. In England this situation was remedied by the passing of the Fatal Accidents Act, 1846, popularly known as Lord Campbell's Act. Soon thereafter the Indian legislature enacted the Fatal Accidents Act, 1855. This Act is fashioned on the lines of the English Act of 1846. Even though the English Act has undergone a substantial change, our law has remained static and seems a trifle archaic. The magnitude of the gas leak disaster in which hundreds lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye-opener. The nation must learn a lesson from this traumatic experience and evolve safeguards at least for the future. We are of the view that the time is ripe to take a fresh look at the outdated century old legislation which is out of tune with modern concepts.

168. While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. We are, therefore, of the opinion that the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:

(*i*) The payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum;

(*ii*) The creation of a special forum with specific power to grant interim relief in appropriate cases;

(*iii*) The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceedings in regular courts; and

(*iv*) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.

169. In addition to what we have said above, we should like to say that the suggestion made by our learned brother, K.N. Singh, J., for the creation of an Industrial Disaster Fund (by whatever name called) deserves serious consideration. We would also endorse his suggestion that the Central Government will be well advised if, in future, it insists on certain safeguards before permitting a transnational company to do busi-

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ness in this country. The necessity of such safeguards, at least in the following two directions, is highlighted in the present case:

(*a*) Shri Garg has alleged that the processes in the Bhopal Gas Plant were so much shrouded in secrecy that neither the composition of the deadly gas that escaped nor the proper antidote therefor were known to anyone in this country with the result that the steps taken to combat its effects were not only delayed but also totally inadequate and ineffective. It is necessary that this type of situation should be avoided. The government should therefore insist, when granting license to a transnational company to establish its industry here, on a right to be informed of the nature of the processes involved so as to be able to take prompt action in the event of an accident.

(*b*) We have seen how the victims in this case have been considerably handicapped on account of the fact that the immediate tort-feasor was the subsidiary of a multinational with its Indian assets totally inadequate to satisfy the claims arising out of the disaster. It is, therefore, necessary to evolve, either by international consensus or by unilateral legislation, steps to overcome these handicaps and to ensure —

(*i*) that foreign corporations seeking to establish an industry here, agree to submit to the jurisdiction of the courts in India in respect of actions for tortious acts in this country;

(*ii*) that the liability of such a corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country, but that the victims are able to reach out to the assets of such concerns anywhere in the world;

(*iii*) that any decree obtained in Indian courts in compliance with due process of law is capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles, in those other countries.

170. Our brother, K.N. Singh, J., has in this context dealt at some length with the United Nations Code of Conduct for Multinational Corporations which awaits approval of various countries. We hope that calamities like the one which this country has suffered will serve as catalysts to expedite the acceptance of an international code on such matters in the near future.

171. With these observations, we agree with the order proposed by the learned Chief Justice.

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(2011) 4 Supreme Court Cases 454

(BEFORE MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.)

ARUNA RAMACHANDRA SHANBAUG .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 115 of 2009†, decided on March 7, 2011

A. Human and Civil Rights — Right to die/Euthanasia — Kinds of euthanasia — Active and passive euthanasia — Voluntary and non-voluntary euthanasia — Legality and permissibility — Relationship of euthanasia vis-à-vis (1) offences concerned under Penal Code, 1860, and (2) doctor-assisted death, explained — Held, non-voluntary passive euthanasia is permissible subject to conditions, safeguards and procedure laid down herein, while active euthanasia and assisted death continue to be illegal

— Held, active euthanasia which involves administration of lethal dose to a patient, is a crime all over the world except where it is permitted by appropriate legislation — Passive euthanasia which involves withdrawal of life-saving measures, is permissible even without any supporting legislation, provided certain conditions are met and safeguards observed

— Voluntary and non-voluntary euthanasia — Permissibility of voluntary euthanasia — Held, voluntary euthanasia is permissible to the extent that a person can refuse to take life-saving medicines — However, question whether refusal to take food by a patient in order to end his life is permissible, left open because petitioner in present case was in persistent vegetative state (PVS) and therefore not capable of taking any decision herself, her case thus raising the issue of non-voluntary euthanasia

— Euthanasia vis-à-vis Penal Code, 1860 — Held, active euthanasia is an offence under S. 302 or at least under S. 304 IPC

— Euthanasia vis-à-vis physician-assisted death — Difference, held, lies in who administers lethal dose — In euthanasia, this is done by doctor or by third person whereas in physician-assisted death, this is done by patient himself — Legal position of physician-assisted death in India — Held, would be abetment of suicide falling under S. 306 IPC — Penal Code, 1860 — Ss. 302, 304, 306 and 309 — Medical Jurisprudence — Euthanasia — Persistent vegetative state (PVS) — Constitution of India — Art. 21 — Dignity, Right to — Euthanasia, Permissibility of

B. Human and Civil Rights — Right to die/Euthanasia — Non-voluntary passive euthanasia — Permissibility of — Whether settled by Constitution Bench decision in *Gian Kaur*, (1996) 2 SCC 648, paras 24 and 25 — Held, no final view has been taken on this issue therein, though active euthanasia and doctor-assisted suicide were held to be illegal therein (see *Shortnote C*)

† Under Article 32 of the Constitution of India

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C. Constitution of India — Art. 21 — Right to die, reiterated, not included in right to life — Hence, (active) euthanasia and assisted suicide are illegal — Human and Civil Rights — Right to die/Euthanasia

P, a social activist filed a petition under Article 32 of the Constitution, seeking a direction from the Supreme Court that *A* who was sixty years old and was in persistent vegetative state (PVS) for the last 37 years, should be subjected to passive euthanasia by denying her food and water, *A*'s only form of life support. The petition was filed by *P* on behalf of and in the name of *A*. *A*'s parents were already dead and no close relative was taking care of her. She was being looked after by the hospital staff of King Edward Memorial Hospital, Mumbai (KEM Hospital) where *A* had been working as a nurse before she went into PVS. The hospital staff was not only taking proper care of *A* but was also emotionally attached to her. They therefore opposed *P*'s petition. The Supreme Court constituted a team of medical experts who reported that *A* though in PVS, was able to digest food, her blood pressure was normal and there was also some brain activity.

Dismissing the writ petition filed by *P* on behalf of *A*, the Supreme Court

Held :

The Constitution Bench of the Supreme Court in *Gian Kaur case*, (1996) 2 SCC 648 held that both euthanasia and assisted suicide are not lawful in India. The Court held that the right to life under Article 21 of the Constitution does not include the right to die and observed that euthanasia could be made lawful only by legislation. (Para 101)

In India, abetment of suicide (Section 306 IPC) and attempt to commit suicide (Section 309 IPC) are both criminal offences. Section 309 IPC has been held to be constitutionally valid in *Gian Kaur case*. (Paras 100 and 103)

All that has been said in paras 24 and 25 in *Gian Kaur case* [set out in para 20 herein], (1996) 2 SCC 648, is that the view taken in *Rathinam case*, (1994) 3 SCC 394, that the right to life includes the right to die, is not correct. *Gian Kaur case* cannot be construed to mean anything beyond that. It has been specifically mentioned in para 25 of the aforesaid decision that the debate even in such cases to permit physician-assisted termination of life is inconclusive. It is therefore obvious that no final view was expressed in the decision in *Gian Kaur case* beyond what has been mentioned above. (Paras 20 and 21)

Gian Kaur v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374, *explained*

P. Rathinam v. *Union of India*, (1994) 3 SCC 394 : 1994 SCC (Cri) 740, *held, overruled*

Aruna Ramachandra Shanbaug v. *Union of India*, (2011) 4 SCC 524, *referred to*

Vikram Deo Singh Tomar v. *State of Bihar*, 1988 Supp SCC 734 : 1989 SCC (Cri) 66, *cited*

Law Commission of India, Medical Treatment of Terminally Ill Patients (2006), *referred to*

[Ed.: It seems that what is being said above is that *Gian Kaur*, (1996) 2 SCC 648, ruled out the permissibility of *active* euthanasia without legislation, but that no conclusive view was expressed therein regarding *passive* euthanasia, which has been held to be permissible herein.]

Euthanasia is of two types: active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart-lung machine, from a patient in coma. The general legal position all over

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the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. (Para 39)

Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart-lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life-saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia. (Para 66)

The difference between "active" and "passive" euthanasia is that in active euthanasia, something is *done* to end the patient's life while in passive euthanasia, something is *not done* that would have preserved the patient's life. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. (Paras 43 and 44)

A further categorisation of euthanasia is between voluntary euthanasia and non-voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non-voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems. (Para 40)

In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for various reasons e.g. that he is in great pain or that the money being spent on his treatment should instead be given to his family who are in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life-saving medicines. In India, if a person consciously and voluntarily refuses to take life-saving medical treatment it is not a crime. Whether not taking food consciously and voluntarily with the aim of ending one's life is a crime under Section 309 IPC (attempt to commit suicide) is a question which need not be decided in this case. Non-voluntary passive euthanasia implies that the person is not in a position to decide for himself e.g. if he is in coma or PVS. The present is a case where the Court has to consider non-voluntary passive euthanasia i.e. whether to allow a person to die who is not in a position to give his/her consent. (Para 67)

Active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under Section 302 or at least under Section 304, Penal Code, 1860. Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance e.g. sodium pentothal which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep. (Para 41)

A distinction is sometimes drawn between euthanasia and physician-assisted death, the difference being in *who* administers the lethal medication. In euthanasia, a physician or third party administers it, while in physician-assisted suicide it is the patient himself who does it, though on the advice of the doctor. In many countries/States the latter is legal while the former is not. Physician-assisted suicide is a crime under Section 306 IPC (abetment to suicide). (Paras 42 and 55)

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It cannot be said that *A* is dead. Even from the report of the committee of doctors it appears that she has some brain activity, though very little. She recognises that persons are around her and expresses her likes or dislikes by making some vocal sound and waving her hand by certain movements. She smiles if she receives her favourite food, fish and chicken soup. She breathes normally and does not require a heart-lung machine or intravenous tube for feeding. Her pulse rate and respiratory rate and blood pressure are normal. She was able to blink well and could see her doctors who examined her. When an attempt was made to feed her through mouth she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. She would get disturbed when many people entered her room, but she appeared to calm down when she was touched or caressed gently. *A* meets most of the criteria for being in a persistent vegetative state which has obtained for 37 years. However, her dementia has not progressed and has remained stable for many years but there appears little possibility of her coming out of PVS in which she is in. In all probability, she will continue to be in the state in which she is in till her death.

(Paras 121 and 122)

It is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not *P* who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take the decision, whether to seek passive euthanasia for *A*. The KEM Hospital staff have clearly expressed their wish that *A* should be allowed to live. It must be recorded though that the Supreme Court regards *P* as a public-spirited person who filed the petition for a cause she bona fide regarded as correct and ethical. We hold her in high esteem. All that is being said is that however much *P*'s interest in *A* may be, it cannot match the involvement of the KEM Hospital staff who have been taking care of *A* day and night for 38 years. Hence for the present *A*'s life support system (which is done by feeding her) may not be withdrawn. However, assuming that the KEM Hospital staff at some future time changes its mind, in such a situation KEM Hospital would have to apply to the Bombay High Court (the High Court concerned) for approval of the decision to withdraw life support. (Paras 124, 140 and 123)

D. Human and Civil Rights — Right to die/Euthanasia — Non-voluntary passive euthanasia — Procedure for permitting — Provisional procedure laid down by Supreme Court till law is enacted by Parliament — Initial decision to subject a patient to euthanasia may be taken by parents, spouse or other close relatives, and in their absence, by person acting as next friend or by doctors — Decision, however, must be bona fide — Thereafter approval must be sought from High Court by filing petition under Art. 226 — High Court to act as *parens patriae* — Matter to be decided by a Bench of at least two Judges — Such Bench in turn to constitute a committee of three reputed doctors after consulting such medical authorities/medical practitioners as may be necessary — Medical Committee should preferably comprise a neurologist, psychiatrist and physician — Report of Medical Committee to be made available to parents, spouse, etc. to ascertain their views — High Court to take speedy and reasoned decision keeping in view best interests of patient — Necessity of judicial oversight, held, arises because non-voluntary passive euthanasia is susceptible to misuse by greedy

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relatives who may be more interested in grabbing dying person's property than their welfare — Constitution of India — Arts. 226, 32 and 21 — Parens Patriae jurisdiction — Euthanasia — Role of High Court in cases where non-voluntary passive euthanasia is sought

E. Constitution of India — Arts. 32 and 141 — Executive or Legislative action/inaction or gaps — Orders/directions redressing/filling — Procedure laid down for administration of non-voluntary passive euthanasia till law is enacted by Parliament — Courts, Tribunals and Judiciary — Judicial Legislation — Judicial legislation by issuance of directions — Instances

Held :

There is no statutory provision in India as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. Passive euthanasia should be permitted in India in certain situations. Hence the following law is laid down in this connection which will continue to be in force until Parliament makes a law on the subject:

(*i*) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

(*ii*) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned.

This is even more necessary in India as the Court cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient. (Paras 85 and 124)

Airedale N.H.S. Trust v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL); *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932, *applied*

Gian Kaur v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374, *explained*

If it is left solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person, there is always a risk in India that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in Indian society today and the rampant commercialisation and corruption, the possibility cannot be ruled out that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money. While giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, it cannot be left entirely to their discretion whether to discontinue the life support or not. Approval of the High Court has to be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relatives and next friend, and for reassurance of the patient's family as well as the public. This

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is also in consonance with the doctrine of *parens patriae*.
(Paras 85, 104, 124 and 125)

Also, since medical science is advancing fast, doctors must not declare a patient to be a hopeless case unless there appears to be no reasonable possibility of any improvement by some newly discovered medical method in the near future. It is experts like medical practitioners who can decide whether there is any reasonable possibility of a new medical discovery which could enable such a patient to revive in the near future. (Para 105)

J. (A Minor) (Wardship: Medical Treatment), In re, (1990) 3 All ER 930 (CA), *relied on*

Schloendorff v. *Society of New York Hospital*, 211 NY 125 : 105 NE 92 (1914); *S.* v. *McC. (Orse S.) and M (D.S. Intervener)*, 1972 AC 24 (HL); *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital*, 1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643 (HL); *Nancy B.* v. *Hotel Dieu de Quebec*, (1992) 86 DLR (4th) 385 (Que SC); *T. (Adult: Refusal of Treatment), In re*, 1993 Fam 95 : (1992) 3 WLR 782 : (1992) 4 All ER 649 (CA); *Supdt. of Belchertown State School* v. *Saikewicz*, 370 NE 2d 417 (1977); *R.* v. *Cox*, Decided on 18-9-1992 (Winchester Crown Court); *F. (Mental Patient : Sterilisation), In re*, (1990) 2 AC 1 : (1989) 2 WLR 1025 (CA & HL) : (1989) 2 All ER 545 (HL); *J.H.L., In re*, Decided on 13-8-1992 (High Court of New Zealand), *referred to*

Washington v. *Glucksberg*, 138 L Ed 2d 772 : 521 US 702 (1996); *Vacco* v. *Quill*, 138 L Ed 2d 834 : 521 US 793 (1996); *Quinlan, In re*, 70 NJ 10 : 355 A 2d 647 (1976); *Conroy, In re*, 98 NJ 321 : 486 A 2d 1209 (1985), *considered*

Cruzan v. *Missouri Deptt. of Health (MDH)*, 111 L Ed 2d 224 : 497 US 261 (1989), *distinguished*

Glanville Williams : Textbook of Criminal Law, 2nd Edn., 282, *referred to*

George Bernard Shaw: *The Doctor's Dilemma*; Robin Cook : *Coma*; Discussion Paper on Treatment of Persistent Vegetative State issued in September, 1992 by Medical Ethics Committee of the British Medical Association; Law Commission of India: Medical Treatment to Terminally Ill Patients (196th Report, Chapter IV), *relied on*

When an application seeking permission for non-voluntary passive euthanasia is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as take the views of the hospital staff and submit its report to the High Court Bench. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters, etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctors' committee to them as soon as it is available. After hearing them, the High Court Bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject. (Paras 134 and 135)

The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient. The High Court should give its decision assigning specific reasons in accordance with the principle of "best interest of the patient"

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laid down by the House of Lords in *Airedale case*, 1993 AC 789. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature. (Para 136)

Airedale N.H.S. Trust v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL), *followed*

A's parents are dead and other close relatives are not interested in her. It is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not *P* who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take the decision, whether to seek passive euthanasia for *A*. The KEM Hospital staff have clearly expressed their wish that *A* should be allowed to live. It must be recorded though that the Supreme Court regards *P* as a public-spirited person who filed the petition for a cause she bona fide regarded as correct and ethical. We hold her in high esteem. All that is being said is that however much *P*'s interest in *A* may be, it cannot match the involvement of the KEM Hospital staff who have been taking care of *A* day and night for 38 years. Hence for the present *A*'s life support system (which is done by feeding her) may not be withdrawn. However, assuming that the KEM Hospital staff at some future time changes its mind, in such a situation KEM Hospital would have to apply to the Bombay High Court (the High Court concerned) for approval of the decision to withdraw life support. (Paras 124, 140 and 123)

F. Medical Jurisprudence — Death — Test to determine — Failure of cardiopulmonary functions vis-à-vis brain death — Inadequacy of cardiopulmonary test in the wake of scientific advancements through which heartbeats and respiration can now be revived — Held, death must now be understood as irreversible and total failure of all parts of brain i.e. cerebrum, cerebellum and brainstem — Person in persistent vegetative state (PVS), if dead — Held, such person cannot be considered to be brain-dead because brainstem is still functioning and therefore such person can support breathing, digestion, etc. without any mechanical aid — On facts held, *A* who was in PVS, could not be considered as dead particularly when there was some brain activity in her though very little — Anoxia — Uniform Determination of Death Act — S. 1 [USA] — Penal Code, 1860 — S. 46 — Transplantation of Human Organs Act, 1994 — Ss. 2(d) and 3(6) — Human and Civil Rights — Right to die/Euthanasia — Death — What is

(Paras 106 to 122)

Schmidt v. *Pierce*, 344 SW 2d 120 (Mo 1961); *Sanger* v. *Butler*, 101 SW 459 (Tex Civ App 1907), *approved*

Black's Law Dictionary, 488 (4th Edn., Revised 1968); Goldsmith, Jason, "Wanted! Dead and/or Alive: Choosing Amongst the Many Not-so-Uniform Definitions of Death", 61 U Miami L Rev 871 (2007); Samantha Weyrauch, "Acceptance of Whole Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan", 17 UCLA Pac Basin LJ 91 at p. 96 (1999), *quoted*

Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 JAMA 337 at pp. 337-40 (1968); Seema K. Shah, Franklin Miller, "Can We Handle The Truth? Legal Fictions in the Determination of Death", 36 Am JL & Med 540 (2010), *quoted*

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G. Medical Jurisprudence — Particular diseases or conditions — Persistent vegetative state (PVS) — Characteristics of — Indicated — Held, brainstem remains alive while cortex becomes non-functional — Human and Civil Rights — Right to die/Euthanasia — Persistent vegetative state (PVS) — What is (Para 70)

H. Human and Civil Rights — Right to die/Euthanasia — Non-voluntary passive euthanasia — Stage at which it can be resorted to — Held, only when a patient is being kept alive only by providing life-support treatment (such as being kept on ventilator) and there is no possibility of their coming out of this state

Held :

