

OPINION –EX PARTE

Querist : The Dow Chemicals Company (TDCC)

Through: Dua Associates

The Querist is one of the largest chemical companies in the world incorporated in the United States of America and has annual sales turnover of about US\$ 46 billion and about 42,000 employees in 175 countries.

The Union Carbide Corporation ("UCC"), a company also incorporated in the United States of America had established a company in India known as Union Carbide India Ltd. ("UCIL") to manufacture pesticides in India. UCC held 50.99% shares in UCIL. UCIL had a plant in Bhopal on the land leased to UCIL by the State of Madhya Pradesh. The plant was using Methyl Isocyanate (MIC) for manufacturing pesticides and due to leakage of MIC from the said plant in December, 1984 about 4000 people died in Bhopal and about 1,86,000 people suffered injuries in

varying degrees. The site was completely closed after the night of the accident in 1984 and the same is in custody of the CBI since then. The Government of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 to conduct litigation on behalf of the victims. The Union of India filed a suit in the appropriate civil court in Bhopal against both UCC and UCIL claiming 3.3 billion US Dollars as compensation for the victims. The civil proceedings have been settled and the settlement was recorded by two separate orders of the Supreme Court dated 14th and 15th February, 1988. By an order dated 4th May, 1989 the Supreme Court recorded its reasons as to why it had approved the said settlement.

Review Petitions were filed by NGOs for the review of the Settlement order on legal/constitutional grounds. The Supreme Court vide its Judgment and Order dated 3rd October, 1991 upheld the validity of the Settlement

Agreement between UCC and Union of India except that one of the terms of the settlement which provided for grant of immunity to UCC and UCIL from future criminal prosecution and quashing of existing criminal proceedings at the trial court in Bhopal, was set aside.

Thereafter criminal proceedings were commenced against UCC, UCIL, Union Carbide Eastern Ltd. (UCE) and certain officers of UCIL. The offence alleged was culpable homicide not amounting to murder under Section 304 of the IPC. This charge was modified by the Supreme Court to the offence of causing death by negligence under Section 304A of the IPC. UCC, UCE and Warren Anderson have till date not participated in the criminal trial at Bhopal. Since they did not appear in the said prosecution even though they were named as accused, UCC, UCE, and Warren Anderson are declared to be as proclaimed absconders under Section 82 of Criminal

Procedure Code, 1973 (CrPC) and in the year 1992 an order for attachment of their properties/assets in India was passed under Section 83 of CrPC.

The said order of attachment dated 30th April, 1992 was subsequently partially modified by the Supreme Court vide its order dated 14th February, 1994 permitting UCC to sell its equity stake in UCIL with a condition that the sale proceeds would be kept in an escrow account with the State Bank of India. Accordingly, the shares were duly sold to McLeod Russel Ltd., and as a result UCC ceased to hold any shares in UCIL from September 1994.

During the period the UCIL was functioning it had stored hazardous waste in drums. In addition NEERI Report states that a certain quantity of waste and hazardous material had seeped into the soil, and the soil, therefore, was required to be cleaned to render it safe, particularly as there was an apprehension that in course of time, the

material which had already penetrated the soil may enter sub-strata water streams and/or aquifers.

After the sale of UCC's shares in UCIL, the State of Madhya Pradesh vide its Order dated 7th July, 1998 cancelled the lease of the land on which the plant/factory of UCIL was situated and the land was surrendered to the State of Madhya Pradesh. On 3rd August, 1999, Transition Sub Inc. (a wholly owned subsidiary of the Queriest) merged into UCC, which was approved by the requisite authorities on 7th February, 2001 and thus UCC has become a wholly owned subsidiary of TDCC. It is pertinent to state that UCC survived the merger continues to be a New York Corporation and a separate legal entity with its own assets and liabilities.

