

Bano v. Union Carbide

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2000 U.S. Dist. LEXIS 12326
August 28, 2000, Decided
August 28, 2000, Filed

DISPOSITION:[*1]Defendants' motions to dismiss and/or for summary judgment granted and Plaintiffs' cross-motions to strike denied.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants moved to dismiss plaintiffs' amended complaint, deny class certification, and/or for summary judgment against plaintiffs' putative class action alleging various torts and statutory violations in connection with the Bhopal, India, gas plant disaster of 1984. Plaintiffs cross-moved to strike defendants' motions to dismiss on the basis of the fugitive disentitlement doctrine.

OVERVIEW: Plaintiffs alleged defendants' liability for various torts, civil rights violations, and statutory violations arising from the Bhopal gas plant disaster of 1984. Defendants moved to dismiss and/or for summary judgment on grounds that plaintiffs lacked standing to bring their claims because the Indian Government had the exclusive right to assert any claims arising out of the disaster. Plaintiffs argued that § 3 of the Bhopal Gas Leak (Processing of Claims) Act (Act) required the Indian Government to obtain foreign courts' permission in order to act as exclusive representative of plaintiffs in courts outside of India. The court found that the Bhopal Act and a ruling by the Indian Supreme Court made it clear that the Indian Government was required to obtain such permission only in cases that were pending prior to enactment of the Act. Plaintiffs brought their action after enactment of the Act. Thus, they lacked standing to bring their action.

OUTCOME: Upon finding that plaintiffs lacked standing to bring their action in connection with the Bhopal gas plant disaster, and that plaintiffs' claims were barred by the 1989 settlement agreement ordered by the Supreme Court of India, the court granted defendants' motions to dismiss and/or for summary judgment and denied plaintiffs' cross-motions to strike.

CORE TERMS: disaster, fugitive, disentitlement, Bhopal Act, settlement, claimant, settlement agreement, civil action, exclusive right, connected, criminal liability, modified, summary judgment, commencement, cross-motion, proceeded, quashing, enjoined, criminal prosecution, conveniens, asserting, motions to dismiss, loss of life, international law, criminal law, unenforceable, forfeiture, Bhopal Act's, exclusive representative, criminal proceeding

CORE CONCEPTS - Hide Concepts

Governments & Legislation : Legislation : Statutory Rights & Remedies

Subsection (1) of § 3 of the Bhopal Gas Leak (Processing of Claims) Act (Act) provides: Subject to the other provisions of this Act, the Central Government of India 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.

Governments & Legislation : Legislation : Statutory Rights & Remedies

Subsection (2) of § 3 of the Bhopal Gas Leak (Processing of Claims) Act (Act) provides: In particular and without prejudice to the generality of the provisions of subsection (1) of § 3 of this Act, the purposes referred to therein include institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any suit or other proceeding, and entering into a compromise.

Governments & Legislation : Legislation : Statutory Rights & Remedies

Subsection (3) of § 3 of the Bhopal Gas Leak (Processing of Claims) Act (Act) provides: The provisions of subsection (1) of § 3 of this Act 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 commencement of this Act in or before any court or other authority outside India, the Central Government of India shall represent, and act in place of, or along with such claimant, if such court or other authority so permits.

Governments & Legislation : Legislation : Statutory Rights & Remedies

Section 2(b) of the Bhopal Gas Leak (Processing of Claims) Act provides that "claim" means: (1) a claim, arising out of, or connected with, the Bhopal gas disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered; (2) a claim, arising out of, or connected with, the Bhopal gas disaster, for any damage to property which has been, or is likely to be sustained; (3) a claim for expenses incurred or required to be incurred for containing the Bhopal gas disaster or mitigating or otherwise coping with the effects of the Bhopal gas disaster; (4) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the Bhopal gas disaster.

Civil Procedure : State & Federal Interrelationships : Federal Common Law

The fugitive disentitlement doctrine is an equitable doctrine that limits access to the courts by fugitives from justice. Under the fugitive disentitlement doctrine, appellate courts have the authority to dismiss an appeal or writ in a criminal matter when the party seeking relief is a fugitive from justice during the pendency of the appeal.

