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Bhopal: As the Law Develops

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Colin Gonsalves' article "The Bhopal Catastrophe: Politics, Conspiracy and Betrayal" (EPW, 26 June 2010) is neither an accurate narrative of the law nor of the Supreme Court's treatment of the Bhopal Gas Disaster case. This note attempts to set the record straight.

The 7 June 2010 conviction and sentencing of seven accused, in the Bhopal Gas Disaster, has revived the indignation and protest that each judicial episode has generated among the survivors and their supporters. The history of the cases, as dealt with by the Supreme Court is important for understanding what has happened. Among the significant judicial moments is the 14/15 February 1989 settlement order[1] that attempted to entomb the cases against the Union Carbide Corporation (UCC), Union Carbide India Ltd (UCIL), and UC Eastern and officers and functionaries of these companies. On 4 May 1989, following protests about the way the Court had brought the cases to a close, the paltry sum for which the cases were settled and the quashing of criminal cases, the Court resorted to a most unusual manoeuvre of delivering an order explaining its reasons for the settlement order.[2] On 22 December 1989, a challenge to the Bhopal Claims Act 1985 that had been pending from before the settlement order was answered, pragmatically upholding the government's taking over of the litigation from the victims.[3] The review petitions were decided in 1991, in which the criminal cases were revived while the rest of the settlement order was preserved.[4] In 1996, on an appeal by the Indian accused, judgment was delivered diluting the criminal charges against the accused – from a graver culpable homicide not amounting to murder to a diluted charge of rash and negligent act.[5] The 7 June judgment is part of the continuum with these cases. The settlement order of February 1989 has been a brooding presence in all judicial proceedings that have followed, adding complexity to each judicial engagement with the disaster. The law has hardly developed, and so, to the extent that the Bhopal cases provide precedent, they remain in place, and will have to be contested and worked on.

In this process, clarity about the law, and facts, is a prerequisite. The article by Colin Gonsalves, senior advocate, "The Bhopal Catastrophe: Politics, Conspiracy and Betrayal", EPW, 26 June 2010, pp 68-75 unfortunately is not an accurate narrative of the law, or of the Court's treatment of the case. One significant problem with Gonsalves' article is that he confuses the argument of the victims with the decision of the Court. This is a serious error, especially considering that the Court has been challenged time and again by the victims, and that, from the settlement order to the 1996 decision to dilute the criminal charges against the corporate accused, the victims have found themselves let down by the Court.

Gonsalves, for instance, refers to what he considers the "positive aspect of this decision", in the case where the Court reviewed the settlement order at the behest of the victims: he reads the Court as having set aside the quashing of the prosecution while holding that

> the memorandum of settlement…leaves no manner of doubt that a part of the consideration for the payment of $470 million was the stifling of the prosecution, and therefore, unlawful and opposed to public policy.

This is contrary to what the judgment records. In fact, the words Gonsalves' extracts are from the attorney general's argument recorded at page 642 of the judgment. In fact, and in contrast, the Court held:

> On a consideration of the matter, we hold that the stifling of prosecution is *not* attracted in the present case. In reaching this conclusion, we do not put out of consideration that it is inconceivable that the Union of India would, under the threat of prosecution, coerce UCC to pay US $470 million or any part thereof as consideration for stifling of the prosecution. In the context of the Union of India the plea lacks as much in reality as in a sense of proportionality (p 650, emphasis added).

While Gonsalves seems to believe that the Court had revised its order quashing the criminal proceedings because it considered that it was a case of stifling of prosecution, the Court actually said that it was inconceivable that the Union of India could be involved in stifling prosecution!

