

Bhopal five years after

The case against Union Carbide enters a crucial phase.



By Rob Jenkins

MORE THAN FIVE AND A HALF years after a yellowish poison gas leaked from the Union Carbide Corp. pesticide plant in Bhopal, India, the hundreds of thousands of permanently disabled victims and relatives of the dead are finally getting their day in court. This month the Indian Supreme Court will consider their petition to invalidate the \$470 million court-initiated "settlement" to which the previous Indian government, acting on the victims' behalf but against their wishes, had acceded in February 1989. If the review petition sways the justices, the original suit against Union Carbide, pre-empted by the court-ordered settlement, could resume in a lower court.

Ever since 1985, when Parliament passed a law making the Indian government the official legal representative of the claimants, there has been widespread fear that the victims would get sold out in a backroom deal. After all, leaders of the Congress Party, which was in power from 1980 until last November's general election, enjoyed close ties to Union Carbide. Party operatives, for example, had been able to secure jobs at Union Carbide for relatives and supporters. And the Congress government had allowed UCC, the American parent company, to hold a 51 percent stake in its subsidiary, Union Carbide India Limited (UCIL), thereby skirting laws that limit foreign firms to 40 percent ownership of their Indian subsidiaries.

Moverover, the Congress-controlled state government failed to enforce industrial regulations of the Union Carbide plant, and what exactly went on at the company's separate research and development facility in Bhopal remains largely a mystery. These sins of omission were augmented by actions that further endangered the community. In a fit of populist pandering during an election campaign, Arjun Singh, the former Congress Party chief minister of Madhya Pradesh, the state in which Bhopal is located, granted land rights to the squatters who had erected a shantytown in the shadow of the Union Carbide plant. These people were among the first to inhale the escaped methyl isocyanate that killed—depending on the estimate—from 2,500 to 8,000.

Impropriety: As the case dragged on, critics became increasingly convinced that Rajiv Gandhi's government, voted into power to succeed his martyred mother only a few weeks after the lethal leak occurred, was not interested in bringing all facts to light before a court of law. Thus, when the government proclaimed that it was duty-bound to obey the court's extremely unor-

thodox \$470 million settlement order, victims' groups and opposition parties believed their long-held suspicions had been justified.

Large protests were staged throughout India. Many observers believed that the actions of the Supreme Court and the Indian government—not to mention the provisions of the settlement itself—were so far afield with standard judicial procedure that nothing but a collusive effort to let Union Carbide off the hook could explain them.

For example, the Supreme Court was supposed to rule on only the narrow question of whether to uphold a lower court ruling that forced Union Carbide to provide an interim level of compensation before the case went to trial. "It was the duty of the court to either uphold or overturn that judgment and to give written reasons," says Clarence Dias of New York City's International Center for Law in Development. "It exceeded its powers when, instead of doing so, the court proceeded to impose upon the Bhopal victims a settlement without their participation or consent and against their expressed wishes." And, as if this overstepping of bounds weren't suspicious enough, the settlement terms barred any future criminal prosecution against Union Carbide officials.

Despite these irregularities, there is no hard evidence demonstrating Supreme Court complicity in arranging a doctored settlement. But Dias argues that at the very least the situation had the appearance of impropriety. The chief justice, it seems, was not completely independent. Not only did he play a leading role in imposing a court-ordered settlement—effectively shielding the government from charges of corruption—but "he did this in the very same month when he sought and obtained the executive's nomination to a seat on the International Court of Justice," Dias explains. "Surely, Chief Justice [R.S.] Pathak should have stepped down from the bench when he was seeking a favor from the plaintiff in the case, namely the Indian government."

The case's tenor changed last December with the departure of Gandhi's scandal-plagued government. The new prime minister, Vishwanath Pratap Singh, a former member of Gandhi's Cabinet, currently heads a precarious minority coalition. Despite this political instability, within three months of taking office Singh's National Front government arranged the first large-scale distribution of funds to the victims since the 1984 gas leak, something Gandhi was either unable or unwilling to accomplish during his five-year term.

What amazes people like Rob Hager, a public-interest lawyer in Washington, D.C., who has represented Bhopal claimants in state and federal suits in the U.S. and has filed an amicus brief in support of the victims' petition to the Indian Supreme Court, is that the victims have to go through the review petition process at all. "When the court finally allowed the victims to speak, they clearly stated that they didn't accept the settlement agreed to by the Gandhi government," he says. "And while the

court was deliberating on the constitutionality of the law that made the government the victims' representative, a new government came into power with a new policy. Any party to a settlement is allowed to change its mind, as long as they do it before the final order is handed down."

The Indian government privately agrees with this legal interpretation, but it is constrained by the need to bolster its image in the eyes of the international business community. A source close to the case who requested anonymity says that India wants to bend over backward to avoid seeming political in its handling of the case. "We do not want it to look like there is no continuity from one government to the next," the source says. "We cannot attract foreign investors if they think commitments will be broken when power changes hands."