In July 2004, a Writ Petition bearing No. 2802/2004 was filed on behalf of one Mr. Alok Pratap Singh before the High Court of Judicature of Madhya Pradesh at Jabalpur

for the remediation and clean-up of the hazardous waste lying at the Bhopal factory of the erstwhile UCIL and to hold the querist responsible for "causing environmental pollution and pass suitable orders against the company i.e. the Querist to assume the undischarged liabilities of Union Carbide for continuing and long term impact of the disaster"

In the light of the above mentioned facts my opinion has been sought on the following

Q.1) If the corporate veil is pierced, whether, TDCC who had no stake whatsoever and who neither owned the shares of, nor controlled either UCC or UCIL during the Bhopal Tragedy in 1984, could be held responsible or liable for the gas leakage in 1984, i.e Can TDCC be held as a successor in business of UCC in the eyes of law post merger (which happened 16

years after the event) such that UCIL/UCC liability devolves on TDCC?

The Bhopal Gas Tragedy occurred in December 1984, the alleged polluter at the time of this catastrophe is UCIL. The constitution of UCIL at this time was UCC held over 50% shares and the rest of UCIL was owned by institutional investors.

The Supreme Court vide its order dated 14.2.1994 permitted UCC to sell its equity stay in UCIL on the condition that the sale proceeds would be kept in an escrow account with the State Bank of India. Accordingly the shares were sold to McLeod Russell Limited and as a result UCC ceased to hold any shares in UCIL. The Querist is a company incorporated in USA. The Querist was a totally distinct corporate entity in USA pre-existing the Bhopal Gas Tragedy. The Querist had a 100% subsidiary qua Transition Sub Inc. On 3rd August 1999 Transition sub Inc (a wholly owned TDCC subsidiary) merged with UCC which was approved by the requisite authorities on 6th February 2001 and thus became a wholly owned subsidiary of TDCC. Further even after the

said merger , UCC survived the merger. Post merger UCC continues to be a distinct and separate corporate entity under US laws and has its own employees, assets and liabilities.

There has been a plethora of litigation in respect to the Bhopal Gas Tragedy. The Union of India filed a suit in the appropriate civil court in Bhopal against UCC and UCIL claiming 3.3 billion dollars as compensation for the victims. The civil proceedings have been settled and the settlement was recorded by two separate orders by the Hon`ble Supreme court dated 14th and 15th Feb 1989 and by an order dated 4th October 1991 the Hon`ble Supreme Court upheld the validity of the Settlement Agreement between UCC and UCIL from future criminal prosecution and quashing of existing criminal proceedings.

There are criminal proceedings against UCC, UCIL and Union Carbide Eastern, Warren Anderson and certain officers of UCIL. UCC, UCIL and, Warren Anderson have till date not participated in the Criminal trial at Bhopal and are declared to be proclaimed absconder under section 82 of the Code of Criminal Procedure. Post this there were orders of attachment issued on 14th February 1994, permitting UCC to sell its equity stake in UCIL on the

condition that the sale proceeds would be kept in an escrow account. Accordingly the shares were duly sold to McLeod Russell and as a result UCC ceased to hold any share in UCIL.

In the light of the above developments and sequence of events it can be concluded that the Querist had no nexus with the Bhopal Gas Tragedy directly or indirectly. The disaster occurred in 1984 and since there has abundant litigation for the same. The Querist was a non-dependent pre-existing corporate entity. UCIL and UCC were independent corporate entities totally unconnected with the gas disaster in any way. UCC was not in charge of the plant at the time of the disaster and was neither a continuing share holder or interest in UCIL. Under Supreme Court order dated 14th February 1994, UCC divested all its interest and control in UCIL and therefore bears no nexus with UCIL.

Therefore it can be concluded that the Querist is not connected with the Bhopal Gas Tragedy in any manner what so ever. Even after the merger between the Querist and UCC in 2001, they continue to exist as separate legal corporate entities recognized under law. The fact that UCC is a subsidiary of the Querist does not detract from

the legal position that they are both independent corporate entities. In *Solomon v Solomon* (1897 AC 22) it was well established that a corporate entity should be treated distinct even from its shareholders. However in England the law relating to corporate veil is more restricted.

However it is important to note that if the corporate veil is lifted it is not the concept of limited liability that disappears. The main intention of the court to pierce the corporate veil is ascertain who was the real person or entity controlling a particular enterprise at the relevant time. If this test is applied to the Querist, it is difficult to see how the Querist could be held liable as they had no nexus at the relevant time of the disaster and did not control either UCC or UCIL at the relevant time.

Further the assets of the Querist can only involved if the courts resort to multiple piercing of the corporate veil. It can be concluded from a catena of judgements that when the corporate veil is pierced courts look at the commercial reality rather than the corporate personality.