In the case of euthanasia determination of, when it would be right or fair to disallow resuscitation of a person who is incapable of expressing his or her consent to a termination of his or her life depends on two circumstances: (*a*) When a person is only kept alive mechanically i.e. when not only consciousness is lost, but the person is only able to sustain involuntary functioning through advanced medical technology—such as the use of heart-lung machines, medical ventilators, etc. (*b*) When there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time—at least a few years—then there can be a fair case made out for passive euthanasia. To extend this further, especially when a person is incapable of being able to give any consent, would amount to committing judicial murder. (Para 117)

I. Human and Civil Rights — Right to die/Euthanasia — Perplexity of issue — Held, is being experienced by courts and legislatures all over the world (Para 3)

J. Human and Civil Rights — Right to die/Euthanasia — Legal position in Netherlands — Euthanasia — Permissibility subject to fulfilment of certain conditions — Conditions outlined — Exceptions also indicated, which are considered normal medical practice rather than euthanasia — Passive euthanasia not considered as offence — Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 [Netherlands] — Burial and Cremation Act [Netherlands] — Groningen Protocol [Netherlands] (Paras 48 to 50)

K. Human and Civil Rights — Right to die/Euthanasia — Legal position in Switzerland — Assisted suicide vis-à-vis active euthanasia — Held, assisted suicide without involvement of a physician is legal but active euthanasia performed by doctor is not — Peculiarity of Swiss law — Non-Swiss nationals also entitled to avail of these provisions — Swiss legal position also compared with Holland — Swiss Penal Code (Paras 51 and 52)

L. Human and Civil Rights — Right to die/Euthanasia — Legal position in Belgium — Euthanasia — Permissibility subject to certain conditions — Difference between Belgian and Dutch law also indicated (Para 53)

M. Human and Civil Rights — Right to die/Euthanasia — Legal position in UK, Spain, Austria, Italy, Germany and France — Held, in none of these countries is euthanasia or physician-assisted death legal (Para 54)

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N. Human and Civil Rights — Right to die/Euthanasia — Legal position in USA — Held, active euthanasia is illegal in all States in USA but physician-assisted death is legal in States of Oregon, Washington and Montana — Oregon Death with Dignity Act — Washington Death with Dignity Act, 2008 (Para 55)

O. Human and Civil Rights — Right to die/Euthanasia — Legal position in State of Oregon in USA — Physician-assisted suicide — Conditions subject to which available to Oregon resident — Outlined — Oregon Death with Dignity Act (Paras 56 and 57)

Gonzales v. *Oregon*, 163 L Ed 2d 748 : 546 US 243 (2005), *referred to*

P. Human and Civil Rights — Right to die/Euthanasia — Legal position in State of Montana in USA — Physician-assisted death — Held, is permissible according to Montana Supreme Court verdict in *Baxter case*, 2009 WL 5155363 (Mont 2009) (Para 60)

Baxter v. *Montana*, 2009 MT 449 : 2009 WL 5155363 (Mont 2009), *referred to*

Q. Human and Civil Rights — Right to die/Euthanasia — Legal position in States other than States of Oregon, Washington and Montana in United States — Active euthanasia and physician-assisted death are not legal — Texas however has provided for withdrawal of life support measures from terminally ill patients where such treatment is considered futile or inappropriate — Some States have made provisions for a living will under which a person can make an advance declaration how he should be treated in case he is unable to take decision due to illness or incapacity — Texas Futile Care Law — Living Will/Advance Directive/Advance Decision (Paras 61 and 62)

R. Human and Civil Rights — Right to die/Euthanasia — Living will — Concept of — Permissibility of, in State of Texas in USA — Constitution of India — Art. 21 — Penal Code, 1860 — Ss. 306 and 309 — Words and Phrases — "Living will" (Paras 61 and 62)

S. Human and Civil Rights — Right to die/Euthanasia — Legal position in Canada — Physician-assisted suicide — Held, is illegal — Supreme Court of Canada has also not permitted assisted suicide — Criminal Code of Canada, S. 241(b) (Para 64)

Sue Rodriguez v. *British Columbia (Attorney General)*, (1993) 3 SCR 519 (Can), *referred to*

T. Constitution of India — Arts. 226 and 32 — Wider jurisdiction of High Court under Art. 226 compared to Supreme Court's jurisdiction under Art. 32 — Power to grant approval for subjecting a patient to non-voluntary passive euthanasia — Held, High Court in addition to its power to issue prerogative writs, can also issue directions or orders — Proper forum to obtain judicial approval for euthanasia is therefore High Court — Human and Civil Rights — Right to die/Euthanasia — Passive euthanasia — Permission for — Proper forum, held, is High Court (Paras 131 and 133)

Dwarka Nath v. *ITO*, AIR 1966 SC 81; *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*, (1989) 2 SCC 691, *relied on*

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U. **Penal Code, 1860 — S. 309 — Attempt to commit suicide — Whether ought to be decriminalised — Held, though S. 309 has been declared constitutionally valid, yet time has come that it should be deleted by Parliament because provision has become anachronistic — A person attempts suicide in depression and hence needs help, rather than punishment** (Para 103)

Gian Kaur v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374, *referred to*

V. Precedents — Foreign precedents — Value of, in India — Held, foreign precedents are not binding but have persuasive effect (Para 99)

Airedale N.H.S. Trust v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL), *relied on*

Cruzan v. *Missouri Deptt. of Health (MDH)*, 111 L Ed 2d 224 : 497 US 261 (1989), *distinguished*

Jobes, In re, 108 NJ 394 at p. 419 : 529 A 2d 434 at p. 477 (1987), *cited*

W. **Legal Maxims — *Parens patriae* (father of country) — Historical background of doctrine — Explained — King as father of country — Court acting as *parens patriae* — Held, court too can assume this role — Human and Civil Rights — Right to die/Euthanasia — Role of Court as *parens patriae* — Constitution of India — Arts. 226 and 32 — *Parens Patriae* jurisdiction**

Held :

The doctrine of *parens patriae* (father of the country) had originated in British law as early as in the 13th century. It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind *parens patriae* is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role. The duty of the King in feudal times to act as *parens patriae* (father of the country) has been taken over in modern times by the State. (Paras 126 and 127)

Charan Lal Sahu v. *Union of India*, (1990) 1 SCC 613; *Heller* v. *DOE*, 125 L Ed 2d 257 : 509 US 312 (1992); *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *relied on*

Addington v. *Texas*, 441 US 418, *cited*

In the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as *parens patriae*, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight. (Para 130)

X. **Constitution of India — Art. 32 — Maintainability — Case involving an important issue of law though no fundamental right violated — Petition under Art. 32 entertained and legal issues decided**

Held :

This petition could have been dismissed on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and it has been held by the Constitution Bench decision in *Gian Kaur case*, (1996) 2 SCC 648 that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. Hence the petitioner has not shown violation of any of her fundamental rights.

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However, in view of the importance of the issues involved the Supreme Court has decided to go deeper into the merits of the case. (Para 6)

Gian Kaur v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374, *referred to*

[Ed.: *See also* Art. 32, '(b)(2)(i)2. Scope of Interference under — Enforcement of fundamental rights — Broadly — Exceptional situations', pp. 375 et seq. in Vol. 7, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

Y. **Practice and Procedure — Evidence — Video-recording — Playing of video-recording in courtroom — Practice regarding — In a case relating to euthanasia of a woman who was in persistent vegetative state (PVS) for about 37 years, a team of medical experts constituted which conducted medical examination on her to see her mental and physical condition — Medical examination video recorded and compact disc (CD) so prepared taken on court records — Video-recording subsequently played in courtroom so that all present could see her condition — Held, this course of action was taken on basis of an earlier instance of Nuremburg trials wherein also a film on some Nazi atrocities during Second World War were screened in courtroom — Evidence Act, 1872 — Ss. 14, 3 "Evidence" (2), 39, 45 and 65-B** (Paras 10 and 11)

Aruna Ramachandra Shanbaug v. *Union of India*, (2011) 4 SCC 524, *referred to*

Z. **Constitution of India — Arts. 32 and 226 — Petition through next friend — Criteria for determination of next friend — Case of a person in persistent vegetative state (PVS) — *Locus standi* of a social activist who had visited patient on a few occasions vis-à-vis hospital staff which affectionately looked after patient constantly for 37 years — Held, it was hospital staff which could properly be considered as next friend — Human and Civil Rights — Right to die/Euthanasia — Locus standi/standing**

Held :

The KEM Hospital staff right from the Dean, including the present and down to the staff nurses and paramedical staff have been looking after *A* for 38 years day and night. What they have done is simply marvellous. They feed *A*, wash her, bathe her, cut her nails, and generally take care of her, and they have been doing this not on a few occasions but day and night, year after year. The whole country must learn the meaning of dedication and sacrifice from the KEM hospital staff. In *38 years A has not developed one bedsore*. It is thus obvious that the KEM Hospital staff has developed an emotional bonding and attachment to *A*, and in a sense they are her real family today. *P* who claims to be the next friend of *A* and has filed this petition on her behalf is not a relative of *A* nor can she claim to have such close emotional bonding with her as the KEM Hospital staff. Hence, the KEM Hospital staff is to be treated as the next friend of *A* and the Court declines to recognise *P* as her next friend, though the Supreme Court regards her as a public-spirited person who filed the petition for a cause she bona fide regarded as correct and ethical. We hold her in high esteem. No doubt *P* has written a book about *A* and has visited her a few times, and the Court has great respect for her for the social causes she has espoused, but she cannot claim to have the extent of attachment or bonding with *A* which the KEM Hospital staff, which has been looking after her for years, claims to have.

(Paras 16, 17, 123, 124 and 140)

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ZA. **Evidence Act, 1872 — Ss. 57, 85-B and 87 — Facts judicially noticeable — Information available on internet — Relevance of such information — *P*, a social activist filing writ petition in Supreme Court seeking euthanasia for a 60-year-old woman, *A* who was in persistent vegetative state (PVS) for 37 years — On facts found that *P* could not be considered as *A*'s next friend — However, *P*'s antecedents ascertained by gathering information available about her on internet and social spirit shown by her, lauded — Practice and Procedure — Evidence — Information on internet — Value of** (Paras 124 and 140)

ZB. **Courts, Tribunals and Judiciary — Judicial Process — Judicial Clerks/Law Clerks/Research Assistants/Interns — Role of, in assisting Judges — Assistance given by judicial clerks and interns in present case, greatly appreciated — Practice and Procedure — Judgment — Civil Procedure Code, 1908, Or. 20 Rr. 4, 5 and Or. 41 R. 31** (Para 138)

K-D/47500/CVR

Advocates who appeared in this case :

G.E. Vahanvati, Attorney General, T.R. Andhyarujina, Shekhar Naphade and Pallav Shishodia, Senior Advocates (Chinmoy P. Sharma, Soumik Ghosal, Ms Shubhangi Tuli, Ms Divya Jain, Vimal Chandra S. Dave, Ms Sunaina Dutta, Ms Suchitra Atul Chitale, Chinmoy Khaladkar, Sanjay V. Kharde and Ms Asha Gopalan Nair, Advocates) for the appearing parties.

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33. 101 SW 459 (Tex Civ App 1907), *Sanger* v. *Butler* 514*d*

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.—

"Marte hain aarzoo mein marne ki
Maut aati hai par nahin aati"

— Mirza Ghalib

2. Heard Mr Shekhar Naphade, learned Senior Counsel for the petitioner, the learned Attorney General for India for the Union of India, Mr Vahanvati, Mr T.R. Andhyarujina, learned Senior Counsel, whom we had appointed as amicus curiae, Mr Pallav Shishodia, learned Senior Counsel for the Dean, KEM Hospital, Mumbai, and Mr Chinmoy Khaladkar, learned counsel for the State of Maharashtra.

3. Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. This Court, in this case, is facing the same issue, and we feel like a ship in an uncharted sea, seeking some guidance by the light thrown by the legislations and judicial pronouncements of foreign countries, as well as the submissions of the learned counsel before us. The case before us is a writ petition under Article 32 of the Constitution, and has been filed on behalf of the petitioner, Aruna Ramachandra Shanbaug by one Ms Pinki Virani of Mumbai, claiming to be a next friend.

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4. It is stated in the writ petition that the petitioner Aruna Ramachandra Shanbaug was a staff nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27-11-1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomised her. To immobilise her during this act he twisted the chain around her neck. The next day on 28-11-1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. It is alleged that the neurologist in the hospital found that she had plantars' extensor, which indicates damage to the cortex or some other part of the brain. She also had brainstem contusion injury with associated cervical cord injury.

5. It is alleged at p. 11 of the petition that 36 years have expired since the incident and now Aruna Ramachandra Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She has stopped menstruating and her skin is now like papier mâché stretched over a skeleton. She is prone to bedsores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives. It is alleged that Aruna Ramachandra Shanbaug is in a persistent vegetative state (PVS) and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth, she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. However, Aruna is virtually a skeleton. Her excreta and the urine is discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same subhuman condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a façade of life which is totally devoid of any human element. It is alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years. The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

6. We could have dismissed this petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and it has been held by the Constitution Bench decision of this Court in *Gian Kaur* v. *State of Punjab*[1] vide paras 22 and 23 that the right to life guaranteed by Article 21 of the

1 (1996) 2 SCC 648 : 1996 SCC (Cri) 374

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Constitution does not include the right to die. Hence the petitioner has not shown violation of any of her fundamental rights. However, in view of the importance of the issues involved we decided to go deeper into the merits of the case.

7. Notice had been issued by this Court on 16-12-2009 to all the respondents in this petition. A counter-affidavit was earlier filed on behalf of Respondents 3 and 4, Mumbai Municipal Corporation and the Dean, KEM Hospital by Dr. Amar Ramaji Pazare, Professor and Head in the said hospital, stating in Para 6 that Aruna accepts the food in normal course and responds by facial expressions. She responds to commands intermittently by making sounds. She makes sounds when she has to pass stool and urine which the nursing staff identifies and attends to by leading her to the toilet. Thus, there was some variance between the allegations in the writ petition and the counter-affidavit of Dr. Pazare.

8. Since there was some variance in the allegation in the writ petition and the counter-affidavit of Dr. Pazare, we, by our order dated 24-1-2011[2] appointed a team of three very distinguished doctors of Mumbai to examine Aruna Shanbaug thoroughly and submit a report about her physical and mental condition. These three doctors were:

(*1*) Dr. J.V. Divatia, Professor and Head, Department of Anaesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai;

(*2*) Dr. Roop Gursahani, Consultant Neurologist at P.D. Hinduja Hospital, Mumbai; and

(*3*) Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital.

9. In pursuance of our order dated 24-1-2011[2], the team of three doctors abovementioned examined Aruna Shanbuag in KEM Hospital and has submitted to us the following report:

"Report of examination of Ms Aruna Ramachandra Shanbaug

Jointly prepared and signed by

1. Dr. J.V. Divatia

(Professor and Head, Department of Anaesthesia, Critical Care and Pain, at Tata Memorial Hospital, Mumbai)

2. Dr. Roop Gursahani

(Consultant Neurologist at P.D. Hinduja Hospital, Mumbai)

3. Dr. Nilesh Shah

(Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital).

I. Background

As per the request of Hon'ble Justice Katju and Hon'ble Justice Mishra of the Supreme Court of India, Ms Aruna Ramachandra

2 *Aruna Ramachandra Shanbaug* v. *Union of India*, (2011) 4 SCC 524

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Shanbaug, a 60-year-old female patient was examined on 28-1-2011 morning and 3-2-2011 in the side room of Ward No. 4, KEM Hospital by the team of 3 doctors viz. Dr. J.V. Divatia (Professor and Head, Department of Anaesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai), Dr. Roop Gursahani (Consultant Neurologist at P.D. Hinduja Hospital, Mumbai) and Dr. Nilesh Shah (Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital).

This committee was set up because the Court found some variance between the allegations in the writ petition filed by Ms Pinki Virani on behalf of Aruna Ramachandra Shanbaug and the counter-affidavit of Dr. Pazare. This team of three doctors was appointed to examine Aruna Ramachandra Shanbaug thoroughly and give a report to the Court about her physical and mental condition.

It was felt by the team of doctors appointed by the Supreme Court that longitudinal case history and observations of the last 37 years along with findings of examination will give a better, clear and comprehensive picture of the patient's condition.

This report is based on:

1. The longitudinal case history and observations obtained from the Dean and the medical and nursing staff of KEM Hospital;

2. Case records (including nursing records) since January 2010;

3. Findings of the physical, neurological and mental status examinations performed by the panel;

4. Investigations performed during the course of this assessment (blood tests, CT scan head, electroencephalogram).

II. Medical history

Medical history of Ms Aruna Ramachandra Shanbaug was obtained from the Dean, the Principal of the School of Nursing and the medical and nursing staff of Ward No. 4 who has been looking after her.

It was learnt from the persons mentioned above that

1. Ms Aruna Ramachandra Shanbaug was admitted in the hospital after she was assaulted and strangulated by a sweeper of the hospital on 27-11-1973.

2. Though she survived, she never fully recovered from the trauma and brain damage resulting from the assault and strangulation.

3. Since last so many years she is in the same bed in the side room of Ward No. 4.

4. The hospital staff has provided her excellent nursing care since then which included feeding her by mouth, bathing her and taking care of her toilet needs. *The care was of such an exceptional nature that she has not developed a single bedsore or fracture in spite of her bedridden state since 1973.*

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5. According to the history from them, though she is not very much aware of herself and her surroundings, she somehow recognises the presence of people around her and expresses her like or dislike by making certain types of vocal sounds and by waving her hands in certain manners. She appears to be happy and smiles when she receives her favourite food items like fish and chicken soup. She accepts feed which she likes but may spit out food which she doesn't like. She was able to take oral feeds till 16-9-2010, when she developed a febrile illness, probably malaria. After that, her oral intake reduced and a feeding tube (Ryle's tube) was passed into her stomach via her nose. Since then she receives her major feeds by the Ryle's tube, and is only occasionally able to accept the oral liquids. Malaria has taken a toll in her physical condition but she is gradually recuperating from it.

6. Occasionally, when there are many people in the room she makes vocal sounds indicating distress. She calms down when people move out of her room. She also seems to enjoy the devotional songs and music which is played in her room and it has calming effect on her.

7. In an annual ritual, each and every batch of nursing students is introduced to Ms Aruna Ramachandra Shanbaug, and is told that 'She was one of us'; 'She was a very nice and efficient staff nurse but due to the mishap she is in this bedridden state'.

8. The entire nursing staff member and other staff members have a very compassionate attitude towards Ms Aruna Ramachandra Shanbaug and they all very happily and willingly take care of her. They all are very proud of their achievement of taking such good care of their bedridden colleague and feel very strongly that they want to continue to take care of her in the same manner till she succumbs naturally. They do not feel that Ms Aruna Ramachandra Shanbaug is living a painful and miserable life.

III. Examination

III(a) Physical examination

She was conscious, unable to cooperate and appeared to be unaware of her surroundings.

Her body was lean and thin. She appeared neat and clean and lay curled up in the bed with movements of the left hand and made sounds, especially when many people were present in the room.

She was afebrile, pulse rate was 80/min, regular, and good volume. Her blood pressure recorded on the nursing charts was normal. Respiratory rate was 15/min, regular, with no signs of respiratory distress or breathlessness.

There was no pallor, cyanosis, clubbing or icterus. She was edentulous (no teeth).

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Skin appeared to be generally in good condition, there were no bedsores, bruises or evidence of old healed bedsores. There were no skin signs suggestive of nutritional deficiency or dehydration.

Her wrists had developed severe contractures, and were fixed in acute flexion. Both knees had also developed contractures (right more than left).

A nasogastric feeding tube (Ryle's tube) was in situ. She was wearing diapers.

Abdominal, respiratory and cardiovascular examination was unremarkable.