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This mix up between argument and court's dictum is in other parts of Gonsalves' article, too (e g, discussion in columns 2 and 3, p 70). Gonsalves has also missed another aspect of significance in the way the Bhopal litigation developed. The victims had not been heard when the settlement order was passed. Victims' groups and their supporters filed petitions for the settlement order to be reviewed and set aside. The review petitions were heard and decided only after the challenge to the Claims Act 1985 had been heard and decided – which happened only by 22 December 1989. That same month in 1989, Parasaran, who had been the attorney general through the hearings which led to the settlement order and in the matter of the Claims Act, stepped down since the government had changed. The new dispensation did not follow the route laid out for them by Parasaran and the government that he represented. Soli Sorabjee, the new attorney general, was charged with supporting the stand of the victims. The way the case went after this was influenced in large measure by this change in circumstance. In his second stint as attorney general, Sorabjee was to act in ways that cast a shadow over his role in the Bhopal criminal cases.

Among the more significant developments that the law has seen in relation to corporate accountability is the emergence of the principle of "strict and absolute liability". This was introduced by the Bhagwati court in 1986, using the oleum gas leak in Delhi, and the case in which that was considered, as an opportunity to develop the law. Gonsalves' article is wrong about the strict liability principle, misses the point about absolute liability, and does not evince an awareness of the uses of strict and absolute liability that has crept into the law.

The legal and judicial politics of the Bhopal case is intricate, and the many players who could provide answers to how, and if, corporations can be brought to book are still around and should be asked to speak to what happened, and why it happened the way it did. This requires that we understand, with some accuracy, what happened in the Court in that period. That is the reason that prompts the setting out here of the complex path that the criminal cases took in the years between 1989 and 1991. The key to the development of law, and its possibilities, lies in these set of cases.

Reviving the Criminal Cases

The Bhopal litigation reached the Supreme Court when UCC contested an order by the Madhya Pradesh High Court that directed the corporation to pay Rs 350 crore as interim compensation.[6] On 14 February 1989, the Supreme Court declared it had found that, in the circumstances of the disaster, the "mass of data", and the "offers and counter-offers", 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". It ordered $470 million be paid in "full settlement". "*To enable the effectuation of the settlement*" (and this is an important qualifier), it ordered that all civil proceedings would be brought to a close and "all criminal proceedings…shall stand quashed wherever these may be pending".[7] This formula was reiterated in its further order on 15 February 1989. In what was termed "consequential terms of settlement", counsel for the UCC, UCIL and Union of India signed on to a document which included a clause that "all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted".

The settlement order met with a volley of protest from survivors, their supporters and other activists. On 4 May 1989, when the Court attempted to explain why it had done what it had done in the settlement-order, it limited its explanation to how it had reached the sum of $470 million. On the quashing of criminal cases, the court would not speak. "The questions raised (about the termination of criminal proceedings)…merit consideration and we should, therefore, abstain from saying anything which might tend to prejudge this issue one way or the other", was all the court would say.[8]

In 1986, long before the settlement order, victims' groups filed a constitutional challenge to the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 by which the state had taken over the civil litigation from the victims. It was contended that this takeover was violative of the rights that every person has under Articles 14, 19(1)(g) and 21, which includes the right to equality, and to life. Among the reasons that provoked this response was the contention that the state too had to answer charges in connection with the disaster, and so was a "joint-tortfeasor" in law. In February 1989, when the settlement order was announced, the case concerning the Claims Act had not yet been heard and decided. The settlement order revived the questions raised against the Claims Act. On 22 December 1989, the Court pronounced its judgment on the Claims Act – against the backdrop of the settlement order.

The Claims Act, 1985 gave the central government the power to represent every person "who has made, and 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" (S.3(1)). Victims and survivors could not have entered into a compromise about the criminal cases, especially since the charges at that time – including culpable homicide not amounting to murder – was non-compoundable, that is, it could not be settled between the parties. This was iterated, and reiterated, in the Claims Act judgment. The majority judgment recorded this position: "This Act…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 the 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" (682). This was reinforced by the two judges who dissented, but whose dissent was restricted to the issue of interim compensation, but, who,

on the question of criminal liability, were categorical that "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" (726-27).

The attorney general had also said 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" (677). According to the attorney general, this had been an exercise of the plenary powers of the Court under Article 136 and Article 142 – the latter article of the constitution recognising a power in the Supreme Court to do what is required to be done in the "interests of complete justice" (677).