Seth J used the phrase "real control" in *Union Carbide v Union Of India* in the civil revision application No.26 of 1988 . The criteria relied by him is however to establish commercial reality. The concept of control is thus merely

the consequence of tearing the corporate veil. The test must be WHO RUN THE COMPANY?

In light of the above discussion, the possibility of holding the Querist responsible for the actions of its subsidiary for a disaster that occurred 22 years ago at UCIL's plant and that too in which the subsidiary UCC has divested all shareholding since 1994 is a rather remote and bleak possibility.

Lastly there is no concept of successor in business in law. There may be a successor in interest but it has to be by specific contractual agreement or by operation of law. In the present case there is neither specific contractual agreement nor any operation of law, which ipso facto makes the Querist the successor in business or successor in interest to UCC/UCIL in relation to the Bhopal Gas Tragedy.

Q.2)If the answer to the above discussion is in the negative then ,in the circumstances ,whether TDCC can be held liable for the alleged contamination and the consequent cleaning up at the Bhopal site (which has not yet been cleaned up by UCIL or Madya

Pradesh Government and is allegedly contaminated as per various reports including the NEERI report)?

The answer to the first query is in the negative hence it can be consequently concluded that the answer to this query is also in the negative.

The matter relating to the same issue i.e regarding the Plant Site Remediation is pending in the US District Court which has already been the subject of several US court orders. In January 2000, certain plaintiffs filed cases in the in US District Courts relating to the contamination involving the Bhopal Disaster. The defendant to this action was UCC. In August 2000 the US District judge dismissed the suit that that plaintiffs had no locus standi to move American courts. In November 2001 the US Court of Appeal confirmed this order of the US District Court.

The US District Judge `s order dated 18th March 2003, granted UCC`s motion to dismiss the cases, specifically observing that the UCC has met its obligations to clean up contamination in and near Bhopal units. The US Court of Appeal`s order dates 17th March 2004 gave liberty to the plaintiff to approach to the District Court with the observation that *"we believe that the District court should*

be free to revisit its dismissal of the plaint for plant site remediation in the event that the Indian Government or the State of Madhya Pradesh seeks to intervene in this connection or otherwise urges the Court to order such relief".

Following these directions the on June 7th 2004 The Government of Madhya Pradesh has given a no objection to the Government of India which in turn on June 28th 2004 has given a no objection to the District Court of United States stating that they have no objection to the plant site remediation so far as they are not held liable to do so and UCC is held liable for it.

Further on 28th June, 2004 the Government of India sends a "No Objection" letter to Judge Keenan. Vide the letter the Government of India categorically stated that UCC should be responsible for any loss/damage caused to life and property and should be responsible for remediation of the plant site. Further neither the State Government nor the Union of India have waived their sovereign immunity. Vide order dated 10th August 2006 the United States Court

of Appeals for the Second Circuit held that the dismissal of Bi's claim for property damage was proper

Therefore it can be inferred that the Querist in any event cannot be held liable in any manner for the plant site remediation. The issue of UCC's liability in this respect is not conclusive by the US Courts.

In 1995 W.P.No.657/1995 was filed under Article 32 of the Indian Constitution in the Apex court against the import of toxic waste and or the existence of toxic sites in India allegedly constituting hazard to life and environment. In these PILs the Apex Court constituted a high-powered committee to examine all the matters relating to hazardous waste all around India. Subsequently the Supreme Court Monitoring Committee (SCMC) has given a large number of directions that they have fully seized of the matter. The Bhopal sites have also been covered under the ambit of these matters. Various periodic reports have been given to this effect, particularly the third quarterly report of the SCMC shows that the SCMC and hence Apex court are fully seized of the matter of the plant site remediation in respect to Bhopal.

Hence the Querist is entitled to content that unless the Supreme Court gives a categorical direction on the plant site remediation at Bhopal in respect to the Querist, the Querist cannot be made liable in any manner.

However it can be concluded in the light of the above factual matrix, the Querist cannot be treated as responsible or liable directly or indirectly or under civil or criminal proceedings for the Bhopal Gas Tragedy 1984.

I have nothing further to add.

New Delhi
December 13th 2006


(ARUN JAITLEY)
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