As a result, the Indian government is operating on three fronts simultaneously. First, government lawyers are working with the victims' groups to strengthen the arguments presented in their Supreme Court petition. At the same time, they are researching various aspects of American law to demonstrate that the Supreme Court review is nothing out of the ordinary in either U.S. or Indian law, and that Union Carbide is therefore receiving due process. And, finally, the government is investigating the potential for new litigation in U.S. courts, where awards for personal injury and wrongful death are much greater than in India.

Man with a mission: These issues topped the agenda of a recent two-week visit to the U.S. by Indian Attorney General Soli Sorabji and his legal team. Sorabji insists that the government is not attempting to increase the settlement offer. His mission, he maintains, is to point out the fundamental flaws contained in the agreement. Consequently, the central premise of the victims' petition is that the number of victims on which the settlement was based grossly undercounts the number of dead and injured. More than 17 studies on methyl isocyanate's long-term effects were submitted as appendices, along with a supporting affidavit. While visiting the U.S., Sorabji was presented with a report issued by the National Toxics Campaign Fund, a Boston-based environmental group. On the basis of lab tests, the researchers concluded that several toxic substances were still found in the Bhopal environment, raising further questions about the disaster's long-term effects.

The Indian legal team's consultation with their Minneapolis-based lawyers confirmed their belief that no precedent exists in U.S. law for granting criminal immunity to defendants in a civil action. The attorney general also stated that he was not aware of any settlement of a U.S. class-action suit that did not include a hearing for the victims. Clearly playing to an international audience, Sorabji added that Union Carbide efforts to portray the review petition as some kind of political manipulation of the legal system were completely un-

found because rehearings in the U.S. Supreme Court are an established procedure.

As for a return appearance in the U.S. courts, the Indian delegation was encouraged by public-interest lawyer Rob Hager to capitalize on Union Carbide's fear of such a scenario. The Bhopal-related litigation in the U.S., consolidated under U.S. District Court Judge John Keenan in 1985, was dismissed in 1986 because the U.S. was deemed an "inconvenient" forum for the suits. This was a major victory for Union Carbide. Ironically, if the victims' petition succeeds in voiding the settlement order and Union Carbide does indeed cry foul, it would increase the possibility of a return to the U.S. courts.

Regardless of what happens to the victims' review petition in India, Hager, as well as the Bhopal Justice Campaign (BJC), a Los Angeles advocacy group with whom he has worked, both emphasize the need to continue pursuing litigation in the U.S. "Punitive damages against Carbide can only be awarded by a U.S. court," says BJC's Joanne Doroshaw.

Because of legal developments over the past couple of years, the state courts have emerged as the plaintiff's most promising line of attack. In 1988, the U.S. Supreme Court ruled in the *Chick Kam Choo* case that a federal court's dismissal of a case on grounds of "inconvenience"—this doctrine, the same one used by Judge Keenan, is called *forum non conveniens*—does not bind a state court judge. Nevertheless, a separate suit filed by Bhopal claimants in Texas state court was dismissed without explanation later in 1988.

Despite that setback, Hager and Doroshaw still see California and Texas as the best prospects for litigation. As evidence, they both pointed to a decision handed down on March 28 by the Texas Supreme Court that repudiated the doctrine of *forum non conveniens* in personal injury or wrongful death suits filed by foreigners. "Judge [Lloyd] Doggett, who wrote the concurring opinion, decided, rightly, that *forum non conveniens* had become a tool for arbitrarily dismissing cases," Hager says.

The other benefit to litigating in state courts, Hager adds, was that the plaintiffs were no longer subject to the ideological slant—which tends to be highly conservative and pro-business—of the judicial panel responsible for assigning multidistrict litigation to a circuit court judge. "The selection of Judge Keenan," Hager argues, "was not an accident."

PR case study: The slippery dissembling exhibited by Union Carbide and the Gandhi government illustrates both the value and the limits of shrewd public relations—that is, they each got away with more than would have seemed possible, though in the end neither could escape democracy's tempering effects.

Union Carbide's behavior since the Bhopal gas leak was, in the words of an Indian journalist, "a model of self-serving deceit." Indeed, the record is full of egregious examples. For instance, shortly after the disaster the company insisted that it had not maintained lower safety standards in India than at its American plants. When this position backfired by igniting fears that a similar accident could happen in the U.S., Union Carbide officials reversed themselves, listing safety systems and procedures used in the American plant that were absent in Bhopal.

In the gas leak's immediate aftermath, as physicians attempted to treat the sick and dying, company officials refused them access to internally produced studies on methyl isocyanate's effects, calling the research a "trade secret." And literally adding insult to injury, Union Carbide demanded that \$5 million in relief aid it had sent while the case was still in the U.S. courts be counted as part of the \$470 million settlement order, although it had originally claimed the money was a humanitarian gesture with no strings attached.