Simply stated, the power to settle criminal cases was not found in the Claims Act, which was the law under which the Union of India was conducting the litigation on behalf of the victims.

This meant that the explanation had to be provided by the "review" court.[9] It is interesting that the Court does *not* provide such an explanation.

One circumstance that had an impact on the ability of the Court to deal with the challenge to its power, and use of that power, was the shift in the government's stand. By the time the review petitions were heard, V P Singh had become prime minister of the National Front government. His government supported the stand of the victims and their supporters and argued that the settlement order be set aside, and the proceedings against UCC resumed.[10] The Court, therefore, could only draw support from the argument of Nariman, counsel for UCC, whose position remained unchanged about upholding the settlement order. "Shri Nariman submitted", the Court said,

> that *if* the Union of India as the *dominus litis* through its attorney general *invited the court* to quash the criminal proceedings and the court accepting the request quashed them, the power to do so was clearly referable to Article 142(1) read with the principle of section 321 CrPC (on withdrawal of prosecution).

But, the Court did not say anywhere in the judgment, if the attorney general had, in fact, so invited the Court. There were three judges on the review bench who had been part of the settlement order court – Ranganath Mishra, M N Venkatachaliah and N D Ojha. Nariman had been the counsel for UCC through the period. Any of them could have clarified what had happened in February 1989. Yet, the "if" kept the possibility in the realm of hypothesis. So, the court acknowledged that "offences alleged in the context of a disaster of such opacity and magnitude should not remain uninvestigated" and referred to the "shifting stand of the Union of India" which should "not by itself lead to any miscarriage of justice". Then, in a statement, that raises more questions than it answers, the Court said: "We hold that no specific ground or grounds for withdrawal of the prosecution having been set out *at that stage* the quashing of the prosecutions requires to be set aside".[11]

The Court asserted that it could do what it had done in the settlement order because of the constitutional provision that gave it the power to do "complete justice". But, it said, "it is really not so much a question of the existence of power as one of the jurisdiction for its exercise". So, it was not that the power did not exist; it was that the Court had not been given reasons for exercising the power. If that indeed was the case, why did the Court allow the criminal cases to be settled? There has been no answer to this question so far, except for an unexplained reference to "motive", and that was in the context that I now hasten to set out.

Settlements ending court cases carry the incidents of contracts, except that they carry the imprimatur of the Court. A contract is not complete without "consideration", and consideration is what one party to a contract gets in return for what they give to the other party to the contract. When the consideration falls, the contract too falls.

Setting aside a central clause in the settlement order, and reviving criminal cases against those who were protected from prosecutions by the settlement, would, logically, result in the settlement order being set aside: but this was a consequence the Court was keen to avert. It was to Nariman that the Court turned, again. The principle in law is that an agreement where the "consideration" is unlawful and against public policy is void. In the settlement order, the Supreme Court had recorded that the civil cases and the criminal prosecutions were being brought to a close "to enable the effectuation of the settlement".[12] Counsel for the victims urged that this amounted to "stifling of prosecution"; and that is unlawful and opposed to public policy. Nariman suggested that this was a misconception. The "true principle", he said, was that non-compoundable offences which are a matter of public concern cannot be the subject of private bargains; that administration of criminal justice should not be allowed to pass from judges to private individuals; but that the doctrine of stifling of prosecutions is not attracted where "there was a pre-existing civil liability that was also settled and satisfied".[13] And this doctrine would be irrelevant where, as in the case on hand, it was the Union of India that was acting in place of the victims, for this could not be said to be exploitation of any private individual for private gains.

Then, the Court adopted the distinction between "motive" and "consideration" advanced by Nariman. It proceeded on the basis that the quashing of the criminal cases had not been "consideration" for the settlement. That is, the quashing of criminal cases was not the reason that induced the parties to settle. Although the Court in the review judgment does not refer to it, this is supported by the statement that the Court in the Claims Act case records the attorney general as having made: "These are not considerations that induced the parties to enter the settlement".[14] Yet, if it was not consideration, what could the "motive" have been? There is not a word in explanation. Was it because the government wanted to close the cases to reassure multinationals that they would be treated gently if disasters raised the possibility of liability, including criminal liability? Perhaps. But, whatever it might have been, it inhabits the uncertain universe of a hypothesis.