III(b) Neurological examination

When examined she was conscious with eyes open wakefulness but without any apparent awareness (see Table 1 for detailed assessment of awareness). From the above examination, she has evidence of intact auditory, visual, somatic and motor primary neural pathways. However no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during our examinations.

There was no coherent response to verbal commands or to calling her name. She did not turn her head to the direction of sounds or voices. When roused she made non-specific unintelligible sounds ('uhhh, ahhh') loudly and continuously but was generally silent when undisturbed.

Menace reflex (blinking in response to hand movements in front of eyes) was present in both eyes and hemifields but brisker and more consistent on the left. Pupillary reaction was normal bilaterally. Fundi could not be seen since she closed her eyes tightly when this was attempted. At rest she seemed to maintain preferential gaze to the left but otherwise gaze was random and undirected (roving) though largely conjugate. Facial movements were symmetric. Gag reflex (movement of the palate in response to insertion of a tongue depressor in the throat) was present and she does not pool saliva. She could swallow both teaspoonfuls of water as well as a small quantity of mashed banana. She licked though not very completely sugar smeared on her lips, suggesting some tongue control.

She had flexion contractures of all limbs and seemed to be incapable of turning in bed spontaneously. There was what appeared to be minimal voluntary movement with the left upper limb (touching her wrist to the eye for instance, perhaps as an attempt to rub it). When examined/ disturbed, she seemed to curl up even further in her flexed foetal position. Sensory examination was not possible but she did seem to find passive movement painful in all four limbs and moaned continuously during the examination. Deep tendon reflexes were difficult to elicit elsewhere but were present at the ankles. Plantars were withdrawal/ extensor.

Thus, neurologically she appears to be in a state of intact consciousness without awareness of self/environment. No cognitive or

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communication abilities could be discerned. Visual function if present is severely limited. Motor function is grossly impaired with quadriparesis.

III(c) Mental status examination

1. Consciousness, general appearance, attitude and behaviour

Ms Aruna Ramachandra Shanbaug was resting quietly in her bed, apparently listening to the devotional music, when we entered the room. Though, her body built is lean, she appeared to be well nourished and there were no signs of malnourishment. She appeared neat and clean. She has developed contractures at both the wrist joints and knee joints and so lied curled up in the bed with minimum restricted physical movements.

She was conscious but appeared to be unaware of herself and her surroundings. As soon as she realised the presence of some people in her room, she started making repetitive vocal sounds and moving her hands. This behaviour subsided as we left the room. She did not have any involuntary movements. She did not demonstrate any catatonic, hostile or violent behaviour.

Her eyes were wide open and from her behaviour it appeared that she could see and hear us, as when one loudly called her name, she stopped making vocal sounds and hand movements for a while. She was unable to maintain sustained eye-to-eye contact but when the hand was suddenly taken near her eyes, she was able to blink well.

When an attempt was made to feed her by mouth, she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. Thus, at times she could cooperate when fed.

2. Mood and affect

It was difficult to assess her mood as she was unable to communicate or express her feelings. She appeared to calm down when she was touched or caressed gently. She did not cry or laugh or expressed any other emotions verbally or non-verbally during the examination period. When not disturbed and observed quietly from a distance, she did not appear to be in severe pain or misery. Only when many people enter her room, she appears to get a bit disturbed about it.

3. Speech and thoughts

She could make repeated vocal sounds but she could not utter or repeat any comprehensible words or follow and respond to any of the simple commands (such as 'show me your tongue'). The only way she expressed herself was by making some sounds. She appeared to have minimal language comprehension or expression.

4. Perception

She did not appear to be having any perceptual abnormality like hallucinations or illusions from her behaviour.

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5. Orientation, memory and intellectual capacity

Formal assessment of orientation in time, place and person, memory of immediate, recent and remote events and her intellectual capacity could not be carried out.

6. Insight

As she does not appear to be fully aware of herself and her surroundings, she is unlikely to have any insight into her illness.

IV. Reports of investigations

IV(a) CT scan head (plain)

This is contaminated by movement artefacts. It shows generalised prominence of supratentorial sulci and ventricles suggestive of generalised cerebral atrophy. Brainstem and cerebellum seem normal. Ischaemic foci are seen in left centrum semiovale and right external capsule. In addition a small left parieto-occipital cortical lesion is also seen and is probably ischaemic.

IV(b) EEG

The dominant feature is a moderately rhythmic alpha frequency at 8-10 hz and 20-70 microvolts which is widely distributed and is equally prominent both anteriorly and posteriorly. It is not responsive to eye-opening as seen on the video. Beta at 18-25 hz is also seen diffusely but more prominently anteriorly. No focal or paroxysmal abnormalities were noted.

IV(c) Blood

Reports of the haemoglobin, white cell count, liver function tests, renal function tests, electrolytes, thyroid function, vitamin B12 and 1, 25 dihydroxy vitamin D3 levels are unremarkable. (Detailed report from KEM Hospital attached.)

V. Diagnostic impression

(1) From the longitudinal case history and examination it appears that Ms Aruna Ramachandra Shanbaug has developed non-progressive but irreversible brain damage secondary to hypoxic-ischaemic brain injury consistent with the known effects of strangulation. Most authorities consider a period exceeding 4 weeks in this condition, especially when due to hypoxic-ischaemic injury as confirming irreversibility. In Ms Aruna's case, this period has been as long as 37 years, making her perhaps the longest survivor in this situation.

(2) She meets most of the criteria for being in a permanent vegetative state (PVS). PVS is defined as a clinical condition of unawareness (Table 1) of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and opening which may simulate sleep and waking (Table 2). While she has evidence of intact auditory, visual, somatic and motor primary neural pathways, no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during our examinations.

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VI. Prognosis

Her dementia has not progressed and has remained stable for last many years and it is likely to remain the same over next many years. At present there is no treatment available for the brain damage she has sustained.

VII. Appendix

VII(a) Table 1—Clinical assessment to establish unawareness

(Wade DT, Johnston C. British Med Journal 1999; 319:841-844)

Domain observed	*Stimulus*	*Response*
Auditory awareness	Sudden loud noise (clap)	Startle present, ceases other movements.
	Meaningful noise (rattled steel tumbler and spoon, film songs of 1970s)	Non-specific head and body movements.
	Spoken commands ("close your eyes", "lift left hand" in English, Marathi and Konkani)	Unable to obey commands. No specific or reproducible response.
Visual awareness	Bright light to eyes	Pupillary responses present.
	Large moving object in front of eyes (bright red torch, rattle)	Tracking movements present but inconsistent and poorly reproducible.
	Visual threat (fingers suddenly moved toward eyes)	Blinks, but more consistent on left than right.
	Written command (English, Marathi: close your eyes)	No response.
Somatic awareness	Painful stimuli to limbs (light prick with sharp end of tendon hammer)	Withdrawal, maximal in left upper limb.
	Painful stimuli to face	Distress but no coordinated response to remove stimulus.
	Routine sensory stimuli during care (changing position in bed and feeding)	Generalised non-specific response present but no coordinated attempt to assist in process.
Motor output	Spontaneous	Non-specific undirected activities. Goal directed—lifting left hand to left side of face, apparently to rub her left eye.
	Responsive	Non-specific undirected without any goal directed activities.

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Conclusion.—From the above examination, she has evidence of intact auditory, visual, somatic and motor primary neural pathways. However no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during our examinations.

VII(b) Table 2—Application of criteria for vegetative state

[Bernat JL, Neurology Clinical Practice, 2010; 75 (Suppl. 1)]

Examination findings: whether she meets Criteria S33-S38)

Criteria	(Yes/No/Probably)
Unaware of self and environment	Yes, unaware
No interaction with others	Yes, no interaction
No sustained, reproducible or purposeful voluntary behavioural response to visual, auditory, tactile noxious stimuli	Yes, no sustained, reproducible or purposeful behavioural response, but: 1. Resisted examination of fundus 2. Licked sugar off lips
No language comprehension or expression	Yes, no comprehension
No blink to visual threat	Blinks, but more consistent on left than right
Present sleep-wake cycles	Yes (according to nurses)
Preserved autonomic and hypothalamic function	Yes
Preserved cranial nerve reflexes	Yes
Bowel and bladder incontinence	Yes

VIII. References

1. 'Multi-Society Task Force on PVS Medical Aspects of the Persistent Vegetative State', N Engl J Med 1994; 330: 1499-508

2. Wade DT, Johnston C., 'The Permanent Vegetative State: Practical Guidance on Diagnosis and Management', Brit Med J 1999; 319:841-4

3. Giacino JT, Ashwal S, Childs N, et al. 'The Minimally Conscious State: Definition and Diagnostic Criteria', Neurology, 2002;58:349-353

4. Bernat JL, 'Current Controversies in States of Chronic Unconsciousness', Neurology, 2010;75;S33"

10. On 18-2-2011, we then passed the following order:

"In the above case Dr. J.V. Divatia on 17-2-2011 handed over the report of the team of the three doctors whom we had appointed by our order dated 24-1-2011. He has also handed over a CD in this connection. Let the report as well as the CD form part of the record.

On mentioning, the case has been adjourned to be listed on 2-3-2011 at the request of the learned Attorney General for India, Mr T.R. Andhyarujina, learned Senior Advocate, whom we have appointed as amicus curiae in the case as well as Mr Shekhar Naphade, learned Senior Advocate for the petitioner.

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We request the doctors whom we had appointed viz. Dr. J.V. Divatia, Dr. Roop Gursahani and Dr. Nilesh Shah to appear before us on 2-3-2011 at 10.30 a.m. in the Court, since it is quite possible that we may like to ask them questions about the report which they have submitted, and in general about their views in connection with euthanasia.

On perusal of the report of the committee of doctors submitted to us we have noted that there are many technical terms which have been used therein which a non-medical man would find it difficult to understand. We, therefore, request the doctors to submit a supplementary report by the next date of hearing (by e-mailing a copy of the same two days before the next date of hearing) in which the meaning of these technical terms in the report is also explained.

The Central Government is directed to arrange for the air travel expenses of all the three doctors as well as their stay in a suitable accommodation at Delhi and also to provide them necessary conveyance and other facilities they require, so that they can appear before us on 2-3-2011. An honorarium may also be given to the doctors, if they so desire, which may be arranged mutually with the learned Attorney General.

The Dean of King Edward Memorial Hospital as well as Ms Pinki Virani (who claims to be the next friend of the petitioner) are directed to intimate the brother(s)/sister(s) or other close relatives of the petitioner that the case will be listed on 2-3-2011 in the Supreme Court and they can put forward their views before the Court if they so desire. The learned counsel for the petitioner and the Registry of this Court shall communicate a copy of this order forthwith to the Dean, KEM Hospital. The Dean, KEM Hospital is requested to file an affidavit stating his views regarding the prayer in this writ petition, and also the condition of the petitioner.

Copy of this order shall be given forthwith to the learned Attorney General for India, Mr Shekhar Naphade and Mr Andhyarujina, learned Senior Advocates.

Let the matter be listed as the first item on 2-3-2011."

11. On 2-3-2011, the matter was listed again before us and we first saw the screening of the CD submitted by the team of doctors along with their report. We had arranged for the screening of the CD in the courtroom, so that all present in the Court could see the condition of Aruna Shanbaug. For doing so, we have relied on the precedent of the Nuremburg trials in which a screening was done in the courtroom of some of the Nazi atrocities during the Second World War. We have heard the learned counsel for the parties in great detail. The three doctors nominated by us are also present in the Court.

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12. As requested by us, the doctors' team submitted a supplementary report before us which states:

a "***Supplement to the report of the medical examination of Aruna Ramachandra Shanbaug***

Jointly prepared and signed by

1. Dr. J.V. Divatia

(Professor and Head, Department of Anaesthesia, Critical Care
b and Pain, at Tata Memorial Hospital, Mumbai)

2. Dr. Roop Gursahani

(Consultant Neurologist at P.D. Hinduja Hospital, Mumbai)

3. Dr. Nilesh Shah

(Professor and Head, Department of Psychiatry at Lokmanya
c Tilak Municipal Corporation Medical College and General Hospital).

Mumbai

26-2-2011

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Introduction

This document is a supplement to the report of examination of Ms Aruna Ramachandra Shanbaug dated 14-2-2011.
e

On perusal of the report, the Hon'ble Court observed that there were many technical terms which a non-medical man would find it difficult to understand, and requested us to submit a supplementary report in which the meaning of these technical terms in the report is also explained.

We have, therefore, prepared this supplement to include a glossary of
f technical terms used in the earlier report, and also to clarify some of the terminology related to brain damage. Finally, we have given our opinion in the case of Aruna Shanbaug.

Terminology

The words coma, brain death and vegetative state are often used in
g common language to describe severe brain damage. However, in medical terminology, these terms have specific meaning and significance.

Brain death

A state of prolonged irreversible cessation of all brain activity, including lower brainstem function with the complete absence of
h voluntary movements, responses to stimuli, brainstem reflexes, and spontaneous respirations.

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Explanation.—This is the most severe form of brain damage. The patient is unconscious, completely unresponsive, has no reflex activity from centres in the brain, and has no breathing efforts on his own. However the heart is beating. This patient can only be maintained alive by advanced life support (breathing machine or ventilator, drugs to maintain blood pressure, etc). These patients can be legally declared dead (brain dead) to allow their organs to be taken for donation.

Aruna Shanbaug is clearly not brain dead.

Coma

Patients in coma have complete failure of the arousal system with no spontaneous eye opening and are unable to be awakened by application of vigorous sensory stimulation.

Explanation.—These patients are unconscious. They cannot be awakened even by application of a painful stimulus. They have normal heart beat and breathing, and do not require advanced life support to preserve life.

Aruna Shanbaug is clearly not in coma.

Vegetative state (VS)

The complete absence of behavioural evidence for self or environmental awareness. There is preserved capacity for spontaneous or stimulus-induced arousal, evidenced by sleep-wake cycles i.e. patients are awake, but have no awareness.

Explanation.—Patients appear awake. They have normal heartbeat and breathing, and do not require advanced life support to preserve life. They cannot produce a purposeful, coordinated, voluntary response in a sustained manner, although they may have primitive reflexive responses to light, sound, touch or pain. They cannot understand, communicate, speak, or have emotions. They are unaware of self and environment and have no interaction with others. They cannot voluntarily control passing of urine or stools. They sleep and awake. As the centres in the brain controlling the heart and breathing are intact, there is no threat to life, and patients can survive for many years with expert nursing care. The following behaviours may be seen in the vegetative state:

Sleep-wake cycles with eyes closed, then open;

Patient breathes on her own;

Spontaneous blinking and roving eye movements;

Produce sounds but no words;

Brief, unsustained visual pursuit (following an object with her eyes);

Grimacing to pain, changing facial expressions;

Yawning; chewing jaw movements;

Swallowing of her own spit;

Non-purposeful limb movements; arching of back;

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Hemifields	Right or left part of the field of vision.
Hypoxic	Related to reduced oxygen levels in the blood.
a Icterus	Yellowish discolouration of the skin and eyeballs. This is commonly known as jaundice, and may be caused by liver disease.
Illusions	Misperception of stimuli (seeing a rope as a snake).
Immediate memory	Memory of events which have occurred just a few minutes ago.
b Insight	Person's understanding of his or her own illness.
Intellectual capacity	Ability to solve problems. The ability to learn, understand and make judgments or have opinions that are based on reason.
Involuntary movements	Automatic movements over which patient has no control.
c Ischemic	Related to restriction or cutting-off of the blood flow to any part of the body.
Malnourishment	Weak and in bad health because of having too little food or too little of the types of food necessary for good health.
Menace reflex	Blinking in response to hand movements in front of eyes.
Mood	The way one feels at a particular time.
Motor	Related to movement.
d Movement artefacts	Disturbance in the image seen in the CT scan due to patient's movement.
Oral feed	Food given through mouth.
Orientation	Awareness about the time, place and person.
Pallor	Pale appearance of the skin. Usually this is due to a low red blood cell count or low haemoglobin level in the blood.
e Passive movement	Movement of a limb or part of the body done by the doctor without any effort by the patient.
Perception	Sensory experiences (such as seeing, hearing etc.).
Perceptual abnormalities	Abnormal sensory experiences e.g. seeing things that do not exist, hearing sounds when there are none.
f Plantars	Reflex response of the toes when a sharp painful stimulus is applied to the sole of the foot. The normal response is curling downwards of the toes.
g Plantars were withdrawal/extensor	When a painful stimulus was applied to the sole of the foot, the toes spread out and there was reflex movement of the leg (withdrawal) or upward curling of the great toe and other toes (extensor). This is an abnormal response indicating damage in the pathway in the brain or to the area in the brain controlling function of the legs.
Primary neural pathways	Course of the nerves from a part of the body to the area in the brain responsible for the function of that part.
h Pupillary reaction	The pupillary light reflex controls the diameter of the pupil, in response to the intensity of light. Greater intensity of light causes the pupil to become smaller (allowing less light in), whereas (*sic*).

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Explanation.—This is the most severe form of brain damage. The patient is unconscious, completely unresponsive, has no reflex activity from centres in the brain, and has no breathing efforts on his own. However the heart is beating. This patient can only be maintained alive by advanced life support (breathing machine or ventilator, drugs to maintain blood pressure, etc). These patients can be legally declared dead (brain dead) to allow their organs to be taken for donation.

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Spontaneous blinking and roving eye movements;

Produce sounds but no words;

Brief, unsustained visual pursuit (following an object with her eyes);

Grimacing to pain, changing facial expressions;

Yawning; chewing jaw movements;

Swallowing of her own spit;

Non-purposeful limb movements; arching of back;

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Reflex withdrawal from painful stimuli;

Brief movements of head or eyes towards sound or movement without apparent localisation or fixation;

Startles with a loud sound.

Almost all of these features consistent with the diagnosis of permanent vegetative state were present during the medical examination of Aruna Shanbaug.

Minimally Conscious State

Some patients with severe alteration in consciousness have neurologic findings that do not meet criteria for VS. These patients demonstrate some behavioural evidence of conscious awareness but remain unable to reproduce this behaviour consistently. This condition is referred to here as the minimally conscious state (MCS). MCS is distinguished from VS by the partial preservation of conscious awareness.

To make the diagnosis of MCS, limited but clearly discernible evidence of self or environmental awareness must be demonstrated on a reproducible or sustained basis by one or more of the following behaviours:

- Following simple commands
- Gestural or verbal yes/no responses (regardless of accuracy)
- Intelligible sounds
- Purposeful behaviour, including movements or emotional behaviours (smiling, crying) that occur in relation to relevant environmental stimuli and are not due to reflexive activity. Some examples of qualifying purposeful behaviour include:

- appropriate smiling or crying in response to the linguistic or visual content of emotional but not to neutral topics or stimuli

- vocalisations or gestures that occur in direct response to the linguistic content of questions

- reaching for objects that demonstrates a clear relationship between object location and direction of reach

- touching or holding objects in a manner that accommodates the size and shape of the object

- pursuit eye movement or sustained fixation that occurs in direct response to moving or salient stimuli

None of the above behaviours suggestive of a minimally conscious state were observed during the examination of Aruna Shanbaug.

