

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

PETITION FOR SPECIAL LEAVE TO APPEAL NO. 8717 OF 1988

IN THE MATTER OF

UNION CARBIDE CORPORATION

(Petitioner)

versus

UNION OF INDIA

(Respondent)

AFFIDAVIT

I, John Macdonald, Assistant Secretary of the Petitioner with an office at 39 Old Ridgebury road, Danbury, Connecticut USA, do hereby solemnly affirm and state as follows:

1. I am the Assistant Secretary of the Petitioner and am competent to affirm this affidavit. I have gone through the counter affidavit filed by the Respondent in reply the Special Leave Petition.

2. The Special Leave Petition was filed by the Petitioner and was served on the Respondent's Advocate on 9th August, 1988. The counter affidavit, on behalf of the respondent Union of India was received by the counsel for the Petitioner in India on Friday 2nd September, 1988. This affidavit is being filed, in view of certain patently incorrect statements of fact made in the counter affidavit. The Petitioner is only dealing with some of the patent misstatement of facts by the Respondent, and this affidavit is not in reply to the other adverse allegations made in the said counter affidavit. Under the circumstance whatever has not been specifically admitted herein is to be deemed as denied.

3. In paragraphs 1 and 2 of the counter affidavit it has been falsely alleged that the Petitioner has not come with clean hands, and that the Petitioner, has misrepresented or suppressed facts. This is wholly incorrect. There is no question of suppressing any facts, as alleged or at all. All material facts have been stated. In view of the order passed by the learned District Judge on 17th December, 1987 on his sou motu proposal purporting to pass an order in exercise of inherent powers under section 151 of the CPC (without any application by any party in that behalf), an unprecedented situation had arisen. In view of the contention urged by the Respondents in the Revision Petition before the High Court, that the High Court has no jurisdiction to interfere with the District Court order under section 115 of the CPC, Special Leave Petition had to be filed out of abundant caution as the

District Court Judgment (*sic*) was reserved and delivered only on 4th April, 1988. The filing of the Revision Petition and its hearing were clearly mentioned in the Special Leave Petition filed on 16th March, 1988. There was no question of suppressing any facts, as alleged.

5. (*sic*). Allegations made in paragraph 3 of the counter affidavit that :

It was never contended by the Respondent before the Hon'ble High Court during the course of arguments, orally or in writing, that Revision under section 115 CPC was not maintainable. It is an untrue statement.

This is completely disingenuous, misleading and incorrect. The next sentence in the same para

It was urged inter alia that no ground exists under section 115 of CPC. Not a word was uttered before the High Court regarding maintainability of the Revision. The Petitioner never sought a direct answer to the said point from the High Court.

clearly shows that it was urged on behalf of the Respondent, Union of India, that the High Court ought not to interfere under section 115. In the circumstance, paragraph 3 is incomprehensible, meaningless and has no substance. In fact, the learned Attorney General on behalf of Respondent, Union of India, argued against the maintainability of the Revision Petition and the powers of the High Court under section 115 of the CPC citing the following authorities AIR 1973 SC 1334, AIR 1966 SC 439, AIR 1964 SC 1341 at 1347. The Petitioner UCC also cited inter alia AIR 1968 SC 1355 at 1358.

6. The incorrectness of the above submission is also established by the Special Leave Petition filed by the Union of India from the Judgment and Order of the High Court, where in paragraph 131 at page 213, the following ground No. 2 appears

The High Court overlooked that in a revision under section 115, CPC, it could interfere with the order of the Trial Court only if the order is without jurisdiction or the Trial Court has failed to exercise jurisdiction vested in it by law, or where its order is vitiated by illegality or material irregularity in the exercise of its jurisdiction, and when these requirements have been satisfied, the High Court could not interfere with the order of the trial court to any extent.

Again, in paragraph 2 of said Special Leave Petition of the Union of India, it has been stated at under :

It is respectfully submitted that the order passed by the High Court of Madhya Pradesh, Jabalpur, raises following important questions of law :

(a) Whether the High Court in the exercise of its Revisional Jurisdiction could interfere with the order of the District Court

in relation to the quantum of the interim relief which is within the discretion of the District Court."

7. With reference to paragraph 4 and 5 of the counter affidavit the petitioner submits that the Revision Petition MCC 172 of 1988 was filed in the M.P. High Court, in view of the settled law (see AIR 1964 SC 377 at 380) that if there are any factual errors in the Judgment, the Petitioner ought first to approach the High Court and not make a grievance of it in the Special Leave Petition without doing so. The contentions and allegations in the said para 4 and 5 of the counter affidavit are incorrect and denied.