Yet, amid all these tactical advances and retreats, Union Carbide has weathered the storm with a crack public-relations campaign that shows no sign of letting up. At April's annual shareholders' meeting, for instance, the company waged a deliberate campaign to misrepresent the status of the Bhopal-related litigation. The carefully worded proxy statement declared that "Union Carbide and its legal counsel in the U.S. and India believe that the settlement is final and that no basis exists to set it aside." But surely they don't "believe" that at all. They know that the matter is under review by the Indian Supreme Court and that the deal could easily collapse.

Thanks to the U.S. media's general willingness to swallow the bait, many Americans are under the impression that the case is over. Given that Union Carbide's stock increased sharply on the day the original settlement order was announced in February 1989, it is not hard to discern why the company is eager to promote the appearance of finality.

For its part, the Gandhi government was able to escape broad international criticism by building its public-relations campaign around the perception of India as a down-and-out Third World government valiantly protecting its citizens. It was aided by a flattering comparison: Gandhi and his Indian legal team could seem only virtuous when viewed alongside the maudlin image of private U.S. attorneys combing the streets and hospitals of Bhopal in an effort to drum up clients.

To make things worse, in early 1986, shortly before the "forum" ruling sent the case to India, American lawyers, fearing they would end up with nothing if the case left the U.S., urged the Indian government to accept a new Union Carbide offer of \$350 million. The government, which had good reason to want the case back in India, where it could be more easily manipulated, was able to strike a moral pose by denouncing the settlement as absurdly low and the American lawyers as insatiably greedy.

Justified vilification: Yet Gandhi's strategy was undone by the strength of India's democracy. Advocates for the victims used India's relatively open political process to pressure the government not to cut a deal with Union Carbide. Sit-ins, rallies, street plays and other forms of demonstration kept the case in the public arena. Later, to protest the outrageous settlement, the entire opposition twice walked out of the lower house of Parliament. Ultimately, the electorate ousted Gandhi's Congress Party because

corruption had become pervasive.

Back when he was still being called "Mr. Clean" because of his late entry into politics, Gandhi could be given the benefit of the doubt in his handling of the Bhopal case. But his other activities soon began to color public opinion. Above all, people simply could not believe that a party as opportunistic as the Congress under Rajiv Gandhi—if it really had nothing to hide—would not milk the tragedy for all it was worth. For Gandhi, who has used even the shakiest of evidence to discredit his enemies, to let such a chance for political gain slip by appeared deeply suspicious. Here was a case where the enemy was real, where vilification would have been not only easy but justified—a once-in-a-lifetime opportunity. And the Congress party was not going to exploit it?

For Union Carbide, the limits of public relations are not yet as clear. Unlike the Gandhi government, the company's survival is not subject to referendum. Financially, it has so far come away virtually unscathed (1988 was a record year for earnings, at \$4.88 a share). Yet, in the long run, the Bhopal incident catalyzed a full-fledged movement to hold Union Carbide responsible for both its past and present.

According to David Dembo, director of the Bhopal Action Resource Center in New York City, opposition to Union Carbide's activities is more united than ever. Dembo is co-author of a recently released book, *Abuse of Power*, that portrays the Bhopal gas leak as a natural extension of Union Carbide's 72-year history of corporate irresponsibility. "The more you learn about Carbide's past, the clearer the pattern of abuse becomes," he says.

If Union Carbide finds itself under increasing scrutiny, much credit must go to the deluge of information that followed the Bhopal disaster, Dembo argues. "They can't make a move without someone starting up a protest and spreading the word," he says.

A concrete manifestation of this solidarity is the Coalition for a Responsible Carbide, which consists of environmental and citizens groups from around the U.S. At the April shareholders' meeting, the coalition held a press conference at which it presented research indicating that "toxic waste at several Union Carbide facilities has actually increased in the last year." Also at the press conference was John Blair, whose group forced the Union Carbide plant in Henderson, Ky., to release information on chemical use and storage at the site. This was the first time a company was challenged for refusing to comply with community requests for information under Title II of the Superfund Amendments and Reauthorization Act. Public-relations victories notwithstanding, Union Carbide is feeling lots of pressure.

Perhaps the most important point made by the Singh government is that holding multinationals accountable for their actions will not slouch the flow of foreign investment. Despite its incessant whining, Union Carbide continues to operate in India. And with Pepsi-Cola, Corning, Bechtel, DuPont and a host of other American companies setting up joint ventures, business is expected to boom.

If the Indian Supreme Court rules in favor of the Bhopal victims, it is unlikely that any of these companies—except perhaps Union Carbide—will pull out of the country. What they likely will do, however, is act with caution and treat the government and the people of India with newfound respect. □ Rob Jenkins is a Cambridge, Massachusetts-based writer.