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Glossary of technical terms used in the main report

(In alphabetical order)

Term in text	*Meaning*
Affect	Feeling conveyed through expressions and behaviour.
Afebrile	No fever.
Auditory	Related to hearing.
Bedsore	A painful wound on the body caused by having to lie in bed for a long time.
Bilaterally	On both sides (right and left).
Bruise	An injury or mark where the skin has not been broken but is darker in colour, often as a result of being hit by something.
Catatonic	Describes someone who is stiff and not moving or reacting, as if dead.
Cerebral atrophy	Shrinking of the globe (cortex) of the brain.
Clubbing	Bulging or prominence of the nailbed, making base of the nails look thick. This is often due to long-standing infection inside the lungs.
Cognitive	Related to ability to understand and process information in the brain.
Conjugate	Synchronised movement (of the eyeball).
Conscious	Awake with eyes open. By itself the term conscious does not convey any information about awareness of self and surroundings, or the ability to understand, communicate, have emotions, etc.
Contractures	Muscles or tendons that have become shortened and taut over a period of time. This causes deformity and restriction of movements.
CT scan	A specialised x-ray test where images of the brain (or other parts of the body) are obtained in cross-section at different levels. This allows clear visualisation of different parts of the brain.
Cyanosis	Bluish discolouration of the nails, lips or skin. It may be due to low levels of oxygen in the blood.
Deep tendon reflexes	Reflex response of the fleshy part of certain muscles when its tendon is hit lightly with an examination hammer.
Dementia	Disorder in which there is a cognitive defect i.e. the patient is unable to understand and process information in the brain.
Electroencephalography (EEG)	Recording of the electrical activity of the brain.
Febrile illness	Illness with fever.
Fracture	A crack or a break in bones.
Fundi	Plural of fundus. Fundus of the eye is the interior surface of the eye, opposite the lens. It is examined with an instrument called the ophthalmoscope.
Gag reflex	Movement of the palate in response to insertion of a tongue depressor in the throat.
Hallucinations	Perception in the absence of stimuli (e.g. hearing voices which are not there or which are inaudible to others).

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Oral feed	Food given through mouth.
Orientation	Awareness about the time, place and person.
Pallor	Pale appearance of the skin. Usually this is due to a low red blood cell count or low haemoglobin level in the blood.
Passive movement	Movement of a limb or part of the body done by the doctor without any effort by the patient.
Perception	Sensory experiences (such as seeing, hearing etc.).
Perceptual abnormalities	Abnormal sensory experiences e.g. seeing things that do not exist, hearing sounds when there are none.
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Plantars were withdrawal/extensor	When a painful stimulus was applied to the sole of the foot, the toes spread out and there was reflex movement of the leg (withdrawal) or upward curling of the great toe and other toes (extensor). This is an abnormal response indicating damage in the pathway in the brain or to the area in the brain controlling function of the legs.
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Pupillary reaction	The pupillary light reflex controls the diameter of the pupil, in response to the intensity of light. Greater intensity of light causes the pupil to become smaller (allowing less light in), whereas (*sic*).

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Opinion

In our view, the issues in this case (and other similar cases) are:

1. In a person who is in a permanent vegetative state (PVS), should withholding or withdrawal of life-sustaining therapies (many authorities would include placement of an artificial feeding tube as a life-sustaining intervention) be permissible or 'not unlawful'?

2. If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his/her wishes be respected when the situation arises?

3. In case a person has not previously expressed such a wish, if his family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?

4. Aruna Shanbaug has been abandoned by her family and is being looked after for the last 37 years by the staff of KEM Hospital. Who should take decisions on her behalf?

Questions such as these come up at times in the course of medical practice. We realise that answers to these questions are difficult, and involve several ethical, legal and social issues. Our opinion is based on medical facts and on the principles of medical ethics. We hope that the Hon'ble Court will provide guidance and clarity in this matter.

***Two of the cardinal principles of medical ethics are patient autonomy and beneficence*:**

1. Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous, the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a living will, OR the wishes of surrogates acting on his behalf (substituted judgment) are to be respected.

The surrogate is expected to represent what the patient may have decided had he/she been competent, or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations.

2. Beneficence is acting in what is (or judged to be) in the patient's best interest. Acting in the patient's best interest means following a course of action that is best for the patient, and is not influenced by personal convictions, motives or other considerations. In some cases, the doctor's expanded goals may include allowing the natural dying process (neither hastening nor delaying death, but 'letting nature take its course'), thus avoiding or reducing the sufferings of the patient and his family, and providing emotional support. This is not to be confused with euthanasia, which involves

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the doctor's deliberate and intentional act through administering a lethal injection to end the life of the patient.

In the present case under consideration

1. We have no indication of Aruna Shanbaug's views or wishes with respect to life-sustaining treatments for a permanent vegetative state.

2. Any decision regarding her treatment will have to be taken by a surrogate.

3. The staff of KEM Hospital have looked after her for 37 years, after she was abandoned by her family. We believe that the Dean of KEM Hospital (representing the staff of the hospital) is an appropriate surrogate.

4. If the doctors treating Aruna Shanbaug and the Dean of KEM Hospital, together acting in the best interest of the patient, feel that life-sustaining treatments should continue, their decision should be respected.

5. If the doctors treating Aruna Shanbaug and the Dean of KEM Hospital, together acting in the best interest of the patient, feel that withholding or withdrawing life-sustaining treatments is the appropriate course of action, they should be allowed to do so, and their actions should not be considered unlawful."

13. To complete the narration of facts and before we come to the legal issues involved, we may mention that Dr. Sanjay Oak, Dean, KEM Hospital, Mumbai has issued a statement on 24-1-2011 opposing euthanasia for the petitioner:

"She means a lot to KEM Hospital. She is on liquid diet and loves listening to music. We have never subjected her to intravenous food or fed her via a tube. All these years, she hasn't had even one bedsore. When those looking after her do not have a problem, I don't understand why a third party who has nothing to do with her (Pinki Virani who has moved the Apex Court to seek euthanasia for Shanbaug) needs to worry,"

added Dr. Oak, who, when he took over as Dean of KEM Hospital in 2008, visited her first to take her blessings.

"I call on her whenever I get time. I am there whenever she has dysentery or any other problem. She is very much alive and we have faith in the judiciary,"

said Dr. Oak.

14. Dr. Sanjay Oak has subsequently filed an affidavit in this Court which states:

"(*a*) Smt Aruna Ramachandra Shanbaug has been admitted in a single room in Ward No. 4 which is a ward of general internal medicine patients and she has been there for the last 37 years. She is looked after entirely by doctors, nurses and paramedical staff of KEM Hospital. She has been our staff nurse and the unfortunate tragic incident has happened

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with her in KEM Hospital and I must put on record that the entire medical, administrative, nursing and paramedical staff is extremely attached to her and consider her as one of us. Her relatives and a gentleman (her fiancé) used to visit her in the initial period of her illness but subsequently she has been left to the care of KEM staff. I visit her frequently and my last visit to her was on 22-2-2011. I give my observations as a Clinician about Smt Aruna Shanbaug as under.

(*b*) It would be incorrect to say that Smt Aruna Shanbaug is an appropriate case for coma. It appears that for a crucial, critical period her brain was deprived of oxygen supply and this has resulted in her present state similar to that of cerebral palsy in the newborn child. It is a condition where brain loses its coordinatory, sensory as well as motor functions and this includes loss of speech and perception. This has resulted into a state which is in a layman's words "*Aruna lives in her own world for the last 37 years*". She is lying in a bed in a single room for 33 years. She has not been able to stand or walk, nor have we attempted to do that of late because we fear that she is fragile and would break her bones if she falls. Her extremities and fingers have developed contractures and subsequent to non-use, there is wasting of her body muscles. Her eyes are open and she blinks frequently; however, these movements are not pertaining to a specific purpose or as a response to a question. At times she is quiet and at times she shouts or shrieks. However, I must say that her shouts and shrieks are completely oblivious to anybody's presence in her room. It is not true that she shouts after seeing a man. I do not think Aruna can distinguish between a man and a woman, nor can she even distinguish between ordinate and inordinate object. We play devotional songs rendered by Sadguru Wamanrao Pai continuously in her room and she lies down on her bed listening to them. She expresses her displeasure by grimaces and shouts if the tape recorder is switched off. All these years she was never fed by tube and whenever a nurse used to take food to her lips, she used to swallow it. It is only since September 2010 she developed malaria and her oral intake dropped. In order to take care of her calorie intake need, nurses cadre resorted to nasogastric tube feed and now she is used to NG feeding. However, if small morsels are held near her lips, Aruna accepts them gladly. It appears that she relishes fish and occasionally smiles when she is given non-vegetarian food. However, I am honest in admitting that her smiles are not purposeful and it would be improper to interpret them as a signal of gratification. I must put on record that in the world history of medicine there would not be another single case where such a person is cared and nurtured in bed for 33 long years and has not developed a single bedsore. This speaks of volumes of excellence of nursing care that KEM nursing staff has given to her.

(*c*) This care is given not as a part of duty but as a part of feeling of oneness. With every new batch of entrants, the student nurses are introduced to her and they are told that she was one of us and she

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continues to be one of us and then they wholeheartedly take care of Aruna. In my opinion, this one is the finest example of love, professionalism, dedication and commitment to one of our professional colleagues who is ailing and cannot support herself. Not once, in this long sojourn of 33 years, anybody has thought of putting an end to her so-called vegetative existence. There have been several Deans and doctors of KEM Hospital who have cared for her in succession. Right from illustrious Dr. C.K. Deshpande in whose tenure the incident happened in 1973, Dr. G.B. Parulkar, Dr. Smt Pragna M. Pai, Dr. R.J. Shirahatti, Dr. Smt N.A. Kshirsagar, Dr. M.E. Yeolekar and now myself, Dr. Sanjay N. Oak, all of us have visited her room time and again and have cared for her and seen her through her ups and downs. The very idea of withholding food or putting her to sleep by active medication (mercy killing) is extremely difficult for anybody working in Seth GSMC & KEM Hospital to accept and I sincerely make a plea to the learned counsel and the Hon'ble Judges of the Supreme Court of India that this should not be allowed. Aruna has probably crossed 60 years of life and would one day meet her natural end. The doctors, nurses and staff of KEM, are determined to take care of her till her last breath by natural process.

(*d*) I do not think it is proper on my part to make a comment on the entire case. However, as a clinical surgeon for the last 3 decades and as an administrator of the hospitals for the last 7 years and as a student of legal system of India (as I hold Bachelor of Laws degree from Mumbai University), I feel that entire society has not matured enough to accept the execution of an act of euthanasia or mercy killing. I fear that this may get misused and our monitoring and deterring mechanisms may fail to prevent those unfortunate incidents. To me any mature society is best judged by its capacity and commitment to take care of its invalid ones. They are the children of lesser God and in fact, a developing nation as we are, we should move in a positive manner of taking care of several unfortunate ones who have deficiencies, disabilities and deformities."

15. The hospital staff of KEM Hospital, Mumbai e.g. the doctors, sister-in-charge, Ward No. 4, KEM Hospital, Lenny Cornielo, Assistant Matron Urmila Chauhan and others have also issued statements that they were looking after Aruna Shanbaug and want her to live. "Aruna is the bond that unites us", KEM Hospital staff has stated. One retired nurse, Tidi Makwana, who used to take care of Aruna while in service, has even offered to continue to take care of her without any salary and without charging any travelling expenses.

16. We have referred to these statements because it is evident that the KEM Hospital staff right from the Dean, including the present Dean Dr. Sanjay Oak and down to the staff nurses and paramedical staff have been looking after Aruna for 38 years day and night. What they have done is simply marvellous. They feed Aruna, wash her, bathe her, cut her nails, and generally take care of her, and they have been doing this not on a few

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occasions but day and night, year after year. The whole country must learn the meaning of dedication and sacrifice from the KEM Hospital staff. In *38 years Aruna has not developed one bedsore.*

17. It is thus obvious that the KEM Hospital staff has developed an emotional bonding and attachment to Aruna Shanbaug, and in a sense they are her real family today. Ms Pinki Virani who claims to be the next friend of Aruna Shanbaug and has filed this petition on her behalf is not a relative of Aruna Shanbaug nor can she claim to have such close emotional bonding with her as the KEM Hospital staff. Hence, we are treating the KEM Hospital staff as the next friend of Aruna Shanbaug and we decline to recognise Ms Pinki Virani as her next friend. No doubt Ms Pinki Virani has written a book about Aruna Shanbaug and has visited her a few times, and we have great respect for her for the social causes she has espoused, but she cannot claim to have the extent of attachment or bonding with Aruna which the KEM Hospital staff, which has been looking after her for years, claims to have.

Submissions of the learned counsel for the parties

18. Mr Shekhar Naphade, learned Senior Counsel for the petitioner has relied on the decision of this Court in *Vikram Deo Singh Tomar* v. *State of Bihar*[3] SCC vide para 2 where it was observed by this Court: (*Vikram Deo case*[3], p. 736)

> "2. ... We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen."

19. He has also relied on the decision of this Court in *P. Rathinam* v. *Union of India*[4] in which a two-Judge Bench of this Court quoted with approval a passage from an article by Dr. M. Indira and Dr. Alka Dhal in which it was mentioned: (SCC p. 409, para 29)

> "29. 'Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality....' "

20. The decision in *Rathinam case*[4] was, however, overruled by a Constitution Bench decision of this Court in *Gian Kaur* v. *State of Punjab*[1]. Mr Naphade, however, has invited our attention to paras 24 and 25 of the aforesaid decision in which it was observed: (*Gian Kaur case*[1], SCC pp. 660-61)

> "*24.* Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the 'right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The 'right to life' including the right to live

3 1988 Supp SCC 734 : 1989 SCC (Cri) 66
4 (1994) 3 SCC 394 : 1994 SCC (Cri) 740
1 (1996) 2 SCC 648 : 1996 SCC (Cri) 374

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with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.

25. A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life."

He has particularly emphasised para 25 of the said judgment in support of his submission that Aruna Shanbaug should be allowed to die.

21. We have carefully considered paras 24 and 25 in *Gian Kaur case*[1] and we are of the opinion that all that has been said therein is that the view in *Rathinam case*[4] that the right to life includes the right to die is not correct. We cannot construe *Gian Kaur case*[1] to mean anything beyond that. In fact, it has been specifically mentioned in para 25 of the aforesaid decision that "the debate even in such cases to permit physician-assisted termination of life is inconclusive". Thus it is obvious that no final view was expressed in the decision in *Gian Kaur case*[1] beyond what we have mentioned above.

22. Mr Naphade, learned Senior Counsel submitted that Ms Pinki Virani is the next friend of Aruna as she has written a book on her life called *Aruna's Story* and has been following Aruna's case from 1980 and has done whatever possible and within her means to help Aruna. Mr Naphade has also invited our attention to the Report of the Law Commission of India, 2006 on "Medical Treatment to Terminally Ill Patients". We have perused the said report carefully.

23. The learned Attorney General appearing for the Union of India after inviting our attention to the relevant case law submitted as under:

(*i*) Aruna Ramachandra Shanbaug has the right to live in her present state.

1 *Gian Kaur* v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374
4 *P. Rathinam* v. *Union of India*, (1994) 3 SCC 394 : 1994 SCC (Cri) 740

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(*ii*) The state that Aruna Ramachandra Shanbaug is presently in does not justify terminating her life by withdrawing hydration/food/medical support.

(*iii*) The aforesaid acts or series of acts and/or such omissions will be cruel, inhuman and intolerable.

(*iv*) Withdrawing/withholding of hydration/food/medical support to a patient is unknown to Indian law and is contrary to law.

(*v*) In case hydration or food is withdrawn/withheld from Aruna Ramachandra Shanbaug, the efforts which have been put in by batches after batches of nurses of KEM Hospital for the last 37 years will be undermined.

(*vi*) Besides causing a deep sense of resentment in the nursing staff as well as other well-wishers of Aruna Ramachandra Shanbaug in KEM Hospital including the management, such acts/omissions will lead to disheartenment in them and large-scale disillusionment.

(*vii*) In any event, these acts/omissions cannot be permitted at the instance of Ms Pinki Virani who desires to be the next friend of Aruna Ramachandra Shanbaug without any locus.

24. The learned Attorney General stated that the report of the Law Commission of India on euthanasia has not been accepted by the Government of India. He further submitted that Indian society is emotional and care-oriented. We do not send our parents to old age homes, as it happens in the west. He stated that there was a great danger in permitting euthanasia that the relatives of a person may conspire with doctors and get him killed to inherit his property. He further submitted that tomorrow there may be a cure to a medical state perceived as incurable today.

25. Mr T.R. Andhyarujina, learned Senior Counsel whom we had appointed as amicus curiae, in his erudite submissions explained to us the law on the point. He submitted that in general in common law it is the right of every individual to have the control of his own person free from all restraints or interferences of others. Every human being of adult years and sound mind has a right to determine what shall be done with his own body. In the case of medical treatment, for example, a surgeon who performs an operation without the patient's consent commits assault or battery. It follows as a corollary that the patient possesses the right not to consent i.e. to refuse treatment. (In the United States this right is reinforced by a constitutional right of privacy). This is known as the principle of self-determination or informed consent. Mr Andhyarujina submitted that the principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient's consent has been expressed at an earlier date before he became unconscious or otherwise incapable of communicating it as by a "living will" or by giving written authority to doctors in anticipation of his incompetent situation.

26. Mr Andhyarujina differed from the view of the learned Attorney General in that while the latter opposed even passive euthanasia,

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Mr Andhyarujina was in favour of passive euthanasia provided the decision to discontinue life support was taken by responsible medical practitioners.

27. If the doctor acts on such consent there is no question of the patient committing suicide or of the doctor having aided or abetted him in doing so. It is simply that the patient, as he is entitled to do, declines to consent to treatment which might or would have the effect of prolonging his life and the doctor has in accordance with his duties complied with the patient's wishes.

28. The troublesome question is what happens when the patient is in no condition to be able to say whether or not he consents to discontinuance of the treatment and has also given no prior indication of his wishes with regard to it as in the case of Aruna. In such a situation the patient being incompetent to express his self-determination the approach adopted in some of the American cases is of "substituted judgment" or the judgment of a surrogate. This involves a detailed inquiry into the patient's views and preferences. The surrogate decision-maker has to gather from material facts as far as possible the decision which the incompetent patient would have made if he was competent. However, such a test is not favoured in English law in relation to incompetent adults.

29. Absent any indication from a patient who is incompetent the test which is adopted by courts is what is in the *best interest of the patient* whose life is artificially prolonged by such life support. This is not a question whether it is in the best interest of the patient that he should die. The question is whether it is in the best interest of the patient that his life should be prolonged by the continuance of the life-support treatment. This opinion must be formed by a responsible and competent body of medical persons in charge of the patient.

30. The withdrawal of life support by the doctors is in law considered as an *omission* and not a positive step to terminate the life. The latter would be *euthanasia*, a criminal offence under the present law in UK, USA and India.

31. In such a situation, generally the wishes of the patient's immediate family will be given due weight, though their views cannot be determinative of the carrying on of treatment as they cannot dictate to responsible and competent doctors what is in the best interest of the patient. However, experience shows that in most cases the opinions of the doctors and the immediate relatives coincide.

32. Whilst this Court has held that there is no right to die (suicide) under Article 21 of the Constitution and an attempt to commit suicide is a crime vide Section 309 IPC, the Court has held that the right to life includes the right to live with human dignity, and in the case of a dying person who is terminally ill or in a permanent vegetative state he may be permitted to terminate it by a premature extinction of his life in these circumstances and it is not a crime vide *Gian Kaur case*[1].

1 *Gian Kaur* v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374

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33. Mr Andhyarujina submitted that the decision to withdraw the life support is taken in the best interests of the patient by a body of medical persons. It is not the function of the Court to evaluate the situation and form an opinion on its own. In England for historical reasons the *parens patriae* jurisdiction over adult mentally incompetent persons was abolished by statute and the Court has no power now to give its consent. In this situation, the Court only gives a declaration that the proposed omission by doctors is not unlawful.

34. In UK, the Mental Capacity Act, 2005 now makes provision relating to persons who lack capacity and to determine what is in their best interests and the power to make declaration by a Special Court of Protection as to the lawfulness of any act done in relation to a patient.