Civil Procedure : State & Federal Interrelationships : Federal Common Law

Disentitlement is not automatically available in civil matters where the party seeking relief becomes a fugitive in a related criminal prosecution.

Civil Procedure : State & Federal Interrelationships : Federal Common Law

Courts have discretion under the fugitive disentitlement doctrine to dismiss the appeal of a civil litigant who becomes a fugitive to escape the effect of the civil judgment.

Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Failure to State Claim or Cause of Action

A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. The factual allegations set forth in the complaint must be accepted as true, and the court must draw all reasonable inferences in favor of plaintiff.

Civil Procedure : Summary Judgment : Summary Judgment Standard

A motion for summary judgment may be granted under Fed. R. Civ. P. 56 if the entire record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure : Summary Judgment : Burdens of Production & Proof

In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim. When viewing the evidence, the court must assess the record in the light most favorable to the non-movant and draw all reasonable inferences in its favor. Although the movant initially bears the burden of showing that there are no genuine issues of material fact, once such a showing is made, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Unsupported allegations will not suffice to create a material issue of fact. Rather, the party opposing the motion must produce sufficient evidence to permit a reasonable jury to return a verdict in its favor.

Governments & Legislation : Legislation : Statutory Rights & Remedies

In cases where suits or proceedings have been instituted before the commencement of the Bhopal Gas Leak (Processing of Claims) Act (Bhopal Act) in any court or before any authority outside India, § 3 of the Bhopal Act by its own force will not come into force in substituting the Central Government of India in place of the victims or their heirs and legal representatives, but the Central Government of India has been given the right to act in place of, or along with, such claimant, provided such court or other authority so permits.

International Law : Immunity : Sovereign Immunity

See 28 U.S.C.S. § 1350.

International Law : Immunity : Sovereign Immunity

The Alien Tort Claims Act, 28 U.S.C.S. § 1350, confers subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law).

International Law : Immunity : Sovereign Immunity

The Alien Tort Claims Act, 28 U.S.C.S. § 1350, provides jurisdiction only for civil claims.

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JUDGES: JOHN F. KEENAN, United States District Judge.

OPINIONBY: JOHN F. KEENAN

OPINION: OPINION and ORDER

JOHN F. KEENAN, United States District Judge:

Before the Court are Defendants' motions to dismiss the Amended Complaint, deny class certification, and/or for summary judgment. Also before the Court are Plaintiffs' cross-motions to strike Defendants' motions to dismiss. For the reasons stated below, Defendants' motions are granted and Plaintiffs' motions are denied.

Background

Plaintiffs are survivors and next-of-kin of victims of the Bhopal Gas Plant disaster of December 2-3, 1984. The Bhopal disaster has been the subject of previous litigation and decisions by this Court, with [*2] which familiarity is assumed. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, (" Bhopal I") 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); *In re Union Carbide Corp. Gas Plant Disaster*, (" Bhopal II") 1992 U.S. Dist. LEXIS 1909, 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992), *aff'd sub nom.*, *Bi v. Union Carbide Chem. And Plastics Co., Inc.*, 984 F.2d 582 (2d Cir.), *cert. denied*, 510 U.S. 862, 126 L. Ed. 2d 138, 114 S. Ct. 179 (1993). On the night of December 2-3, 1984, a deadly gas leak of methyl isocyanate (MIC) from a chemical plant operated by Union Carbide India Limited ("UCIL") killed thousands of people in Bhopal, India, and injured several hundred thousand. Defendant Union Carbide Corporation ("Union Carbide"), a New York corporation with its principal place of business in Connecticut, owned 50.9% of UCIL's stock. Defendant Warren Anderson is the former Chief Executive Officer of Union Carbide.