An analysis of the four judgments produce some startling conclusions:

- the Claims Act had nothing to do with the criminal proceedings.
- the Court settled civil and criminal proceedings "to enable effectuation of the settlement".
- the Court considered that it had the power to terminate criminal cases even if it was contrary to the law, and it had exercised the power in 1989.
- the court had been given no occasion to quash the criminal cases, but it had done it anyway.
- the quashing was not a consideration for the settlement – which may be distinguished from motive – and neither is explained by the Court.
- this could not be said to amount to stifling of prosecution because it was not a private individual, but the Union of India, that had been party to settling the cases which would stop all prosecutions.
- yet, the termination of the criminal proceedings was not introduced into the settlement by the Union of India.

Contradictions, and feebleness in the application of rules and principle, abound. In a matter of public importance such as this, documents and persons which carry the memory of what happened must be persuaded to speak. Public policy cannot proceed to be made in a void created by individual and institutional silence.

Role of the Attorneys General

Gonsalves' article repeatedly refers to Soli Sorabjee as having presented the government's case in the proceedings that culminated in the settlement order and in the challenge to the Claims Act. It was Parasaran who was the attorney general when these cases were being heard. In December 1989, Parasaran stepped down as the attorney general, but by then both cases had been heard and the Court made the later pronouncement on 22 December 1989. This is a significant circumstance because, and as has been referred to above, when Sorabjee took over as attorney general, the government had changed, and the position had shifted, with the government now aligning itself with the victims and their supporters. This explains why the Court had only the lawyer for the corporation supporting the settlement order. This also explains what the Court termed in its order as the "shifting stand of the government". Gonsalves misses this context altogether, leading to confusion in his depiction of the role of the attorney general, and the government.

It is Sorabjee's role in the extradition proceedings of Warren Anderson that has raised the hackles of the victims and their supporters. In his second stint as the attorney general on 6 August 2001, Sorabjee gave it as his opinion that proceedings in the US for extradition of Warren Anderson were "not likely to succeed and, therefore, the same may not be pursued". To make extradition possible, certain "missing evidentiary links" would have to be provided, and, he said:

> In my opinion, although it is not impossible to furnish the 'missing evidentiary links', the time and effort would be considerable and I am not sanguine at the end of the day, the requisite evidentiary material would be forthcoming.

According to him, "policy reasons" too would prevent extradition – reasons of "humanitarian concerns", such as Anderson's age said to be 81 years old and health

and length of time that has elapsed, almost 17 years, between the event and the Indian government's decision to make a formal request for his extradition.[15]

Years later, when the conviction of 7 June 2010 was hitting the news, Sorabjee was to "reveal" to the press that he had said no to being on UCC's team of lawyers because "my heart was with the victims".[16] And, revising the meaning of his letter of advice in 2001, he was to say:

> I did not advise the government not to seek Anderson's extradition. I was asked to give my opinion whether an extradition request would be met and I said that it was unlikely,

which, he said, was an opinion based on advice from a "reputed law firm". And, "Sorabjee also said he had a meeting with senior government officials, who said they would be unable to dig out the kind of rigorous evidence Washington needed to extradite Anderson". "I cannot remember whether they were from the home or petroleum ministry", he is quoted as having said, "but they said *aisa* evidence *nahin milega*". Laying the blame at the door of a law firm or the home or petroleum ministry when the attorney general was tasked to advise the government, and overriding the demand for accountability and liability of the parent corporation and its leadership despite having represented the victims in the Court in 1990-91 may leave the victims, and observers, not entirely impressed with Sorabjee's interpretation of a past that refuses to go away.