8. (a) With reference to the allegations made in paragraph 6 read with certain allegations at page 17, as part of paragraph 5 (though wrongly numbered as sub para 5), of the said counter affidavit dealing with the alleged production of 500 claim forms the correct position is as under :

(b) At the commencement of the hearing of the suo motu application, the Petitioner, UCC, on 7th December, 1987, filed, I.A. 28/88 (copy of that application in Annexure K at page 342 of the Special Leave Petition of Petitioner UCC). Paras 2, 3 and 4 of the said application are as under :

2. There is no mention anywhere on record at all to indicate the claimants in need of interim relief.
3. It has however been pointed out in the submission filed today (a copy of which was served on the Union of India and State of Madhya Pradesh and filed in Court of December 5, 1987) that it has been officially disclosed by the Government last month that administratively the Directorate of Claims has so far processed about 7,000 claims out of the totality of claims allegedly received—and that to process the remaining claims will take 4 years more.
4. To enable the Court to be appraised of the factual position it is essential in the interest of justice that the said 7,000 claim forms (though admittedly not under the Scheme) and the nature and result of the processing (including medical reports) be forthwith disclosed in Court before the Court's "proposal" is determined by an adjudication, as indicated in the Court's order dated 27-11-1987.

(c) No reply was given by the Respondent to this application for furnishing particulars. However, the Respondent, Union of India in "reply to the response of defendant of the proposal of the Court dated April 2, 1987" filed a reply before the District Court on 8th December, 1987. The facts stated in IA 28/88 were referred to in that reply. [The said reply is at Annexure J. page 340 of the Petitioner (UCC's) Special Leave Petition]. It was stated in paragraph 4 and 5 of the said reply :

4. It is respectfully submitted that this Hon'ble Court has ample power, even if the parties do not apply to grant interim relief in all appropriate cases, including the present case. The Court

can pass such an order if it is prima facie satisfied that such an order is necessary to the ends of justice. It is not necessary that the victims should be identified before interim relief can be granted to them. Reference to the Act and Scheme is besides the point.

5. The statement in the defendant UCC's submissions that it was stated in Parliament that the State Government of Madhya Pradesh has processed so far only 7000 cases of victims and that it would take 4 more years to process the rest, is incorrect. The correct figures as stated in Parliament will be placed before this Hon'ble Court after obtaining a certified copy of the statement from Lok Sabha. However, the figure is in the neighbourhood of 60,000 and the time expected to process the remaining claims in about a year or so.

(d) During the hearing in the High Court of the Revision Petition No. 26/1987 certain further facts were revealed which were set out in the review petition No. 229 of 1988 as under :

5. RE : POINT-III

- 5.1 During the course of arguments by UCC, it was brought out that the *Plaint*, as originally filed by the Union of India, did not contain either any figure of damages claimed or the number of victims alleged to have been injured. Even in the amended *Plaint*, no particulars were furnished as the nature of injuries, the medical treatment or the quantum of damage claimed for the alleged victims. What had been furnished by the Union of India up to date were only computer sheets (partly cut) which contained the names and addresses of victims who were alleged to have died and names and addresses of other alleged claimants on account of personal injuries-retaining with them and not furnishing the other part of the computer sheets. Even after over three years, neither the Petitioner, UCC, nor the Court, has been given any information or particulars about the nature and extent of the alleged injuries or the medical treatment given or the amount of damage claimed or suffered. It was also pointed out by the counsel for UCC that before the suo motu order was passed by the District Judge on 17th November, 1988, UCC had made an application IA No. 28. In this application UCC had asked for information of the type mentioned above, including medical records, and the nature and result of the claims processed. It was then contended by the Union of India that they had processed claims in the neighbourhood of 60,000 and not 7,000 as stated in UCC's said application. On 2nd February 1988 (during oral arguments) the learned judge asked the Attorney General to furnish the details of claims already processed or registers prepared, and the break up, if any, to Court. It was

stated on behalf of the Union of India that this would take a few days and the aforesaid information would be made available. The hearing which commenced on 1st February, 1988 went up to and inclusive of 5th February, 1988, was adjourned for further arguments to 17th February, 1988. In spite of the aforesaid break, the aforesaid information has not been made available to the Court, nor copies thereof supplied to UCC.

- 5.2 It is respectfully submitted that this is a material omission which does not find a place in the judgment and has been wholly overlooked.
- 5.3 It is, therefore, submitted that the fact that the court itself had asked for the details of the claims already processed or registers prepared and the break up if any, and that it was not furnished should be recorded.

(e) In the reply dated 29.6.88 to IA No. 35, filed by the Union of India before the District Judge, Bhopal the Petitioner, UCC, stated in paragraph 12 and 16 stated as under :

12. The Union of India has also consistently refused to furnish any information whatever either to the Defendant or to the Court with respect to the number of persons affected, the nature of injuries, the number of persons in the various categories mentioned in the statutory Scheme and the quantum of compensation claimed by individual claimants and the heads, under which such claims for compensation have been made. It has also deliberately chosen to ignore and not comply with the provision of the statutory Scheme framed under the Act. Although the claim forms have been with the Union of India for more than 2 years, the Plaintiff Union of India has consistently refused to supply any information whatever with respect to the specific nature of the claims made, the specific injuries suffered and any treatment obtained or other details.
16. With further reference to para 11 of the application, it is of great significance to mention that while furnishing additional particulars of claims, as directed by the Court, the Plaintiff Union of India has merely furnished some information as to claims made by the Central and State Governments and their instrumentalities approximating the Rs. 146 crores whilst suppressing and not furnishing any details whatsoever with regard to individual claims. (The claims of the State Government includes a claim made by Madhya Pradesh Tourism agency). With regard to individual claims, the deliberate nature of the suppression is apparent from the fact that whilst stating that they were furnishing computer sheets of claim forms the Union of India deliberately cut out the relevant portion of the computer sheets and furnished only the names and addresses of the

claimants—despite statements made in Court repeatedly that they will produce the remaining part of the computer sheets, till date they have not been provided.