Immediately after the disaster in 1984, numerous actions against Union Carbide were filed in the United States. [*3] In Bhopal I, 145 actions filed in the United States, involving approximately 200,000 plaintiffs, were joined by the Judicial Panel on Multidistrict Litigation and the consolidated action was assigned to this Court. In March 1985, India enacted the Bhopal Gas Leak (Processing of Claims) Act (the "Bhopal Act"), which enabled its government, the Union of India, to act as the legal representative of the victims in claims arising out of or related to the Bhopal disaster. Pursuant to this authority, on April 8, 1985, the Indian Government filed a complaint in Bhopal I on behalf of all the Bhopal victims, asserting claims resting on theories of absolute liability, strict liability, negligence, breach of warranty, and misrepresentation. See Am. Compl. P108. On May 12, 1986, this Court granted Union Carbide's motion to dismiss the consolidated action on grounds of forum non conveniens but conditioned dismissal on the requirement that "Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations." n1 634 F. Supp. at 867. The Second Circuit affirmed the dismissal on [*4] forum non conveniens grounds. See In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195.

-----Footnotes-----

n1 The Court imposed two additional conditions which were deleted on appeal.

-----End Footnotes-----

In September 1986, the Indian Government, acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants in the District Court of Bhopal, asserting the same causes of action as in Bhopal I. See Am. Compl. P111. Independently of the civil action, on November 11, 1987, India's Central Bureau of Investigation filed criminal charges against Union Carbide, Union Carbide's Asian subsidiary, Union Carbide Eastern, Inc., Warren Anderson, UCIL, and eight of UCIL's Indian managers for culpable homicide, grievous hurt, and causing death by use of a dangerous instrumentality under the Indian Penal Code. See id. P112.

The litigation in India proceeded for two and a half years. On February 14, 1989, after the Supreme Court of India obtained jurisdiction over the case, the Supreme Court issued a [*5] judicially fashioned settlement under Article 142(1) of the Indian Constitution, which enables the Court to fashion any decree for the purpose of accomplishing "complete justice" in a case pending before it. The February 14, 1989 Order provides:

We order:

- (1) The Union Carbide Corporation shall pay a sum of U.S. dollars 470 millions . . . to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the 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 and arising out of the disaster shall stand quashed wherever these may be pending.

A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential direction, if any, to issue.

See *Krohley Aff., Ex. A, Union Carbide Corp. V. Union of India*, AIR [*6] 1990 (S.C.) 273, at 275. On February 15, 1989, the Supreme Court issued a subsequent order, supplementing the February 14 Order by providing, among other things, that Union Carbide would pay \$ 425 million on or before March 23, 1989, less \$ 5 million already paid pursuant to this Court's June 7, 1985 Order and that UCIL would pay the rupee equivalent of \$ 45 million dollars on or before March 23, 1989. See *id.* The February 15 Order also provided that, upon full payment:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company, or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any Court or authority are hereby enjoined and shall not be proceeded with before such Court or authority except for dismissal or quashing in terms of this order.

See *id.*

Petitions were then [*7] brought challenging the constitutionality of the Bhopal Act and challenging the adequacy of the settlement to provide just compensation to the victims of the disaster. In an Order dated April 5, 1989, the Supreme Court agreed to hear these challenges and retained jurisdiction over Union Carbide pending the resolution of these two challenges. See *Am. Compl. P114; Union Carbide Corp. v. Union of India*, AIR 1990 (S.C.) at 276.

In *Charan Lal Sahu, et al. v. Union of India*, AIR 1990 (S.C.) 1480, the Indian Supreme Court considered and upheld the constitutional validity of the Bhopal Act. See *Krohley Aff., Ex. C.* The Bhopal Act's "Statement of Objects and Reasons" provides that the Act was intended

to ensure that the interests of the victims of the disaster are fully protected and that the claims for compensation or damages for 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.

See *Krohley Aff., Ex. B.* To achieve those ends, the Government was given the exclusive right to represent the claimants.

Section [*8] 3 of the Bhopal Act provides:

Power of Central Government to represent claimants. - (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 person.

(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 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 commencement of this Act in or [*9] 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.

See id. Section 2(b) of the Bhopal Act provides 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 or employment) arising out of, or connected with, the disaster.

See id.

In *Sahu*, the Indian Supreme Court upheld the constitutionality of the Bhopal Act and affirmed that the Indian Government had exclusive authority to represent the victims:

[A petitioner] sought to urge in addition, that in order to make the provisions constitutionally valid, we should [*10] eliminate the concept of exclusiveness to the Central Govt. and give the victims the right to sue along with the Central Govt. We are unable to accept these submissions.