35. Mr Andhyarujina submitted that the withdrawal of nutrition by stopping essential food by means of nasogastric tube is not the same as unplugging a ventilator which artificially breathes air into the lungs of a patient incapable of breathing resulting in instant death. In case of discontinuance of artificial feeding the patient will as a result starve to death with all the sufferings and pain and distress associated with such starving. This is a very relevant consideration in a PVS patient like Aruna who is not totally unconscious and has sensory conditions of pain, etc. unlike Antony Bland in *Airedale N.H.S. Trust* v. *Bland*[5] who was totally unconscious. Would the doctor be able to avoid such pain or distress by use of sedatives, etc.? In such a condition would it not be more appropriate to continue with the nasogastric feeding but not take any other active steps to combat any other illness which she may contract and which may lead to her death?

36. Mr Andhyarujina further submitted that in a situation like that of Aruna, it is also necessary to recognise the deep agony of nurses of the hospital who have with deep care looked after her for over 37 years and who may not appreciate the withdrawal of the life support. It may be necessary that their views should be considered by the Court in some appropriate way. Mr Andhyarujina, in the course of his submission stated that some courts in USA have observed that the view of a surrogate may be taken to be the view of the incompetent patient for deciding whether to withdraw the life support, though the House of Lords in *Airedale case*[5] has not accepted this. He submitted that relatives of Aruna do not seem to have cared for her and it is only the nursing staff and medical attendants of KEM Hospital who have looked after her for 37 years. He has also submitted that though the humanistic intention of Ms Pinki Virani cannot be doubted, it is the opinion of the attending doctors and nursing staff which is more relevant in this case as they have looked after her for so many years.

37. Mr Pallav Shishodia, learned Senior Counsel for the Dean, KEM Hospital, Mumbai submitted that Ms Pinki Virani has no locus standi in the matter and it is only KEM Hospital staff which could have filed such a writ petition.

5 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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38. We have also heard the learned counsel for the State of Maharashtra, Mr Chinmoy Khaladkar and other assisting counsel whose names have been mentioned in this judgment. They have been of great assistance to us as we are deciding a very sensitive and delicate issue which while requiring a humanistic approach, also requires great care and caution to prevent misuse. We were informed that not only the learned counsel who argued the case before us, but also the assistants (whose names have been mentioned in the judgment) have done research on the subject for several weeks, and indeed this has made our task easier in deciding this case. They, therefore, deserve our compliment and thanks.

Legal issues: active and passive euthanasia

39. Coming now to the legal issues in this case, it may be noted that euthanasia is of two types: active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart-lung machine, from a patient in coma. The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.

40. A further categorisation of euthanasia is between voluntary euthanasia and non-voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non-voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems, which we shall address.

Active euthanasia

41. As already stated above active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under Section 302 or at least under Section 304 of the Penal Code, 1860. Physician-assisted suicide is a crime under Section 306 IPC (abetment to suicide). Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance e.g. sodium pentothal which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep.

42. A distinction is sometimes drawn between euthanasia and physician-assisted dying, the difference being in *who* administers the lethal medication. In euthanasia, a physician or third party administers it, while in physician-assisted suicide it is the patient himself who does it, though on the advice of the doctor. In many countries/States the latter is legal while the former is not.

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43. The difference between "active" and "passive" euthanasia is that in active euthanasia, something is *done* to end the patient's life while in passive euthanasia, something is *not done* that would have preserved the patient's life. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. While we usually applaud someone who saves another person's life, we do not normally condemn someone for failing to do so. If one rushes into a burning building and carries someone out to safety, he will probably be called a hero. But if one sees a burning building and people screaming for help, and he stands on the sidelines—whether out of fear for his own safety, or the belief that an inexperienced and ill-equipped person like himself would only get in the way of the professional fire-fighters, or whatever—if one does nothing, few would judge him for his inaction. One would surely not be prosecuted for homicide. (At least, not unless one started the fire in the first place.) Thus, proponents of euthanasia say that while we can debate whether active euthanasia should be legal, there can be no debate about passive euthanasia: you cannot prosecute someone for failing to save a life. Even if you think it would be good for people to do *X*, you cannot make it illegal for people to *not* do *X*, or everyone in the country who did not do *X* today would have to be arrested.

44. Some persons are of the view that the distinction is not valid. They give the example of the old joke about the child who says to his teacher, "Do you think it's right to punish someone for something that he didn't do?" "Why, of course not", the teacher replies. "Good", the child says, "because I didn't do my homework". In fact we have many laws that penalise people for what they did not do. A person cannot simply decide not to pay his income taxes, or not bother to send his/her children to school (where the law requires sending them), or not to obey a policeman's order to put down one's gun. However, we are of the opinion that the distinction is valid, as has been explained in some detail by Lord Goff in *Airedale case*[5] which we shall presently discuss.

Legislation in some countries relating to euthanasia or physician-assisted death

45. Although in the present case we are dealing with a case related to passive euthanasia, it would be of some interest to note the legislations in certain countries permitting active euthanasia. These are given below.

Netherlands

46. Euthanasia in the Netherlands is regulated by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a Review Committee.

47. The legal debate concerning euthanasia in the Netherlands took off with *Postma case* in 1973, concerning a physician who had facilitated the death of her mother following repeated explicit requests for euthanasia. While the physician was convicted, the court's judgment set out criteria when a doctor would not be required to keep a patient alive contrary to his will. This set of criteria was formalised in the course of a number of court cases during the 1980s.

48. The Termination of Life on Request and Assisted Suicide (Review Procedures) Act took effect on 1-4-2002. It legalises euthanasia and physician-assisted suicide in very specific cases, under very specific circumstances. The law was proposed by Els Borst, Minister of Health. The procedures codified in the law had been a convention of the Dutch medical community for over twenty years. The law allows a Medical Review Board to suspend prosecution of doctors who performed euthanasia when each of the following conditions is fulfilled:

- the patient's suffering is unbearable with no prospect of improvement
- the patient's request for euthanasia must be voluntary and persist over time (the request cannot be granted when under the influence of others, psychological illness, or drugs)
- the patient must be fully aware of his/her condition, prospects and options
- there must be consultation with at least one other independent doctor who needs to confirm the conditions mentioned above
- the death must be carried out in a medically appropriate fashion by the doctor or patient, in which case the doctor must be present
- the patient is at least 12 years' old (patients between 12 and 16 years of age require the consent of their parents).

49. The doctor must also report the cause of death to the municipal coroner in accordance with the relevant provisions of the Burial and Cremation Act. A regional Review Committee assesses whether a case of termination of life on request or assisted suicide complies with the due care criteria. Depending on its findings, the case will either be closed or, if the conditions are not met, brought to the attention of the Public Prosecutor. Finally, the legislation offers an explicit recognition of the validity of a written declaration of the will of the patient regarding euthanasia (a "euthanasia directive"). Such declarations can be used when a patient is in coma or otherwise unable to state if they wish to be euthanised.

50. Euthanasia remains a criminal offence in cases not meeting the law's specific conditions, with the exception of several situations that are not

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subject to the restrictions of the law at all, because they are considered normal medical practice. These are:

- stopping or not starting a medically useless (futile) treatment
- stopping or not starting a treatment at the patient's request
- speeding up death as a side effect of treatment necessary for alleviating serious suffering.

Euthanasia of children under the age of 12 remains technically illegal, however, Dr. Eduard Verhagen has documented several cases and, together with colleagues and prosecutors, has developed a protocol to be followed in those cases. Prosecutors will refrain from pressing charges if this Groningen Protocol is followed.

Switzerland

51. Switzerland has an unusual position on assisted suicide: it is legally permitted and can be performed by non-physicians. However, euthanasia is illegal, the difference between assisted suicide and euthanasia being that while in the former the patient administers the lethal injection *himself*, in the latter a doctor or some other person administers it.

52. Article 115 of the Swiss Penal Code, which came into effect in 1942 (having been approved in 1937), considers assisting suicide a crime if, and only if, the motive is selfish. The Code does not give physicians a special status in assisting suicide; although, they are most likely to have access to suitable drugs. Ethical guidelines have cautioned physicians against prescribing deadly drugs. Switzerland seems to be the only country in which the law limits the circumstances in which assisted suicide is a crime, thereby decriminalising it in other cases, without requiring the involvement of a physician. Consequently, non-physicians have participated in assisted suicide. However, legally, active euthanasia e.g. administering a lethal injection by a doctor or some other person to a patient is illegal in Switzerland (unlike in Holland where it is legal under certain conditions). The Swiss law is unique because (*1*) the recipient need not be a Swiss national, and (2) a physician need not be involved. Many persons from other countries, especially Germany, go to Switzerland to undergo euthanasia.

Belgium

53. Belgium became the second country in Europe after Netherlands to legalise the practice of euthanasia in September 2002. The Belgian law sets out conditions under which suicide can be practised without giving doctors a licence to kill. Patients wishing to end their own lives must be conscious when the demand is made and repeat their request for euthanasia. They have to be under "constant and unbearable physical or psychological pain" resulting from an accident or incurable illness. The law gives patients the right to receive ongoing treatment with painkillers—the authorities have to pay to ensure that poor or isolated patients do not ask to die because they do not have money for such treatment. Unlike the Dutch legislation, minors cannot seek assistance to die. In the case of someone who is not in the

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terminal stages of illness, a third medical opinion must be sought. Every mercy killing case will have to be filed at a special commission to decide if the doctors in charge are following the regulations.

UK, Spain, Austria, Italy, Germany, France, etc.

54. In none of these countries is euthanasia or physician-assisted death legal. In January 2011 the French Senate defeated by a 170-142 vote a bill seeking to legalise euthanasia. In England, in May 2006 a bill allowing physician-assisted suicide, was blocked, and never became law.

United States of America

55. Active euthanasia is illegal in all States in USA, but physician-assisted death is legal in the States of Oregon, Washington and Montana. As already pointed out above, the difference between euthanasia and physician-assisted suicide lies in who administers the lethal medication. In the former, the physician or someone else administers it, while in the latter the patient himself does so, though on the advice of the doctor.

Oregon

56. Oregon was the first State in USA to legalise physician-assisted death. The Oregon Legislature enacted the Oregon Death with Dignity Act, in 1997. Under the Death with Dignity Act, a person who sought physician-assisted suicide would have to meet certain criteria:

- He must be an Oregon resident, at least 18 years old, and must have decision-making capacity.
- The person must be terminally ill, having six months or less to live.
- The person must make one written and two oral requests for medication to end his/her life, the written one substantially in the form provided in the Act, signed, dated, witnessed by two persons in the presence of the patient who attest that the person is capable, acting voluntarily and not being coerced to sign the request. There are stringent qualifications as to who may act as a witness.
- The patient's decision must be an "informed" one, and the attending physician is obligated to provide the patient with information about the diagnosis, prognosis, potential risks, and probable consequences of taking the prescribed medication, and alternatives, including, but not limited to comfort care, hospice care and pain control. Another physician must confirm the diagnosis, the patient's decision-making capacity, and voluntariness of the patient's decisions.
- Counselling has to be provided if the patient is suffering from depression or a mental disorder which may impact his judgment.
- There has to be a waiting period of 15 days, next of kin have to be notified, and the State authorities have to be informed.

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- The patient can rescind his decision at any time.

57. In response to concerns that patients with depression may seek to end their lives, the 1999 Amendment provides that the attending physician must determine that the patient does not have "depression causing impaired judgment" before prescribing the medication. Under the law, a person who met all requirements could receive a prescription of a barbiturate that would be sufficient to cause death. However, the lethal injection must be administered by the patient himself, and physicians are prohibited from administering it.

58. The landmark case to declare that the practice of euthanasia by doctors to help their patients shall not be taken into cognizance was *Gonzales* v. *Oregon*[6], decided in 2006. After the Oregon Law was enacted about 200 persons have had euthanasia in Oregon.

Washington

59. Washington was the second State in USA which allowed the practice of physician-assisted death in the year 2008 by passing the Washington Death with Dignity Act, 2008.

Montana

60. Montana was the third State (after Oregon and Washington) in USA to legalise physician-assisted deaths, but this was done by the State judiciary and not the legislature. On 31-12-2009, the Montana Supreme Court delivered its verdict in *Baxter* v. *Montana*[7] permitting physicians to prescribe lethal indication. The Court held that there was "nothing in the Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy".

Other States in USA

61. In no other State in USA is euthanasia or physician-assisted death legal. Michigan banned euthanasia and assisted suicide in 1993, after Dr. Kevorkian (who became known as "Doctor Death") began encouraging and assisting in suicides. He was convicted in 1999 for an assisted suicide displayed on television, his medical licence was cancelled, and he spent 8 years in jail.

62. In 1999 the State of Texas enacted the Texas Futile Care Law which entitles Texas hospitals and doctors, in some situations, to withdraw life-support measures, such as mechanical respiration, from terminally ill patients when such treatment is considered futile and inappropriate. However, Texas has not legalised euthanasia or physician-assisted death. In California, though 75% of people support physician-assisted death, the issue is highly controversial in the State Legislature. Forty States in USA have enacted laws which explicitly make it a crime to provide another with the means of taking his or her life.

6 163 L Ed 2d 748 : 546 US 243 (2005)
7 2009 MT 449 : 2009 WL 5155363 (Mont 2009)

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63. In 1977 California legalised living wills, and other States soon followed suit. A living will (also known as advance directive or advance decision) is an instruction given by an individual while conscious, specifying what action should be taken in the event he/she is unable to make a decision due to illness or incapacity, and appoints a person to take such decisions on his/her behalf. It may include a directive to withdraw life support on certain eventualities.

Canada

64. In Canada, physician-assisted suicide is illegal vide Section 241(*b*) of the Criminal Code of Canada. The leading decision of the Canadian Supreme Court in this connection is *Sue Rodriguez* v. *British Columbia (Attorney General)*[8]. Rodriguez, a woman of 43, was diagnosed with amyotrophic lateral sclerosis (ALS), and requested the Canadian Supreme Court to allow someone to aid her in ending her life. Her condition was deteriorating rapidly, and the doctors told her that she would soon lose the ability to swallow, speak, walk and move her body without assistance. Thereafter she would lose her capacity to breathe without a respirator, to eat without a gastrotomy, and would eventually be confined to bed. Her life expectancy was 2 to 14 months.

65. The Canadian Supreme Court was deeply divided. By a 5 to 4 majority her plea was rejected. Sopinka, J. speaking for the majority (which included La Forest, Gonthier, Iacobucci and Major, JJ.) observed:

> "Sanctity of life has been understood historically as excluding freedom of choice in the self-infliction of death, and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the State to regulate the involvement of others in exercising power over individuals ending their lives."

The minority, consisting of Lamer, C.J. and L'Heureux-Dube, Cory and McLachlin, JJ. dissented.

Passive euthanasia

66. Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart-lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life-saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia.

67. As already stated above, euthanasia can be both voluntary or non-voluntary. In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for

8 (1993) 3 SCR 519 (Can)

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various reasons e.g. that he is in great pain or that the money being spent on his treatment should instead be given to his family who are in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life-saving medicines. In India, if a person consciously and voluntarily refuses to take life-saving medical treatment it is not a crime. Whether not taking food consciously and voluntarily with the aim of ending one's life is a crime under Section 309 IPC (attempt to commit suicide) is a question which need not be decided in this case. Non-voluntary passive euthanasia implies that the person is not in a position to decide for himself e.g. if he is in coma or PVS. The present is a case where we have to consider non-voluntary passive euthanasia i.e. whether to allow a person to die who is not in a position to give his/her consent.

68. There is a plethora of case law on the subject of the courts all over the world relating to both active and passive euthanasia. It is not necessary to refer in detail to all the decisions of the courts in the world on the subject of euthanasia or physician-assisted death (PAD) but we think it appropriate to refer in detail to certain landmark decisions, which have laid down the law on the subject.

The Airedale case[5]

69. In *Airedale case*[5] decided by the House of Lords in the UK, the facts were that one Anthony Bland aged about 17 went to Hillsborough Ground on 15-4-1989 to support Liverpool Football Club. In the course of the disaster which occurred on that day, his lungs were crushed and punctured and the supply to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of the brain. For three years, he was in a condition known as persistent vegetative state (PVS). This state arises from the destruction of the cerebral cortex on account of prolonged deprivation of oxygen, and the cerebral cortex of Anthony had resolved into a watery mass. The cortex is that part of the brain which is the seat of cognitive function and sensory capacity. Anthony Bland could not see, hear or feel anything. He could not communicate in any way. His consciousness, which is an essential feature of an individual personality, had departed forever. However, his brainstem, which controls the reflective functions of the body, in particular the heartbeat, breathing and digestion, continued to operate. He was in persistent vegetative state (PVS) which is a recognised medical condition quite distinct from other conditions sometimes known as "irreversible coma", "the Guillain-Barre syndrome", "the locked-in syndrome" and "brain death".

70. The distinguishing characteristic of PVS is that the brainstem remains alive and functioning while the cortex has lost its function and activity. Thus the PVS patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and thus can feel no emotion, whether pleasure or distress. The absence of cerebral function is not a matter of surmise; it can be scientifically demonstrated. The space which the brain should occupy is full of watery fluid.

71. In order to maintain Mr Bland in his condition, feeding and hydration were achieved by artificial means of a nasogastric tube while the excretory functions were regulated by a catheter and enemas. According to eminent medical opinion, there was no prospect whatsoever that he would ever make a recovery from his condition, but there was every likelihood that he would maintain this state of existence for many years to come provided the artificial means of medical care was continued. In this state of affairs the medical men in charge of Anthony Bland's case took the view, which was supported by his parents, that no useful purpose would be served by continuing medical care, and that artificial feeding and other measures aimed at prolonging his existence should be stopped. Since, however, there was a doubt as to whether this course might constitute a criminal offence, the hospital authorities sought a declaration from the British High Court to resolve these doubts. The declaration was granted by the Family Division of the High Court on 19-11-1992 and that judgment was affirmed by the Court of Appeal on 9-12-1992.

72. A further appeal was made to the House of Lords which then decided the case. The broad issued raised before the House of Lords in *Airedale case*[5] was (AC p. 857 B) "In what circumstances, if ever, can those having a duty to feed an invalid lawfully stop doing so?" In fact this is precisely the question raised in the present case of Aruna Shanbaug before us.

73. In *Airedale case*[5], Lord Keith of Kinkel, noted that it was unlawful to administer treatment to an adult who is conscious and of sound mind, without his consent. Such a person is completely at liberty to decline to undergo treatment, even if the result of his doing so will be that he will die. This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive.

74. It was held that if a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion it is in the *best interests of the unconscious patient*. That is what happened in the case of Anthony Bland when he was first dealt with by the emergency services and later taken to hospital. When the incident happened the first imperative was to prevent Anthony from dying, as he would certainly have done in the absence of the

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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steps that were taken. For a time, no doubt, there was some hope that he might recover sufficiently for him to be able to live a life that had some meaning. Some patients who have suffered damage to the cerebral cortex have, indeed, made a complete recovery. It all depends on the degree of damage. But sound medical opinion takes the view that if a PVS patient shows no signs of recovery after six months, or at most a year, then there is no prospect whatever of any recovery.

75. There are techniques available which make it possible to ascertain the state of the cerebral cortex, and in Anthony Bland's case these indicated that, it had degenerated into a mass of watery fluid. In this situation the question before the House of Lords was whether the doctors could withdraw medical treatment or feeding Anthony Bland thus allowing him to die. It was held by Lord Keith that a medical practitioner is under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance of the treatment. Existence in a vegetative state with no prospect of recovery is by that opinion regarded as not being of benefit to the patient.