In response to that reply the Respondent Union of India by its Rejoinder dated 29th July, 1988 stated as under :

16. With respect to para No. 12, the plaintiff has never refused to furnish the relevant information relating to the nature of injuries suffered by the gas victims. The plaintiff only said that the processing is going on and when completed, the full material would be placed before the Court. Even when the said allegation was raised on 2.2.1988 before Hon'ble the High Court during the arguments in Civil Revision No. 26/88 about 500 claims were brought to the Court but the defendant did not insist on the learned Judge looking into them. As regard the scope of the Bhopal Act and the Scheme, Hon'ble the High Court has elaborately considered the provisions and has by detailed analysis explained the same....
20. With respect to the allegations in para No. 16, whether the plaintiff furnished particular as directed by this Hon'ble Court or not is for this Hon'ble Court to decide and in any event the claim is totally irrelevant for this petition, if there is any grievance with regard to non-production of claims it can be raised at appropriate time.

(f) In view of the totally incorrect statements for the first time made in paragraph 16 of the said Rejoinder dated 29th July, 1988 the petitioner UCC filed its sur-rejoinder dated 29th July, 1988, and the paragraphs 2, 3 and 4 set out the correct facts. These paragraphs are as under :

2. It is alleged in para 16 of the Rejoinder that before the Hon'ble High Court of Madhya Pradesh, during the hearing of Civil Revision No. 26 of 1988, about 500 claims were brought to the Court but the defendant did not insist on the learned Judge looking into them. It is further averred in the said para 16 that the plaintiff only said that the processing is going on and when completed, the full material would be placed before the court....
4. It is submitted that the correct position in this regard is that in the course of arguments urged on behalf of the Defendant, UCC, in the High Court, it was specifically brought to the notice of the Hon'ble Court that the Defendant has filed I.A. No. 28 in this Hon'ble Court for production of processed forms of other information relating to nature of injuries etc. (including Medical Reports) and that no order calling for the records as prayed for has been passed on the said I.A. No. 28. Interrupting the arguments of counsel for UCC, the Hon'ble Judge of the High

Court requested counsel for the Union of India on 2nd February 1988 to produce and file in court details of claims already processed, or registered of the same that had been prepared. Counsel appearing on behalf of the Union of India stated to His Lordship (on February 2, 1988) that this would take some time, but it would be done within a few days. However, no detailed processed claims or registers prepared were ever filed before the High Court at any time. The averments in para 16 of the rejoinder are suggested false and deliberately misleading.

(g) The allegations made for the first time in the counter affidavit under reply at page 3 and page 17 are clearly an improvement upon the version given by the Union of India, as set out in details hereinabove. The earlier version was that

during the arguments, in Civil Revision 27/88 (*sic*) about 500 claim forms were produced before the Court.

Now this version is completely abandoned and it is to be suggested that the Hon'ble Court did not want to go through them. All these allegations made for the first time in the counter affidavit are wholly incorrect and it is a deliberate attempt to mislead this Hon'ble Court. It is incorrect to say that about 500 claim forms were brought to the Court. In fact the respondent Union of India did not bring to the notice of the Court or the petitioner UCC that it had brought to Court 500 claim forms to the Court as alleged.

(h) While disposing of IA 33 (recusal application), the learned District Judge, while dealing with the contention of non-disposal of IA 28 stated in his Order dated 16th June, 1988 as under :

I may make it clear here that on 7th December 1987, a note was made in the Order Sheet, that plaintiff (*sic* it should be defendant) filed IA No. 28. This application was not argued, nor decided. The application naturally remained to be heard. Hence it is not correct to say that IA No. 28 was cryptically disposed of. It was not thought necessary to decide this application, like other applications before hearing on interim relief.

The Respondent UOI did not controvert what was stated in the Review as set out hereinabove. The Review Petition came up for admission on 24th June, 1988, and counsel appeared on behalf of the Union of India and the matter was fixed for final disposal at the admission stage on 22nd July, 1988. Even on the adjourned date, the Union of India did not file any reply to controvert the above facts nor were the facts now alleged for the first time sought to be put on record.

The Petitioner UCC denies allegations in the said counter affidavit which are contrary to or inconsistent with the petition for special leave filed by the Petitioner UCC, as if the same was set out herein and traversed. In regard to some new allegations sought to be made in the counter affidavit for the first time, as there is not time for making any detailed affidavit, the same should not be deemed to be admitted.

DEPONENT

VERIFICATION

I, John Macdonald, do hereby verify that the factual contents of the foregoing affidavit are based on information received regarding the records of the Courts below; the legal submissions made therein are based on legal advice and believed to be true.

Verified at Connecticut on this 12th day of September, 1988.

DEPONENT