In our opinion, Secs. 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 Govt. along with the victims in instituting or proceeding for the realization 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.

See *Sahu*, AIR 1990 (S.C.) at [*11] 1533. In considering the validity of the Bhopal Act, the Supreme Court of India additionally found that, a reading of the relevant provisions of the Act reveals 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 . . . claims or rights arising out of such criminal

liability." See *id.* at 1529. Rather, "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."

In *Union Carbide Corp. v. Union of India*, AIR 1992 (S.C.) 248, the Indian Supreme Court considered the challenge to the settlement agreement entered pursuant to the Orders of February 14 and 15, 1989. The Indian Supreme Court upheld that it had jurisdiction to enter a decree which finally disposed of both civil and criminal proceedings under Article 142(1) of the Indian Constitution. See *id.* at 272. The Supreme Court went on to set aside and modify the settlement agreement in part, however, finding that, "in the particular facts and circumstances, it is held that the quashing [*12] of the criminal proceeding was not justified. The criminal proceedings are, accordingly, directed to be proceeded with." See *id.* at 312. The Indian Supreme Court noted, "we leave the settlement and the orders dated 14/15th February, 1989--except to the extent set aside or modified pursuant to other findings--undisturbed." See *id.* at 309.

In October 1990, after the February 1989 settlement in India, two class actions were filed in Texas seeking compensation for injuries caused by the Bhopal disaster. These cases were transferred by the Judicial Panel on Multidistrict Litigation and assigned to this Court. In *Bhopal II*, this Court again dismissed on the grounds of *forum non conveniens* and declined to reach the merits of motions made by Defendants to dismiss. See 1992 U.S. Dist. LEXIS 1909, 1992 WL 36135, *4-*5. On appeal, the Second Circuit affirmed but concluded that the plaintiffs did not have standing to maintain this action in light of the Bhopal Act's delegation to the Indian Government of the exclusive right to represent those injured in the Bhopal disaster. The Second Circuit found that

India has chosen a system to deal efficiently with a problem of mass proportions [*13] that occurred within its borders. It decided in an act passed by its democratic parliament to represent exclusively all the victims in a suit against Union Carbide and to use the money it received in settlement of that suit to fund a plan framed, pursuant to the Bhopal Act, to process the claims of all the victims. Union Carbide's negotiations with the Indian Government were conducted under the assumption that the settlement amount covered all claims. To grant the victims of the Bhopal disaster, most of whom are citizens of India, access to our courts when India has set up what it believes to be the most effective method of dealing with a difficult problem would frustrate India's efforts.

* * * *

We are deferring to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. Any challenge appellants may have to the settlement must be made through the legislative or judicial channels that are available in India. We hold that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents [*14] the victims in courts around the world, we will not pass judgment on that determination, and we will permit only the foreign government access to our courts to litigate those claims, subject of course to our own requirements for standing. This conclusion is especially compelling in a case such as this where almost all of the victims are Indian citizens.

See *Bi*, 984 F.2d at 586. Thus, the Second Circuit found that it need reach only the threshold issue of the plaintiffs' standing to dispose of the appeal.

Plaintiffs have now brought this action against Union Carbide and Warren Anderson asserting the following claims: (1) Violations of international criminal law under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; (2) Racial discrimination in violation of international law under the ATCA, 28 U.S.C. § 1350; (3) Cruel, inhuman, and degrading treatment under the ATCA, 28 U.S.C. § 1350; (4) Violation of the rights to life, health, and security of the person under the ATCA, 28 U.S.C. § 1350; (5) Violations of international environmental rights under the ATCA, 28 U.S.C. § 1350; [*15](6) A consistent pattern of gross violations of human rights under the ATCA, 28 U.S.C. § 1350; (7) Civil contempt under 18 U.S.C. § 401 for violation of this Court's May 12, 1986 Order and Opinion, *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986); (8) Active and constructive fraud; (9) Negligence; (10) Public nuisance; (11) Private nuisance; (12) Strict liability; (13) Medical monitoring; (14) Trespass; (15) Equitable relief to remedy the contamination and spoliation of Plaintiffs' properties, water supplies, and environment. Plaintiffs seek compensatory and punitive damages and equitable and injunctive relief on Plaintiffs' environmental contamination claims.