A Judge in Question

Gonsalves' article not-so-subtly claims that "one of the judges who delivered the (Shriram)[17] decision" was later advising industry that the decision was not binding in the matter of strict liability. This he bases on the classic words that characterise hearsay: "We are told". His reference to Chief Justice Pathak's stint at the International Court of Justice "soon after criminal liability was quashed" could, however, have drawn on existing literature.

Gobind Das, a senior advocate practising in the Supreme Court, and who has held the office of advocate general of Orissa, in the 2000 edition of his 1987 book, *Supreme Court in Quest for Identity* writes about the case; and the comments with which the narrative is interspersed speaks a language that cannot be misunderstood.

> Bhagwati's court had laid the foundation of the law of tort…with an eye on the Union Carbide case…It was expected that Chief Justice Pathak would give appropriate shape to the doctrine of 'absolute liability'… the case was a battlefield of legal principle, and moral accountability. The opportunity would have been tempting for Chief Justice Pathak…But the Pathak court turned away from it all (264).
>
> Hardly had the ink of the settlement dried, …[a]llegations were hurled against the court and the judges, attributing mala fides. Improper motives were attributed to the Chief Justice. At that time the Prime Minister was politically lobbying for Chief Justice Pathak's nomination to the world court [ICJ] (267).

Then, Gobind Das quotes extensively from Justice Krishna Iyer's *Justice at Crossroads* which carries an indictment of the Court, especially Justice Pathak, and where Justice Krishna Iyer comments on, "the beholdenness of the candidate [for the ICJ] to the litigant government in

getting the great office for him" (at 268). Gobind Das concludes: "Indeed the leakage of gas at Bhopal had an unfortunate victim at Delhi, Chief Justice Pathak". He goes on:

> It is said that a judge shall be a compound of the faculties that are demanded of the historian, the philosopher and the prophet. The last demand upon him, to make some forecast of the consequences of his action, is perhaps the heaviest. It requires poetic sensibilities; Chief Justice Pathak evidently had lost this during the case in question, perhaps due to his quest for the high office in the World Court (269-70).

This book, brought out by a reputed law publisher (Eastern Book Company) is found on library shelves and in lawyers' chambers. Gobind Das' reputation is impeccable. Ten years have elapsed since its publication, and this representation of events, and their implications, have not been rebutted or even challenged. On this peg hangs a judicial tale.

'Absolute Liability'

In the last section of Gonsalves' article are many broad brush statements which may lack somewhat in accuracy where they may be strong on the rhetorical flourish. The *Shriram* case is otherwise known as the oleum gas leak case. It concerns the leakage of oleum gas from the Shriram plant in Delhi on 4 December 1985 – a year and a day after Bhopal. The Bhagwati court worked on principles that could be useful in dealing with a mass disaster such as Bhopal, and wrote it into the Shriram decision which was delivered in December 1986. Gonsalves' observations about the *Shriram* case, and the reduction of the strict liability principle into mere verbiage without consequence, may not be quite the way the law, in fact, stands.

First of all, the *Shriram* principle was not about "strict liability". Strict liability pre-existed the *Shriram* case, from its introduction in *Rylands vs Fletcher* in 1868.[18] It is a principle that has pervasive presence in law and, illustratively, it can be found in the Motor Vehicles Act, 1988 and the Public Liability (Insurance) Act, 1991. Its significance is that it takes away the burden of proving the "fault" of the offending person from the victim. It is related to "non-natural" user where the person who brings on to their land any thing or any process which then causes harm, for which such person is strictly held liable. The exceptions that the such person may draw on to escape liability are – where the escape of the thing that causes harm is due to an "act of god" (such as earthquakes, floods); an act of a stranger (sabotage); the person harmed has consented to the escape of the thing from the land; or, in certain cases where it is authorised by law.

In the *Shriram* case, the Bhagwati court decided that they had to "evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy". So they moved the law beyond strict liability to "strict and absolute liability". "We would therefore hold", the Court said, "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-à-vis the tortious principle of strict liability under the rule in *Rylands vs Fletcher"* (421).