76. Given that existence in the persistent vegetative state is of no benefit to the patient, the House of Lords then considered whether the principle of the sanctity of life which is the concern of the State (and the judiciary is one of the arms of the State) required the Court to hold that medical treatment to Bland could not be discontinued. Lord Keith observed that the principle of sanctity of life is not an absolute one. For instance, it does not compel the medical practitioner on pain of criminal sanction to treat a patient, who will die, if he does not, according to the express wish of the patient. It does not authorise forcible feeding of prisoners on hunger strike. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering. On the other hand, it forbids the taking of active measures to cut short the life of a terminally ill patient (unless there is legislation which permits it).

77. Lord Keith observed that although the decision whether or not the continued treatment and cure of a PVS patient confers any benefit on him is essentially one for the medical practitioners in charge of his case to decide, *as a matter of routine the hospital/medical practitioner should apply to the Family Division of the High Court for endorsing or reversing the said decision. This is in the interest of the protection of the patient, protection of the doctors, and for the reassurance of the patient's family and the public.*

78. In *Airedale case*[5] another Judge on the Bench, Lord Goff of Chieveley observed:

> "The central issue in the present case has been aptly stated by [the Master of the Rolls] to be whether artificial feeding and antibiotic drugs may lawfully be withheld from an insensate patient with no hope of recovery when it is known that if that is done the patient will shortly

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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thereafter die. The Court of Appeal, like [the President,] answered this question generally in the affirmative, and (in the declarations made or approved by them) specifically also in the affirmative in relation to Anthony Bland. I find myself to be in agreement with the conclusions so reached by all the Judges below, substantially for the reasons given by them. But the matter is of such importance that I propose to express my reasons in my own words.

I start with the simple fact that, in law, Anthony is still alive. It is true that his condition is such that it can be described as a living death; but he is nevertheless still alive. This is because, as a result of developments in modern medical technology, doctors no longer associate death exclusively with breathing and heartbeat, and it has come to be accepted that death occurs when the brain, and in particular the brainstem, has been destroyed [see Professor Ian Kennedy's paper entitled 'Switching off Life-Support Machines: The Legal Implications', reprinted in *Treat Me Right, Essays in Medical Law and Ethics*, (1988), especially at pp. 351-52, and the material there cited]. There has been no dispute on this point in the present case, and it is unnecessary for me to consider it further. The evidence is that Anthony's brainstem is still alive and functioning and it follows that, in the present state of medical science, he is still alive and should be so regarded as a matter of law.

It is on this basis that I turn to the applicable principles of law. Here, the fundamental principle is the principle of the sanctity of human life—a principle long recognised not only in our own society but also in most, if not all, civilised societies throughout the modern world, as is indeed evidenced by its recognition both in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Article 6 of the International Covenant of Civil and Political Rights, 1966.

But this principle, fundamental though it is, is not absolute. Indeed there are circumstances in which it is lawful to take another man's life, for example, by a lawful act of self-defence, or (in the days when capital punishment was acceptable in our society) by lawful execution. We are not however concerned with cases such as these. We are concerned with circumstances in which it may be lawful to withhold from a patient medical treatment or care by means of which his life may be prolonged. But here too there is no absolute rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances. (AC pp. 863 D-864 C)

First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so [see

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Schloendorff v. *Society of New York Hospital*[9], NE at p. 93, per Cardozo, J.; *S.* v. *McC. (Orse S.) and M (D.S. Intervener)*[10], W v. W; AC at p. 43, per Lord Reid; and *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital*[11] AC at p. 882, per Lord Scarman]. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination [see (Court of Appeal transcript in the present case, at p. 38 F per Hoffmann, L.J.)], and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. On this basis, it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued: see *Nancy B.* v. *Hotel Dieu de Quebec*[12]. Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred [see e.g. *T. (Adult: Refusal of Treatment), In re*[13]]. I wish to add that, in *cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so.* It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

But in many cases not only may the patient be in no condition to be able to say whether or not he consents to the relevant treatment or care, but also he may have given no prior indication of his wishes with regard to it. In the case of a child who is a ward of court, the court itself will decide whether medical treatment should be provided in the child's best interests, taking into account medical opinion. But the court cannot give its consent on behalf of an adult patient who is incapable of himself deciding whether or not to consent to treatment. I am of the opinion that *there is nevertheless no absolute obligation upon the doctor who has the patient in his care to prolong his life, regardless of the circumstances.* Indeed, it would be most startling, and could lead to the most adverse and cruel effects upon the patient, if any such absolute rule were held to exist. It is scarcely consistent with the primacy given to the principle of self-determination in those cases in which the patient of sound mind has declined to give his consent, that the law should provide no means of enabling treatment to be withheld in appropriate circumstances where the patient is in no condition to indicate, if that was his wish, that he did not consent to it. The point was put forcibly in the judgment of the Supreme

9 211 NY 125 : 105 NE 92 (1914)
10 1972 AC 24 (HL)
11 1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643 (HL)
12 (1992) 86 DLR (4th) 385 (Que SC)
13 1993 Fam 95 : (1992) 3 WLR 782 : (1992) 4 All ER 649 (CA)

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Judicial Court of Massachusetts in *Supdt. of Belchertown State School* v. *Saikewicz*[14] NE 2d at p. 428, as follows:

> 'To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.'

I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example, by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But *it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be*: see *R.* v. *Cox*[15] (unreported), [Ognall, J.]. *So to act is to cross the Rubicon* which runs between on the one hand the care of the living patient and on the other hand euthanasia—actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but *that result could, I believe*, only be *achieved by legislation* which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straightaway, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others. (AC pp. 864 C-865 H)

At the heart of this distinction lies a theoretical question. Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die, may not act unlawfully—and will not do so, if he commits no breach of duty to his patient? Professor Glanville Williams has suggested (see his *Textbook of Criminal Law*, 2nd Edn., p. 282) that the reason is that *what the doctor*

14 370 NE 2d 417 (1977)

15 Decided on 18-9-1992 (Winchester Crown Court)

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patient. But this may not always be so. To take a simple example given by Thomas, J. in *J.H.L., In re*[17] (unreported), to whose judgment in that case I wish to pay tribute, it cannot be right that a doctor, who has under his care a patient suffering painfully from terminal cancer, should be under an absolute obligation to perform upon him major surgery to abate another condition which, if unabated, would or might shorten his life still further. The doctor who is caring for such a patient cannot, in my opinion, be under an absolute obligation to prolong his life by any means available to him, regardless of the quality of the patient's life. Common humanity requires otherwise, as do medical ethics and good medical practice accepted in this country and overseas. As I see it, the doctor's decision whether or not to take any such step must (subject to his patient's ability to give or withhold his consent) be made in the best interests of the patient. It is this principle too which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, where the doctor's treatment of his patient is lawful, the patient's death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable. (AC pp. 866 A-867 E)

It is of course the development of modern medical technology, and in particular the development of life support systems, which has rendered cases such as the present so much more relevant than in the past. Even so, where (for example) a patient is brought into hospital in such a condition that, without the benefit of a life support system, he will not continue to live, the decision has to be made whether or not to give him that benefit, if available. That decision can only be made in the best interests of the patient. No doubt, his best interests will ordinarily require that he should be placed on a life support system as soon as necessary, if only to make an accurate assessment of his condition and a prognosis for the future. But if he neither recovers sufficiently to be taken off it nor dies, the question will ultimately arise *whether he should be kept on it indefinitely*. As I see it, that question (assuming the continued availability of the system) can only be answered by reference to the best interests of the patient himself, having regard to established medical practice. Indeed, if the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the *treatment* may, and *indeed ultimately should, be discontinued where it is no longer in his best interests to provide it*. The question which lies at the heart of the present case is, as I see it, whether on that principle the doctors responsible for the treatment and care of Anthony Bland can justifiably discontinue the process of artificial feeding upon which the prolongation of his life depends.

17 Decided on 13-8-1992 (High Court of New Zealand)

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does when he switches off a life-support machine 'is in substance not an act but an omission to struggle', and that 'the omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case'.

I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example, where he takes some positive step to bring the life support to an end. But *discontinuation of life support is, for present purposes, no different from not initiating life support in the first place.* In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying *as a result of his pre-existing condition*; and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient. I also agree that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life-support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission.

The distinction appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony.

I return to the patient who, because for example he is of unsound mind or has been rendered unconscious by accident or by illness, is incapable of stating whether or not he consents to treatment or care. In such circumstances, it is now established that a doctor may lawfully treat such a patient if he acts in his best interests, and indeed that, if the patient is already in his care, he is under a duty so to treat him: see *F. (Mental Patient: Sterilisation), In re*[16], in which the legal principles governing treatment in such circumstances were stated by this House. For my part I can see no reason why, as a matter of principle, a decision by a doctor whether or not to initiate, or to continue to provide, treatment or care which could or might have the effect of prolonging such a patient's life, should not be governed by the same fundamental principle. Of course, in the great majority of cases, the best interests of the patient are likely to require that treatment of this kind, if available, should be given to a

16 (1990) 2 AC 1 : (1989) 2 WLR 1025 (CA & HL) : (1989) 2 All ER 545 (HL)

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It is crucial for the understanding of this question that the question itself should be correctly formulated. The *question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life*. The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: should a doctor be entitled to switch it off, or to pull the plug? And then it is asked: can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient's death? Such an approach has rightly been criticised as misleading, for example, by Professor Ian Kennedy in his paper in *Treat Me Right, Essays in Medical Law and Ethics* (1988), and by Thomas, J. in *J.H.L., In re*[17] at pp. 21-22. This is because *the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.*

The correct formulation of the question is of particular importance in a case such as the present, where the patient is totally unconscious and where there is no hope whatsoever of any amelioration of his condition. In circumstances such as these, it may be difficult to say that it is in his best interests that the treatment should be ended. But if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued, that question can sensibly be answered to the effect that [it is not in his best interests to do so]. (AC pp. 867 E-868 E)" (emphasis supplied)

79. In *Airedale case*[5] in a Discussion Paper on Treatment of Patients in Persistent Vegetative State issued in September 1992 by the Medical Ethics Committee of the British Medical Association certain safeguards were mentioned which should be observed before constituting life support for such patients: (AC pp. 870H-871A)

"(1) every effort should be made at rehabilitation for at least six months after the injury;

(2) the diagnosis of irreversible PVS should not be considered confirmed until at least twelve months after the injury, with the effect that any decision to withhold life-prolonging treatment will be delayed for that period;

(3) the diagnosis should be agreed by two other independent doctors; and

(4) generally, the wishes of the patient's immediate family will be given great weight."

17 Decided on 13-8-1992 (High Court of New Zealand)

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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80. Lord Goff observed that discontinuance of artificial feeding in such cases is not equivalent to cutting a mountaineer's rope, or severing the air pipe of a deep sea diver. The true question is not whether the doctor should take a course in which he will actively kill his patient, but rather whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life.

81. Lord Browne-Wilkinson was of the view that removing the nasogastric tube in the case of Anthony Bland cannot be regarded as a positive act causing the death. The tube itself, without the food being supplied through it, does nothing. Its non-removal itself does not cause the death since by itself, it does not sustain life. Hence removal of the tube would not constitute the actus reus of murder, since such an act would not cause the death.

82. Lord Mustill observed: (*Airedale case*[5], AC p. 896 C-E)

> "Threaded through the technical arguments addressed to the House were the strands of a much wider position, that it is in the best interests of the community at large that *Anthony Bland's life should now end.* The doctors *have done all they can. Nothing will be gained by going on* and much will be lost. The *distress of the family will get steadily worse.* The strain on the *devotion of a medical staff charged with the care* of a patient whose condition will never improve, who may live for years and who does not even recognise that he is being cared for, will continue to mount. The large resources of skill, *labour and money now being devoted to Anthony Bland* might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come."

83. Thus all the Judges of the House of Lords in *Airedale case*[5] were agreed that Anthony Bland should be allowed to die.

84. *Airedale*[5] (1993) decided by the House of Lords has been followed in a number of cases in UK, and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.

85. The question, however, remains as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)? Most decisions have held that the decision of the parents, spouse, or other close relative, should carry weight if it is an informed one, *but it is not decisive* (several of these decisions have been referred to in Chapter IV of the 196th Report of the Law Commission of India on Medical Treatment to Terminally Ill Patients).

86. It is ultimately for the Court to decide, as parens patriae, as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and the opinion of medical practitioners should be given due weight in coming to its decision. As stated by Balcombe, J. in *J. (A Minor)*

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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(Wardship: Medical Treatment), In re[18], the Court as representative of the Sovereign as *parens patriae* will adopt the same standard which a reasonable and responsible parent would do. The *parens patriae* (father of the country) jurisdiction was the jurisdiction of the Crown, which, as stated in *Airedale*[5], could be traced to the 13th century. This principle laid down that as the Sovereign it was the duty of the King to protect the person and property of those who were unable to protect themselves. The Court, as a wing of the State, has inherited the *parens patriae* jurisdiction which formerly belonged to the King.

US decisions

87. The two most significant cases of the US Supreme Court that addressed the issue whether there was a federal constitutional right to assisted suicide arose from challenges to State laws banning physician-assisted suicide brought by terminally ill patients and their physicians. These were *Washington* v. *Glucksberg*[19] and *Vacco* v. *Quill*[20].

88. In *Glucksberg case*[19], the US Supreme Court held that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Court observed: (US p. 725)

> "... The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct."

89. The Court went on to conclude that the Washington statute being challenged was rationally related to five legitimate government interests: protection of life, prevention of suicide, protection of ethical integrity of the medical profession, protection of vulnerable groups, and protection against the "slippery slope" towards euthanasia. The Court then noted that perhaps the individual States were more suited to resolving or at least addressing the myriad concerns raised by both proponents and opponents of physician-assisted suicide. The Court observed: (*Glucksberg case*[19], US p. 735)

> "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

90. In *Vacco case*[20] the US Supreme Court again recognised the distinction between refusing life-saving medical treatment and giving lethal medication. The Court disagreed with the view of the Second Circuit Federal Court that ending or refusing life-saving medical treatment is nothing more nor less than assisted suicide. The Court held that: (US pp. 793-94)

18 (1990) 3 All ER 930 (CA)

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

19 138 L Ed 2d 772 : 521 US 702 (1996)

20 138 L Ed 2d 834 : 521 US 793 (1996)

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"... *The distinction between letting a patient die and making that patient die* is important, logical, rational, and well established."
(emphasis supplied)

The Court held that the State of New York could validly ban the latter.

91. In *Cruzan* v. *Missouri Deptt. of Health (MDH)*[21], decided by the US Supreme Court the majority opinion was delivered by Rehnquist, C.J. In that case, the petitioner Nancy Cruzan sustained injuries in an automobile accident and lay in a Missouri State hospital in what has been referred to as a persistent vegetative state (PVS), a condition in which a person exhibits motor reflexes but evinces no indication of significant cognitive function. The State of Missouri was bearing the cost of her care. Her parents and co-guardians applied to the Court for permission to withdraw her artificial feeding and hydration equipment and allow her to die. While the trial court granted the prayer, the State Supreme Court of Missouri reversed, holding that under a statute in the State of Missouri it was necessary to prove by clear and convincing evidence that the incompetent person had wanted, while competent, withdrawal of life support treatment in such an eventuality. The only evidence led on that point was the alleged statement of Nancy Cruzan to a housemate about a year before the accident that she did not want life as a "vegetable". The State Supreme Court was of the view that this did not amount to saying that medical treatment or nutrition or hydration should be withdrawn.

92. Rehnquist, C.J. delivering the opinion of the Court (in which White, O'Connor, Scalia, and Kennedy, JJ. joined) in his judgment first noted the facts: (*Cruzan case*[21], US pp. 266-68)

> "On the night of 11-1-1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks, and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri State hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State of Missouri is bearing the cost of her care.

21 111 L Ed 2d 224 : 497 US 261 (1989)

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> After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked the hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorisation from the State trial court for termination."

While the trial court allowed the petition the State Supreme Court of Missouri reversed. The US Supreme Court by majority affirmed the verdict of the State Supreme Court.

93. Rehnquist, C.J. noted that in law even touching of one person by another without consent and without legal justification was a battery, and hence illegal. The notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. As observed by Cardozo, J. while on the Court of Appeals of New York:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

Vide *Schloendorff* v. *Society of New York Hospital*[9], NY at pp. 129-30, NE at p. 93. Thus the informed consent doctrine has become firmly entrenched in American Tort Law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.

94. The question, however, arises in cases where the patient is unable to decide whether the treatment should continue or not e.g. if he is in coma or PVS. Who is to give consent to terminate the treatment in such a case? The learned Chief Justice referred to a large number of decisions of courts in USA in this connection, often taking diverse approaches.

95. *Quinlan, In re*[22], Karen Quinlan suffered severe brain damage as a result of anoxia, and entered into PVS. Her father sought judicial approval to disconnect her respirator. The New Jersey Supreme Court granted the prayer, holding that Karen had a right of privacy grounded in the US Constitution to terminate treatment. The Court concluded that the way Karen's right to privacy could be exercised would be to allow her guardian and family to decide whether she would exercise it in the circumstances.

96. *Conroy, In re*[23], however, the New Jersey Supreme Court, in a case of an 84-year-old incompetent nursing home resident who had suffered irreversible mental and physical ailments, contrary to its decision in *Quinlan case*[22], decided to base its decision on the common law right to self-

9 211 NY 125 : 105 NE 92 (1914)
22 70 NJ 10 : 355 A 2d 647 (1976)
23 98 NJ 321 : 486 A 2d 1209 (1985)

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determination and informed consent. This right can be exercised by a surrogate decision-maker when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking the Court held that an individual's right could still be invoked in certain circumstances under objective "best-interest" standards. Where no trustworthy evidence existed that the individual would have wanted to terminate treatment, and a person's suffering would make the administration of life-sustaining treatment inhumane, a pure objective standard could be used to terminate the treatment. If none of these conditions obtained, it was best to err in favour of preserving life.

97. What is important to note in *Cruzan case*[21] is that *there was a statute* of the State of Missouri, unlike in *Airedale case*[5] (where there was none), which required clear and convincing evidence that while the patient was competent she had desired that if she becomes incompetent and enters into a PVS her life support should be withdrawn.

98. In *Cruzan case*[21] the learned Chief Justice observed: (US p. 281)

> "... Not all incompetent patients will have loved ones available to serve as surrogate decision-makers. And even where family members are present, '[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient'*. A State is entitled to guard against potential abuses in such situations."

The learned Chief Justice further observed: (*Cruzan case*[21], US p. 283)

> "... An erroneous decision not to terminate results in maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."

99. No doubt Mr Brennan, J. (with whom Marshall and Blackmun, JJ. joined) wrote a powerful dissenting opinion, but it is not necessary for us to go into the question whether the view of the learned Chief Justice or that of Brennan, J. is correct. It may be clarified that foreign decisions have only persuasive value in our country, and are not binding authorities on our courts. Hence we can even prefer to follow the minority view, rather than the majority view of a foreign decision, or follow an overruled foreign decision.

21 *Cruzan* v. *Missouri Deptt. of Health (MDH)*, 111 L Ed 2d 224 : 497 US 261 (1989)

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

* Ed.: As observed in *Jobes, In re*, 108 NJ 394 at p. 419 : 529 A 2d 434 at p. 477 (1987).

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Cruzan case[21] can be distinguished on the simple ground that there was a *statute* in the State of Missouri, whereas there was none in *Airedale case*[5] nor in the present case before us. We are, therefore, of the opinion that *Airedale case*[5] is more apposite as a precedent for us. No doubt foreign decisions are not binding on us, but they certainly have persuasive value.