Discussion

A. Plaintiffs' cross-motions to strike Defendants' motions

In addition to submitting papers opposing Defendants' motions, Plaintiffs cross-move to strike Defendants' motions on the basis of the "fugitive disentitlement doctrine." The fugitive disentitlement doctrine is "an equitable doctrine that limits access to the courts by fugitives from justice." *Federal Deposit Insurance Corp. v. Pharaon*, 178 F.3d 1159, 1161 (11th Cir. 1999). [*16] Under the fugitive disentitlement doctrine, it is well settled that appellate courts have the authority to dismiss an appeal or writ in a criminal matter when the party seeking relief is a fugitive from justice during the pendency of the appeal. See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239, 113 S. Ct. 1199, 1203, 122 L. Ed. 2d 581 (1993) (citing *Smith v. United States*, 94 U.S. 97, 24 L. Ed. 32 (1876)). In *Ortega-Rodriguez*, the U.S. Supreme Court set forth several justifications for the fugitive disentitlement rule. First, the rule addresses a concern that, if the defendant is a fugitive, there can be no assurance that any judgment issued would prove enforceable. See *id.* Second, the doctrine rests in part on a "disentitlement theory": an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." See *id.* (quoting *Molinero v. New Jersey*, 396 U.S. 365, 366, 90 S. Ct. 498, 499, 24 L. Ed. 2d 586 (1970)). In addition, dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, [*17] dignified appellate practice. See *id.* at 242, 113 S. Ct. at 1204-05. The Supreme Court in *Ortega-Rodriguez* found that these rationales for the fugitive disentitlement doctrine did not justify dismissal of an appeal by a fugitive who is recaptured before he invokes the jurisdiction of the appellate tribunal "absent some connection between a defendant's fugitive status and his appeal." See *id.* at 249-50, 113 S. Ct. at 1208-09.

In *Degen v. United States*, 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996), the Supreme Court considered whether the doctrine should be extended to allow a district court in a civil forfeiture suit to strike the filings of a claimant and grant judgment against him because he was a fugitive from a related criminal prosecution. Many lower federal courts, including the Second Circuit, had ruled that a defendant in a criminal case who was a fugitive from justice could not, under the fugitive disentitlement doctrine, either defend the civil forfeiture proceeding or assert any claim to the property. See, e.g., *United States v. Eng*, 951 F.2d 461 (2d Cir. 1991). In *Degen*, the petitioner had moved to a foreign country [*18] prior to being indicted for various crimes and had not returned to face the criminal charges against him. The Government had also filed a civil forfeiture complaint against *Degen* relating to the proceeds of the alleged criminal activity. While remaining outside this country, *Degen* filed an answer in the civil action to contest the forfeiture. The district court held that the petitioner was not entitled to be heard in the civil forfeiture action because he remained outside the country unamenable to criminal prosecution. The Ninth Circuit affirmed. The Supreme Court reversed, finding that the disentitlement was unjustified. See *Degen*, 517 U.S. at 825, 116 S. Ct. at 1781.

The *Degen* Court examined each rationale for the fugitive disentitlement doctrine and concluded that the rationales either did not apply to the related civil proceeding or that disentitlement was too harsh and arbitrary a remedy for the problem it was supposed to address. The Supreme Court first found that there was no risk that the district court would render an unenforceable judgment because the district court's jurisdiction over the property was secure. See *id.* The Court next rejected the [*19] Government's contention that disentitlement was warranted because the criminal prosecution might be prejudiced by *Degen's* participation in the forfeiture case due to the different rules of discovery in criminal and civil cases. The *Degen* Court listed several means of protecting the Government's interests other than "the harsh sanction of absolute disentitlement." See *id.* at 827, 116 S. Ct. at 1781. The Supreme Court then considered two other purposes purportedly advanced by the disentitlement doctrine: the need to deter flight from criminal prosecution and the need to redress the indignity visited upon the district court by the petitioner's absence from the criminal proceeding. The Court found that "both interest are substantial, but disentitlement is too blunt an instrument for advancing them." See *id.* at 828, 116 S. Ct. at 1783. The Court acknowledged "disquiet at the spectacle of a criminal defendant reposing in [a foreign country], beyond the reaches of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored" but found that "[a] court-made rule striking [petitioner's] [*20] claims and entering summary judgment against him as a sanction . . . would be an arbitrary response to the conduct it is supposed to redress or discourage." See *id.* The Supreme Court went on to state that "the dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." See *id.* Finally, the *Degen* Court noted that "[a] court's inherent power is limited by the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case; to strike [petitioner's] filings and grant judgment against him would be an excessive response to the concerns here advanced." See *id.*