In the review judgment, Justice Ranganath Mishra did take a swipe at this principle, suggesting that it was not a binding pronouncement. But this shrugging off of a legal principle has been expressly rejected in a 1996 decision, *Indian Council for Enviro-legal Action vs Union of India*.[19] In that case, and others of its ilk, the principle of absolute liability has been applied, urging along the polluter pays principle.[20] In this context, it is interesting to acknowledge Nariman's assertion in relation to why UCC paid the $470 million. Asked whether he was suggesting – in his 2004 December article the *Seminar* – that the UCC could not be held liable on the polluter pays principle, Nariman replied: "Far from it: it is on this very principle that the settlement of $470 million was fashioned..."[21]

The settlement order in the Bhopal gas disaster case could be seen as marking a moment when the collaboration that had grown between the Court and those socially committed to the use of the law in public interest broke down. If answers to the many questions that have arisen were to emerge from the shadows into the glare of public knowledge, may be it will lay at rest some of the doubts and despair that has dogged this case since 1989.

NOTES

1 *Union Carbide Corporation vs Union of India* (1989) 1 SCC 674 (settlement order), R S Pathak, CJ, E S Venkataramaiah, Ranganath Mishra, M N Venkatachaliah and N D Ojha, JJ.

2 *Union Carbide Corporation vs Union of India* (1989) 3 SCC 38 (4 May order), R S Pathak, CJ, E S Venkataramaiah, Ranganath Mishra, M N Venkatachaliah and N D Ojha, JJ.

3 *Charan Lal Sahu vs Union of India* (1990) 1 SCC 613 (Claims Act), Sabyasachi Mukharji, CJ, K N Singh, S Ranganathan, A M Ahmadi, K N Saikia, JJ.

4 *Union Carbide Corporation vs Union of India* (1991) 4 SCC 584 (review), Ranganath Mishra, CJ, K N Singh, M N Venkatachaliah, A M Ahmadi, and N D Ojha, JJ.

5 *Keshub Mahindra vs State of MP* (1996) 6 SCC 129, A M Ahmadi, Majmudar, JJ.

6 Fali Nariman, counsel for UCC, was to say, 15 years later, that, in retrospect, he thought he had been "very wrong" in appealing this order of the high court. "I must confess that when I first read Justice Sheth's judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution bench of the Supreme Court. I had submitted that it was illogical. But, as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action…". This was first published in the 2004 December issue of *Seminar*, and reproduced in Fali S Nariman (2010) *Before Memory Fades… An Autobiography* at p 218. This, of course, makes a strong case for the belief that, if the Court had heard the case instead of settling it, it could have found good ground for upholding the order of the high court for interim compensation, making the premature settling of the case unnecessary, and allowing an opportunity for establishing principles that could have helped in future cases.

7 Supra note 1.

8 Supra note 2 at 42.

9 Supra note 4.

10 Since Gonsalves seems not to have noticed this shift, he makes mistakes about who supported the victims, and at what stage in which proceedings. More about that, infra.

11 Supra note 4 at 638.

12 Supra note 1 at 675.

13 Supra note 4 at 645.

14 Supra note 3 at 683.

15 Remember-bhopal.@lists.essential.org cited in Usha Ramanathan, "A Critical Analysis of the Laws Relating to Compensation for Personal Injury", PhD thesis, September 2001 at p 308, footnote 171.

16 "Sorabjee Turned Down Offer To Be Carbide Lawyer", *Hindustan Times*, 17 June 2010.

17 Oleum gas leak decision reported in *M C Mehta vs UOI* (1987) 1 SCC 395.

18 (1868) LR3 HL 330.

19 (1996) 3 SCC 212 at 242.

20 See e g, *Vellore Citizens Welfare Forum vs Union of India* (1996) 5 SCC 647 and the *Nakkavagu* case reported in (1996) 5 SCALE 412 at 413-14 and (1997) 1 SCALE (SP) 21.

21 Published in the "Letters" section of *Seminar* February 2005, reproduced in his autobiography, supra note 7, at p 245.