Law in India

100. In India abetment of suicide (Section 306 of the Penal Code) and attempt to suicide (Section 309 of the Penal Code) are both criminal offences. This is in contrast to many countries such as USA where attempt to suicide is not a crime.

101. The Constitution Bench of the Supreme Court in *Gian Kaur* v. *State of Punjab*[1] held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two-Judge Bench decision of the Supreme Court in *P. Rathinam* v. *Union of India*[4]. The Court held that the right to life under Article 21 of the Constitution does not include the right to die (vide SCC para 33). In *Gian Kaur case*[1] the Supreme Court approved of the decision of the House of Lords in *Airedale case*[5] and observed that euthanasia could be made lawful only by legislation.

102. Sections 306 and 309 IPC read as under:

> "**306.** ***Abetment of suicide.***—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> * * *
>
> **309.** ***Attempt to commit suicide.***—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both."

103. We are of the opinion that although Section 309 of the Penal Code (attempt to commit suicide) has been held to be constitutionally valid in *Gian Kaur case*[1], the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in depression, and hence he needs help, rather than punishment. We, therefore, recommend to Parliament to consider the feasibility of deleting Section 309 from the Penal Code.

104. It may be noted that in *Gian Kaur case*[1] although the Supreme Court has quoted with approval the view of the House of Lords in *Airedale case*[5], it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a

21 *Cruzan* v. *Missouri Deptt. of Health (MDH)*, 111 L Ed 2d 224 : 497 US 261 (1989)

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

1 (1996) 2 SCC 648 : 1996 SCC (Cri) 374

4 (1994) 3 SCC 394 : 1994 SCC (Cri) 740

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large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialisation, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.

105. Also, since medical science is advancing fast, doctors must not declare a patient to be a hopeless case unless there appears to be no reasonable possibility of any improvement by some newly discovered medical method in the near future. In this connection we may refer to a recent news item which we have come across on the internet of an Arkansas man Terry Wallis, who was 19 years of age and newly married with a baby daughter when in 1984 his truck plunged through a guard rail, falling 25 feet. He went into coma in the crash in 1984, but after 24 years he has regained consciousness. This was perhaps because his brain spontaneously rewired itself by growing tiny new nerve connections to replace the ones sheared apart in the car crash. Probably the nerve fibres from Terry Wallis' cells were severed but the cells themselves remained intact, unlike Terri Schiavo, whose brain cells had died (see *Terri Schiavo case* on Google). However, we make it clear that it is experts like medical practitioners who can decide whether there is any reasonable possibility of a new medical discovery which could enable such a patient to revive in the near future.

When can a person be said to be dead

106. It is alleged in the writ petition filed by Ms Pinki Virani (claiming to be the next friend of Aruna Shanbaug) that in fact Aruna Shanbaug is already dead and hence by not feeding her body any more we shall not be killing her. The question hence arises as to when a person can be said to be dead?

107. A person's most important organ is his/her brain. This organ cannot be replaced. Other body parts can be replaced e.g. if a person's hand or leg is amputated, he can get an artificial limb. Similarly, we can transplant a kidney, a heart or a liver when the original one has failed. However, we cannot transplant a brain. If someone else's brain is transplanted into one's body, then in fact, it will be that other person living in one's body. The entire mind, including one's personality, cognition, memory, capacity of receiving signals from the five senses and capacity of giving commands to the other parts of the body, etc. are the functions of the brain. Hence one is one's brain. It follows that one is dead when one's brain is dead.

108. As is well known, the brain cells normally do not multiply after the early years of childhood (except in the region called hippocampus), unlike other cells like skin cells, which are regularly dying and being replaced by new cells produced by multiplying of the old cells. This is probably because brain cells are too highly specialised to multiply. Hence if the brain cells die, they usually cannot be replaced (though sometimes one part of the brain can

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take over the function of another part in certain situations where the other part has been irreversibly damaged). Brain cells require regular supply of oxygen which comes through the red cells in the blood. If oxygen supply is cut off for more than six minutes, the brain cells die and this condition is known as anoxia. Hence, if the brain is dead a person is said to be dead.

Brain death

109. The term "brain death" has developed various meanings. While initially, "death" could be defined as a cessation of breathing, or, more scientifically, a cessation of heartbeat, recent medical advances have made such definitions obsolete. In order to understand the nature and scope of brain death, it is worthwhile to look at how death was understood. Historically, as the oftquoted definition in *Black's Law Dictionary* suggests, "death" was:

> "The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."[24]

This definition saw its echo in numerous other texts and legal case law. This includes many American precedents, such as *Schmidt* v. *Pierce*[25], SW 2d at p. 133 ("*Black's Law Dictionary*, 4th Edn., defines death as 'the cessation of life; the ceasing to exist....' "); and *Sanger* v. *Butler*[26], SW at p. 462 ("*The Encyclopaedic Dictionary*, among others, gives the following definitions of [death]: 'The state of being dead; the act or state of dying; the state or condition of the dead.' *The Century Dictionary* defines death as 'cessation of life; that state of a being, animal or vegetable, in which there is a total and permanent cessation of all the vital functions'.").[27]

110. This understanding of death emerged from a cardiopulmonary perspective. In such cases, the brain was usually irrelevant—being understood that the cessation of circulation would automatically lead to the death of brain cells, which require a great deal of blood to survive. The invention of the ventilator and the defibrillator in the 1920s altered this understanding, it being now possible that the cessation of respiration and circulation, though critical, would no longer be irreversible.[28]

111. Hence, a present-day understanding of death as the irreversible end of life must imply total brain failure, such that neither breathing, nor circulation is possible any more. The question of the length of time that may determine such death is significant, especially considering a significant increase in organ donations across jurisdictions over the last few years.

24 *Black's Law Dictionary*, 488 (4th Edn., Revised 1968).

25 344 SW 2d 120 (Mo 1961)

26 101 SW 459 (Tex Civ App 1907)

27 Goldsmith, Jason, "Wanted! Dead and/or Alive: Choosing Amongst the Many Not-so-Uniform Definitions of Death", 61 U Miami L Rev 871 (2007).

28 Samantha Weyrauch, "Acceptance of Whole Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan", 17 UCLA Pac Basin LJ 91 at p. 96 (1999).

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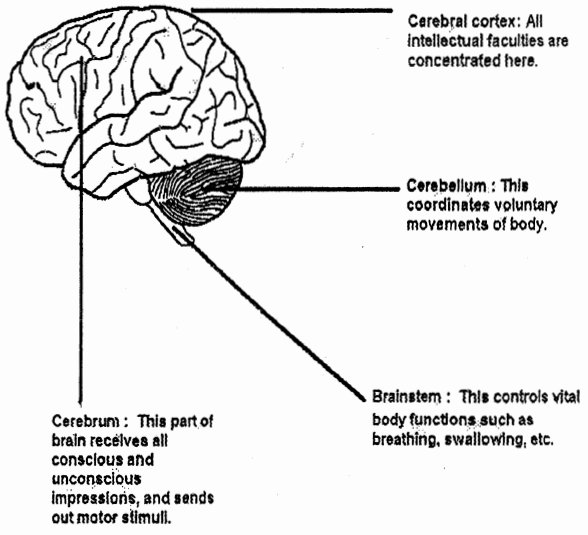
112*. Brain death, may thus, be defined as "the irreversible cessation of all functions of the entire brain, including the brainstem".[29] It is important to understand that this definition goes beyond acknowledging consciousness—a person who is incapable of ever regaining consciousness will not be considered to be brain dead as long as parts of the brain e.g. brainstem that regulates involuntary activity (such as response to light, respiration, heartbeat, etc.) still continue to function. Likewise, if consciousness, albeit severely limited, is present, then a person will be considered to be alive even if he has suffered brainstem death, wherein breathing and heartbeat can no longer be regulated and must be mechanically determined. Hence, the international standard for brain death is usually considered to include "whole-brain death" i.e. a situation where the higher brain (i.e. the part of the brain that regulates consciousness and thought), the cerebellum or midbrain, and the brainstem have all ceased to demonstrate any electrical activity whatsoever for a significant amount of time. To say, in most cases, that only the death of the higher brain would be a criteria for "brain death" may have certain serious consequences, for example, a foetus, technically under this definition, would not be considered to be alive at all. Similarly, as per this, different definitions of death would apply to human and non-human organisms.

* **Ed.**: For the facility of readers, a sketch showing various parts of human brain, discussed in this judgment, is reproduced below:



29 Section 1 of the Universal Determination of Death Act (The United States Legislation).

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113. Brain death, thus, is different from a persistent vegetative state, where the brainstem continues to work, and so some degree of reactions may occur, though the possibility of regaining consciousness is relatively remote. Even when a person is incapable of any response, but is able to sustain respiration and circulation, he cannot be said to be dead. The mere mechanical act of breathing, thus, would enable him or her to be "alive". The first attempt to define death in this manner came about in 1968, as a result of a Harvard Committee constituted for the purpose.[30] This definition, widely criticised for trying to maximise organ donations, considered death to be a situation wherein "individuals who had sustained traumatic brain injury that caused them to be in an irreversible coma, and had lost the ability to breathe spontaneously"[31], would be considered dead. This criticism led to the Presidents' Committee set up for the purpose in 1981, defining death more vaguely as the point "where the body's physiological system ceases to contribute a uniform whole". This definition of whole brain death, however, is not without its critics. Some argue that the brain is not always responsible for all bodily functioning—digestion, growth, and some degree of movement (regulated by the spinal cord) may not require any electrical activity in the brain.

114. In order to combat this argument, and further explain what brain death could include, the President's Committee on Bioethics in the United States of America in 2008 came up with a new definition of brain death, according to which a person was considered to be brain dead when he could no longer perform the fundamental human work of an organism. These are:

> "(1) openness to the world, that is receptivity to stimuli and signals from the surrounding environment,
>
> (2) the ability to act upon the world to obtain selectively what it needs, and
>
> (3) the basic felt need that drives the organism to act ... to obtain what it needs."[32]

115. When this situation is reached, it is possible to assume that the person is dead, even though he or she, through mechanical stimulation, may be able to breathe, his or her heart might be able to beat, and he or she may be able to take some form of nourishment. It is important, thus, that it be medically proved that a situation where any human functioning would be impossible should have been reached for there to be a declaration of brain death—situations where a person is in a persistent vegetative state but can support breathing, cardiac functions, and digestion *without* any mechanical aid are necessarily those that will not come within the ambit of brain death.

116. In legal terms, the question of death would naturally assume significance as death has a set of *legal* consequences as well. As per the definition in the American Uniform Definition of Death Act, 1980, an

30 Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 JAMA 337 at pp. 337-40 (1968).

31 Seema K. Shah, Franklin Miller, "Can We Handle The Truth? Legal Fictions in the Determination of Death", 36 Am JL & Med 540 (2010).

32 *Ibid.*

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individual who "sustain[s] ... irreversible cessation of all functions of the entire brain, including the brainstem, is dead". This stage, thus, is reached at a situation where not only consciousness, but every other aspect of life regulated from the brain can no longer be so regulated.

117. In the case of "euthanasia", however, the situation is slightly different. In these cases, it is believed, that a determination of when it would be right or fair to disallow resuscitation of a person who is incapable of expressing his or her consent to a termination of his or her life depends on two circumstances:

(*a*) When a person is only kept alive mechanically i.e. when not only consciousness is lost, but the person is only able to sustain involuntary functioning through advanced medical technology—such as the use of heart-lung machines, medical ventilators, etc.

(*b*) When there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time—at least a few years—then there can be a fair case made out for passive euthanasia.

To extend this further, especially when a person is incapable of being able to give any consent, would amount to committing judicial murder.

118. In this connection we may refer to the Transplantation of Human Organs Act, 1994 enacted by the Indian Parliament. Section 2(*d*) of the Act states:

"2. (*d*) 'brainstem death' means the stage at which all functions of the brainstem have permanently and irreversibly ceased and is so certified under sub-section (6) of Section 3;"

119. Section 3(6) of the said Act states:

"3. (6) Where any human organ is to be removed from the body of a person in the event of his brainstem death, no such removal shall be undertaken unless such death is certified, in such form and in such manner and on satisfaction of such conditions and requirements as may be prescribed, by a board of medical experts consisting of the following namely—

(*i*) the registered medical practitioner, in charge of the hospital in which brainstem death has occurred;

(*ii*) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (*i*), from the panel of names approved by the appropriate authority;

(*iii*) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (*i*), from the panel of names approved by the appropriate authority; and

(*iv*) the registered medical practitioner treating the person whose brainstem death has occurred."

120. Although the above Act was only for the purpose of regulation of transplantation of human organs it throws some light on the meaning of brain death.

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121. From the above angle, it cannot be said that Aruna Shanbaug is dead. Even from the report of the committee of doctors which we have quoted above it appears that she has some brain activity, though very little. She recognises that persons are around her and expresses her likes or dislikes by making some vocal sound and waving her hand by certain movements. She smiles if she receives her favourite food, fish and chicken soup. She breathes normally and does not require a heart-lung machine or intravenous tube for feeding. Her pulse rate and respiratory rate and blood pressure are normal. She was able to blink well and could see her doctors who examined her. When an attempt was made to feed her through mouth she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. She would get disturbed when many people entered her room, but she appeared to calm down when she was touched or caressed gently. Aruna Shanbaug meets most of the criteria for being in a permanent (sic persistent) vegetative state which has resulted for 37 years. However, her dementia has not progressed and has remained stable for many years.

122. From the above examination by the team of doctors, it cannot be said that Aruna Shanbaug is dead. Whatever the condition of her cortex, her brainstem is certainly alive. She does not need a heart-lung machine. She breathes on her own without the help of a respirator. She digests food, and her body performs other involuntary functions without any help. From the CD (which we had screened in the courtroom on 2-3-2011 in the presence of the counsel and others) it appears that she can certainly not be called dead. She was making some sounds, blinking, eating food put in her mouth, and even licking with her tongue morsels on her mouth. However, there appears little possibility of her coming out of PVS in which she is in. In all probability, she will continue to be in the state in which she is in till her death.

123. The question now is whether her life support system (which is done by feeding her) should be withdrawn, and at whose instance?

Withdrawal of life support of a patient in permanent vegetative state (PVS)

124. There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in *Vishaka case*[33], we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject:

(*i*) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons

33 *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932

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acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As already noted above, it is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms Pinki Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take that decision. KEM Hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Mr Pallav Shishodia, learned Senior Counsel, appearing for the Dean, KEM Hospital, Mumbai, submitted that Ms Pinki Virani has no locus standi in this case. In our opinion it is not necessary for us to go into this question since we are of the opinion that it is the KEM Hospital staff who is really the next friend of Aruna Shanbaug.

We do not mean to decry or disparage what Ms Pinki Virani has done. Rather, we wish to express our appreciation of the splendid social spirit she has shown. We have seen on the internet that she has been espousing many social causes, and we hold her in high esteem. All that we wish to say is that however much her interest in Aruna Shanbaug may be it cannot match the involvement of the KEM Hospital staff who have been taking care of Aruna day and night for 38 years.

However, assuming that the KEM Hospital staff at some future time changes its mind, in our opinion in such a situation KEM Hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(*ii*) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in *Airedale case*[5].

In our opinion, this is even more necessary in our country as we cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient.

125. In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialisation and corruption, we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors.

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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While many doctors are upright, there are others who can do anything for money (see George Bernard Shaw's play *The Doctor's Dilemma*). The commercialisation of our society has crossed all limits. Hence we have to guard against the potential of misuse (see Robin Cook's novel *Coma*). In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the life support or not. We agree with the decision of Lord Keith in *Airedale case*[5] that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relatives and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of *parens patriae* which is a well-known principle of law.

Doctrine of parens patriae

126. The doctrine of *parens patriae* (father of the country) had originated in British law as early as in the 13th century. It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind *parens patriae* is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role.

127. In the Constitution Bench decision of this Court in *Charan Lal Sahu* v. *Union of India*[34] the doctrine has been explained in some detail as follows: (SCC p. 648, para 35)

> "*35.* ... In the '*Words and Phrases*' Permanent Edn., Vol. 33 at p. 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby 'the father of the country', were applied originally to the King and are used *to designate the State referring to its sovereign power of guardianship over persons under disability*. *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on [the] sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term *parens patriae* differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability." (emphasis in original)

The duty of the King in feudal times to act as *parens patriae* (father of the country) has been taken over in modern times by the State.

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

34 (1990) 1 SCC 613

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128. In *Heller* v. *DOE*[35] Mr Kennedy, J. speaking for the US Supreme Court observed: (US p. 332)

> " '... the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable ... to care for themselves'*".

129. In *State of Kerala* v. *N.M. Thomas*[36], SCR at p. 951 Mr Mathew, J. observed: (SCC p. 343, para 64)

> "*64.* ... the Court also is 'State' within the meaning of Article 12 (of the Constitution)...."

130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

Under which provision of law can the Court grant approval for withdrawing life support to an incompetent person

131. In our opinion, it is the High Court under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. Article 226(1) of the Constitution states:

> "**226.** ***Power of High Courts to issue certain writs.***—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories *directions, orders or writs*, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose." (emphasis supplied)

A bare perusal of the above provisions shows that the High Court under Article 226 of the Constitution is not only entitled to issue writs, *but is also entitled to issue directions or orders.*

132. In *Dwarka Nath* v. *ITO*[37] AIR vide para 4 this Court observed: (AIR pp. 84-85)

> "*4.* ... This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. *That apart, the*

35 125 L Ed 2d 257 : 509 US 312 (1992)

* **Ed.:** As observed in *Addington* v. *Texas*, 441 US 418 at p. 426.

36 (1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906

37 AIR 1966 SC 81

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it is crucial for the understanding of this question that the question itself should be correctly formulated. The *question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life*. The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: should a doctor be entitled to switch it off, or to pull the plug? And then it is asked: can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient's death? Such an approach has rightly been criticised as misleading, for example, by Professor Ian Kennedy in his paper in *Treat Me Right, Essays in Medical Law and Ethics* (1988), and by Thomas, J. in *J.H.L., In re*[17] at pp. 21-22. This is because *the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.*

The correct formulation of the question is of particular importance in a case such as the present, where the patient is totally unconscious and where there is no hope whatsoever of any amelioration of his condition. In circumstances such as these, it may be difficult to say that it is in his best interests that the treatment should be ended. But if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued, that question can sensibly be answered to the effect that [it is not in his best interests to do so]. (AC pp. 867 E-868 E)"

(emphasis supplied)

79. In *Airedale case*[5] in a Discussion Paper on Treatment of Patients in Persistent Vegetative State issued in September 1992 by the Medical Ethics Committee of the British Medical Association certain safeguards were mentioned which should be observed before constituting life support for such patients: (AC pp. 870H-871A)

"(1) every effort should be made at rehabilitation for at least six months after the injury;

(2) the diagnosis of irreversible PVS should not be considered confirmed until at least twelve months after the injury, with the effect that any decision to withhold life-prolonging treatment will be delayed for that period;

(3) the diagnosis should be agreed by two other independent doctors; and

(4) generally, the wishes of the patient's immediate family will be given great weight."

17 Decided on 13-8-1992 (High Court of New Zealand)

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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80. Lord Goff observed that discontinuance of artificial feeding in such cases is not equivalent to cutting a mountaineer's rope, or severing the air pipe of a deep sea diver. The true question is not whether the doctor should take a course in which he will actively kill his patient, but rather whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life.

81. Lord Browne-Wilkinson was of the view that removing the nasogastric tube in the case of Anthony Bland cannot be regarded as a positive act causing the death. The tube itself, without the food being supplied through it, does nothing. Its non-removal itself does not cause the death since by itself, it does not sustain life. Hence removal of the tube would not constitute the actus reus of murder, since such an act would not cause the death.

82. Lord Mustill observed: (*Airedale case*[5], AC p. 896 C-E)

> "Threaded through the technical arguments addressed to the House were the strands of a much wider position, that it is in the best interests of the community at large that *Anthony Bland's life should now end.* The doctors *have done all they can. Nothing will be gained by going on* and much will be lost. The *distress of the family will get steadily worse.* The strain on the *devotion of a medical staff charged with the care* of a patient whose condition will never improve, who may live for years and who does not even recognise that he is being cared for, will continue to mount. The large resources of skill, *labour and money now being devoted to Anthony Bland* might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come."

83. Thus all the Judges of the House of Lords in *Airedale case*[5] were agreed that Anthony Bland should be allowed to die.

84. *Airedale*[5] (1993) decided by the House of Lords has been followed in a number of cases in UK, and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.

85. The question, however, remains as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)? Most decisions have held that the decision of the parents, spouse, or other close relative, should carry weight if it is an informed one, *but it is not decisive* (several of these decisions have been referred to in Chapter IV of the 196th Report of the Law Commission of India on Medical Treatment to Terminally Ill Patients).

86. It is ultimately for the Court to decide, as parens patriae, as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and the opinion of medical practitioners should be given due weight in coming to its decision. As stated by Balcombe, J. in *J. (A Minor)*

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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> " '... the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable ... to care for themselves'*".

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> "*64.* ... the Court also is 'State' within the meaning of Article 12 (of the Constitution)...."

130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

Under which provision of law can the Court grant approval for withdrawing life support to an incompetent person

131. In our opinion, it is the High Court under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. Article 226(1) of the Constitution states:

> "**226.** ***Power of High Courts to issue certain writs.***—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories *directions, orders or writs*, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose." (emphasis supplied)

A bare perusal of the above provisions shows that the High Court under Article 226 of the Constitution is not only entitled to issue writs, *but is also entitled to issue directions or orders.*

132. In *Dwarka Nath* v. *ITO*[37] AIR vide para 4 this Court observed: (AIR pp. 84-85)

> "*4.* ... This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. *That apart, the*

35 125 L Ed 2d 257 : 509 US 312 (1992)

* **Ed.**: As observed in *Addington* v. *Texas*, 441 US 418 at p. 426.

36 (1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906

37 AIR 1966 SC 81

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While many doctors are upright, there are others who can do anything for money (see George Bernard Shaw's play *The Doctor's Dilemma*). The commercialisation of our society has crossed all limits. Hence we have to guard against the potential of misuse (see Robin Cook's novel *Coma*). In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the life support or not. We agree with the decision of Lord Keith in *Airedale case*[5] that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relatives and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of *parens patriae* which is a well-known principle of law.

Doctrine of parens patriae

126. The doctrine of *parens patriae* (father of the country) had originated in British law as early as in the 13th century. It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind *parens patriae* is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role.

127. In the Constitution Bench decision of this Court in *Charan Lal Sahu* v. *Union of India*[34] the doctrine has been explained in some detail as follows: (SCC p. 648, para 35)

> "*35.* ... In the '*Words and Phrases*' Permanent Edn., Vol. 33 at p. 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby 'the father of the country', were applied originally to the King and are used *to designate the State referring to its sovereign power of guardianship over persons under disability*. *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on [the] sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term *parens patriae* differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability." (emphasis in original)

The duty of the King in feudal times to act as *parens patriae* (father of the country) has been taken over in modern times by the State.

5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

34 (1990) 1 SCC 613

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128. In *Heller* v. *DOE*[35] Mr Kennedy, J. speaking for the US Supreme Court observed: (US p. 332)

> " '... the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable ... to care for themselves'*".

129. In *State of Kerala* v. *N.M. Thomas*[36], SCR at p. 951 Mr Mathew, J. observed: (SCC p. 343, para 64)

> "*64.* ... the Court also is 'State' within the meaning of Article 12 (of the Constitution)...."

130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

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High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure." (emphasis supplied)

The above decision has been followed by this Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*[38], SCC vide para 19 : AIR vide para 18.

133. No doubt, the ordinary practice in our High Courts since the time of framing of the Constitution in 1950 is that petitions filed under Article 226 of the Constitution pray for a writ of the kind referred to in the provision. However, from the very language of Article 226, and as explained by the above decisions, a petition can also be made to the High Court under Article 226 of the Constitution praying for *an order or direction*, and not for any writ. Hence, in our opinion, Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind abovementioned.

Procedure to be adopted by the High Court when such an application is filed

134. When such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as take the views of the hospital staff and submit its report to the High Court Bench. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters, etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court Bench should give its verdict.

135. The above procedure should be followed all over India until Parliament makes legislation on this subject.

136. The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the

38 (1989) 2 SCC 691 : AIR 1989 SC 1607

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relatives and persons close to the patient. The High Court should give its decision assigning specific reasons in accordance with the principle of "best interest of the patient" laid down by the House of Lords in *Airedale case*[5]. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.

137. With these observations, this petition is dismissed.

138. Before parting with the case, we would like to express our gratitude to Mr Shekhar Naphade, learned Senior Counsel for the petitioner, assisted by Ms Shubhangi Tuli, Ms Divya Jain and Mr Vimal Chandra S. Dave, Advocates, the learned Attorney General for India Mr G.E. Vahanvati, assisted by Mr Chinmoy P. Sharma, Advocate, Mr T.R. Andhyarujina, learned Senior Counsel, whom we had appointed as amicus curiae assisted by Mr Soumik Ghosal, Advocate, Mr Pallav Shishodia, learned Senior Counsel, assisted by Ms Sunaina Dutta and Ms Suchitra Atul Chitale, Advocates for KEM Hospital, Mumbai and Mr Chinmoy Khaladkar, Counsel for the State of Maharashtra, assisted by Mr Sanjay V. Kharde and Ms Asha Gopalan Nair, Advocates, who were of great assistance to us. We wish to express our appreciation of Mr Manav Kapur, Advocate, who is Law Clerk-cum-Research Assistant of one of us (Katju, J.) as well as Ms Neha Purohit, Advocate, who is Law Clerk-cum-Research Assistant of Hon'ble Justice Gyan Sudha Mishra. We also wish to mention the names of Mr Nithyaesh Nataraj and Mr Vaibhav Rangarajan, final-year law students in the School of Excellence, Dr. B.R. Ambedkar Law University, Chennai, who were the interns of one of us (Katju, J.) and who were of great help in doing research in this case.

139. We wish to commend the team of doctors of Mumbai who helped us viz. Dr. J.V. Divatia, Professor and Head, Department of Anaesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai; Dr. Roop Gursahani, Consultant Neurologist at P.D. Hinduja, Mumbai; and Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital. They did an excellent job.

140. We also wish to express our appreciation of Ms Pinki Virani who filed this petition. Although we have dismissed the petition for the reasons given above, we regard her as a public-spirited person who filed the petition for a cause she bona fide regarded as correct and ethical. We hold her in high esteem.

141. We also commend the entire staff of KEM Hospital, Mumbai (including the retired staff) for their noble spirit and outstanding, exemplary and unprecedented dedication in taking care of Aruna for so many long years. Every Indian is proud of them.

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5 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789 : (1993) 2 WLR 316 : (1993) 1 All ER 821 (CA and HL)

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Writ Petition (Pil) No. 126 of 2014

Mohd. Salim v. State of Uttarakhand

2017 SCC OnLine Utt 367 : (2017) 2 KLJ (NOC 4) 7

In the High Court of Uttarakhand at Nainital
(BEFORE RAJIV SHARMA AND ALOK SINGH, JJ.)

Mohd. Salim ..... Petitioner
v.
State of Uttarakhand & Others ..... Respondents

Writ Petition (Pil) No. 126 of 2014
Decided on March 20, 2017

Mr. M.C. Pant, Advocate, for the petitioner.
Mr. Sanjay Bhatt, Standing Counsel, for the Union of India.
Mr. N.P. Shah, Standing Counsel, for the State of Uttarakhand.

The Judgment of the Court was delivered by

RAJIV SHARMA, J.:— Vide judgment dated 5.12.2016, this Court had issued the following mandatory directions to the respondents:—

"1. Respondent nos. 3 to 7 are directed to evict the respondent nos. 8 & 9 from the Government land within a period of twelve weeks from today.

2. The respondent no. 11 i.e. Central Government is directed to take final decision on the basis of the settlement arrived at between the State of Uttar Pradesh and the State of Uttarakhand, regarding the division of assets/properties on 02.02.2016, within a period of three months from today.

3. The Central Government is also directed to constitute a Ganga Management Board, under Section 80 of the Act, and make it functional within a period of three months. The Central Government shall also induct State of Uttarakhand as member of the Upper Yamuna Board within three months.

4. The mining in river bed of Ganga and its highest flood plain area is banned forthwith. The District Magistrate and Sub-Divisional Magistrate shall be personally responsible to implement this direction."

2. In sequel to order dated 6.3.2017, Mr. Virendra Sharma, Senior Joint Commissioner, Ministry of Water Resource & Ganga Rejuvenation, is present in person along with the records.

3. The Court has a very meaningful interaction with Mr. Virendra Sharma. He has made a startling revelation that despite long correspondence, neither the State of U.P. nor the State of Uttarakhand are cooperating with the Central Government for the constitution of Ganga Management Board.

4. According to Section 80(2)(b) of the U.P. Reorganization Act, 2000 (hereinafter to be referred as 'the Act'), two full time members, one from each of the successor States, are to be nominated by the respective State Government as Members of the Ganga Management Board. As per Section 80(4)(c) of the Act, four part-time members, two from each of the successor States are to be nominated by the respective State Government. The Chairman is to be appointed by the Central Government in consultation with the successor States along with two representatives.

5. Mr. Virendra Sharma, Sr. Joint Commissioner, has undertaken that even if there is no cooperation from both the State Governments. The Ganga Management Board

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shall be constituted within a period of eight weeks from today by appointing the Chairman and two members by the Central Government. However, he further submits that in case the State Governments respond within two weeks from today, the Members shall also be appointed as nominated by the successor States as per Section 80 of the Act to Ganga Management Board.

6. As far as direction no. 1 in judgment dated 5.12.2016 is concerned, respondent nos. 3 to 7 were directed to evict the respondent nos. 8 and 9 from the Government land within twelve weeks from the date of order. However, Mr. M.C. Pant, Advocate for the petitioner, apprises that respondent nos. 8 and 9 have not been evicted till date. Consequently, there shall be a direction to the District Magistrate, Haridwar to evict the respondent nos. 8 and 9 from the government land within seven days from today, if there is no stay granted by the Hon. Apex Court, failing which the District Magistrate, Haridwar shall be deemed to be put under suspension for not evicting the respondent nos. 8 and 9.

7. Vide judgment dated 5.12.2016, the Central Government was directed to take a final decision on the basis of the settlement arrived at between the State of U.P. and State of Uttarakhand regarding the division of assets/properties on the basis of Memorandum of Understanding (MoU) dated 2.2.2016. Mr. Virendra Sharma, however, submits that the MoU arrived at between the States of U.P. and Uttarakhand on 2.2.2016 has not been supplied to the Central Government.

8. Accordingly, there shall be a direction to the Chief Secretaries of both the States to supply the MoU arrived at on 2.2.2016 to the Central Government within 72 hours. Thereafter, the Central Government shall take its final decision within 10 weeks.

9. The Court shows its serious displeasure about the manner in which the State of U.P. and State of Uttarakhand have acted in this matter. It is a sign of non-governance. We need not remind the State Governments that they are bound to obey the orders passed by the Central Government failing which the consequences may ensue under Article 365 of the Constitution of India. Consequently, the Chief Secretaries of the State of U.P. and State of Uttarakhand are directed to cooperate with the Central Government in a right earnest manner for the constitution of Ganga Management Board by appointing the Members, failing which it shall be open to the Central Government to constitute the Ganga Management Board without the Members of the successor States, as directed hereinabove.

10. The extraordinary situation has arisen since Rivers Ganga and Yamuna are loosing their very existence. This situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna.

11. Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganges & Yamuna. According to Hindu beliefs, a dip in River Ganga can wash away all the sins. The Ganga is also called 'Ganga Maa'. It finds mentioned in ancient Hindu scriptures including 'Rigveda'. The river Ganga originates from Gaumukh Glacier and River Yamuna originates from Yamnotri Glacier.

12. In (1969) 1 SCC 555 their Lordships of Hon. Supreme Court in '*Yogendra Nath Naskar* v. *Commission of Income-Tax, Calcutta*' have held that a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property. In paragraph no. 6, their Lordships have held as under:—

> "6. That the consecrated idol in a Hindu temple is a juridical person has been expressly laid down in *Manohar Ganesh's case*, I.L.R. 12 Bom. 247 which Mr. Prannath Saraswati, the author of the 'Tagore Lectures on Endowments' rightly enough speaks of as one ranking as the leading case on the subject, and in which West J., discusses the whole matter with much erudition. And in more than one

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case, the decision of the Judicial Committee proceeds on precisely the same footing (*Maharanee Shibessourec Dehia* v. *Mothocrapath Acharjo* 13 M.I.A. 270 and *Prosanna Kumari Debya* v. *Golab Chand Baboo L.R.* 2 IndAp 145 Such ascription of legal personality to an idol must however be incomplete unless it be linked of human guardians for them variously designated in *Debya* v. *Golab Chand Baboo L.R.* 2 IndAp 145 the Judicial Committee observed thus: 'It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as shebait or manager. It would seem to follow that the person so entrusted must be necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir'-words which seem to be almost on echo of what was said in relation to a church in a judgment of the days of Edward I: 'A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age' (Pollock and Maitland's 'History of English Law', Volume I, 483."

13. In (1999) 5 SCC 50, their Lordships of Hon. Apex Court in the case of "*Ram Jankijee Deities* v. *State of Bihar*" have held that Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas, God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. It was further held that the deity/idol are the juridical person entitled to hold the property. In paragraph nos. 14, 16 and 19, their Lordships have held as under:—

"14. Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. The Padma Purana says: "the image of Hari (God) prepared of stone earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established images...where the self-possessed Vishnu has placed himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed." (B.K. Mukherjea-Hindu Law of Religious and Charitable Trusts: 5th Edn.) A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. The Salgram Shila depicts Narayana being the Lord of the Lords and represents Vishnu Bhagwan. It is a Shila-the shalagram form partaking the form of Lord of the Lords Narayana and Vishnu.

16. The observations of the Division Bench has been in our view true to the Shastras and we do lend our concurrence to the same. If the people believe in the temples' religious efficacy no other requirement exists as regards other areas and the learned Judge it seems has completely overlooked this aspect of Hindu Shastras -In any event, Hindus have in Shastras "Agni" Devta; "Vayu" Devta-these deities are shapeless and formless but for every ritual Hindus offer their oblations before the deity. The Ahuti to the deity is the ultimate-the learned Single Judge however was pleased not to put any reliance thereon. It is not a particular image which is a

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juridical person but it is a particular bent of mind which consecrate the image.

19. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. 'The Supreme Being has no attribute, which consists of pure spirit and which is without a second being, i.e. God is the only Being existing in reality, there is no other being in real existence excepting Him - (see in this context Golap Chandra Sarkar, Sastri's Hindu Law: 8th Edn.). It is the human concept of the Lord of the Lords-it is the human vision of the Lord of the Lords: How one sees the deity: how one feels the deity and recognises the deity and then establishes the same in the temple upon however performance of the consecration ceremony. Shastras do provide as to how to consecrate and the usual ceremonies of Sankalpa and Utsarga shall have to be performed for proper and effective dedication of the property to a deity and in order to be termed as a juristic person. In the conception of Debutter, two essential ideas are required to be performed: In the first place, the property which is dedicated to the deity vests in an ideal sense in the deity itself as a juristic person and in the second place, the personality of the idol being linked up with natural personality of the shebait, being the manager or being the Dharam karta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of the property of the idol. The Deva Pratistha Tatwa of Raghunandan and Matsya and Devi Puranas though may not be uniform in its description as to how Pratistha or consecration of image does take place but it is customary that the image is first carried to the Snan Mandap and thereafter the founder utters the Sankalpa Mantra and upon completion thereof, the image is given bath with Holy water, Ghee, Dahi, Honey and Rose water and thereafter the oblation to the sacred fire by which the Pran Pratistha takes place and the eternal spirit is infused in that particular idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however, lend any assistance to the matter in issue and the Principles of Hindu Law seems to have been totally misread by the learned Single Judge."

14. In (2000) 4 SCC 146 : AIR 2000 SC 1421, their Lordships of Hon. Supreme Court in the case of '*Shiromani Gurudwara Prabandhak Committee, Amritsar* v. *Shri. Som Nath Dass*' have held that the concept 'Juristic Person' arose out of necessities in the human development-Recognition of an entity as juristic person-is for subserving the needs and faith of society. In paragraph nos. 11, 13 and 14, their Lordships held as under:—

"11. The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "Person" in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a "Slave" was not a person. He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were

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not treated as chattel.

13. With the development of society, 'where an individual's interaction fell short, to upsurge social development, co-operation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very Constitution of State, municipal corporation, company etc. are all creations of the law and these "Juristic Persons" arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says:

Natural person. A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition 'Person' it is stated that the word "person," in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons.

Corpus Juris Secundum, Vol. VI, page 778 says:

Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Salmond on Jurisprudence, 12th Edn., 305 says:

A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human being is one of the most noteworthy feats of the legal imagination.... Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. ... If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention...

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members....1
2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself....
3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses-a charitable fund, for example or a trust estate...

Jurisprudence by Paton, 3rd Edn. page 349 and 350 says:

It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units-all entities recognised by the law as capable of being parties to legal relationship. Salmond said: 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties...

...Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a

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corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract: and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities." Analytical and Historical Jurisprudence, 3rd Edn. At page 357 describes "person";

We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

14. Thus, it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol, was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an Idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such."

15. In AIR 1972 Allahabad 287, learned Single Judge of Allahabad High Court in case of '*Moorti Shree Behari Ji* v. *Prem Dass*' has held that a deity can sue as a pauper. In paragraph no. 6, it was held as under:—

"6. The question then that arises is why a deity who is juristic person and can sue or be sued through its Pujari, Shebait or any other person interested, cannot sue as a pauper? To my mind when an incorporated limited company has been held by this Court capable of suing as a pauper, a fortiori it follows that a deity can also sue as a pauper. The learned Judge of the court below was in error in explaining away the Full Bench decision of this Court in the case of AIR 1959 All 540 (FB) (supra) on the observation that It related to a joint stock company, hence not applicable. The court below thus was in error in rejecting the application of the deity for that reason.

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16. With the development of the society where the interaction of individuals fell short to upsurge the social development, the concept of juristic person was devised and created by human laws for the purposes of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, as their Lordships have held in the judgments cited hereinabove, that for a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. *This recognition is for subserving the needs and faith of the society. Corpus Juris Secundum, Vol. 6, page 778 explains the concept of juristic persons/artificial persons thus: "Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development. (See Salmond on Jurisprudence 12th Edition Pages 305 and 306).* Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.

17. All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.

18. The constitution of Ganga Management Board is necessary for the purpose of irrigation, rural and urban water supply, hydro power generation, navigation, industries. There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48-A and 51A(g) of the Constitution of India.

19. Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared *persons in loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.

20. The Advocate General shall represent at all legal proceedings to protect the interest of Rivers Ganges and Yamuna.

21. The presence of the Secretary, Ministry of Water Resources, River Development & Ganga Rejuvination is dispensed with.

22. Let a copy of this order be sent by the Registry to the Chief Secretary of the State of Uttarakhand forthwith.

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