Plaintiffs argue that Defendants should be disentitled from invoking the law and asserting the affirmative legal defenses of its present motion because Defendants willfully absconded from pending criminal charges in India. Defendants, however, maintain that the fugitive disentitlement

doctrine does not apply in this civil action for the same reasons it was found inapposite in Degen. Without considering whether Defendants are in fact [*21] fugitives from justice," which Defendants dispute, the Court concludes that, under Degen, Plaintiffs' cross-motion to strike based on the fugitive disentitlement doctrine should be denied.

Plaintiffs rely on *Empire Blue Cross and Blue Shield v. Finkelstein*, ("Finkelstein") 111 F.3d 278 (2d Cir. 1997) to argue that Defendants' motion should be stricken on the basis of the fugitive disentitlement doctrine. n2 In Finkelstein, the Second Circuit found that defendants in a civil action who were fugitives from district court orders and from a bench warrant issued to compel their presence at proceedings before the district court, were disentitled from prosecuting an appeal from the judgment entered against them in that action. The Second Circuit articulated four rationales justifying the application of the fugitive disentitlement doctrine: "1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by defendant's escape." 111 F.3d at 280 [*22] (citing *Bar-Levy v. United States*, 990 F.2d 33, 35 (2d Cir. 1993)). In Finkelstein, the Second Circuit concluded that the defendants' absence rendered the judgment against them unenforceable and that "disentitlement therefore represents the sole remaining means of minimizing the prejudice to [Plaintiff] caused by defendants' fugitive status." See id. 111 F.3d at 282. The Finkelstein court distinguished the facts of that case from Degen:

Degen makes it clear that disentitlement is not automatically available in civil matters where the party seeking relief becomes a fugitive in a related criminal prosecution. However, Degen did not address the question of whether a fugitive defendant in a civil action may forfeit the right to appeal an adverse judgment in that same proceeding. We hold that we have discretion to dismiss the appeal of a civil litigant who becomes a fugitive to escape the effect of the civil judgment.

Degen does not overturn, subvert, or call into question the principle that underlies *Ortega-Rodriguez* as well as our resolution of this appeal: a fugitive whose absence severely prejudices a proceeding may forfeit the right [*23] to appeal an adverse judgment in that case.

Disentitlement is appropriate in the present case, for several reasons. (1) In contrast to Degen, the disappearance of [defendants] does not affect some related matter; it impacts the very case on appeal. . . . (2) In Degen, the judgment in the civil proceeding could be enforced despite Degen's absence. Enforceability concerns clearly animate disentitlement doctrine, here . . . "the defendants' absence rendered Empire's judgment against them unenforceable." This factor weighs heavily in favor of disentitlement.

See id. (internal citations omitted).

-----Footnotes-----

n2 Plaintiffs also rely on cases decided prior to the Supreme Court's decision in Degen.

-----End Footnotes-----

The present case is similar to *Degen* in that Defendants are alleged to be fugitives in a related criminal prosecution--not in the present civil action. Unlike *Finkelstein*, Plaintiffs here do not allege that there is any concern that a decision rendered against Defendants in this action would be unenforceable, [*24] nor is there any indication that any such concern exists. Although Plaintiffs argue that Defendants should be disentitled from bringing these motions to dismiss as a penalty for "flouting the judicial process" and to deter other defendants, the *Degen* Court rejected these same arguments, finding that "disentitlement is too blunt an instrument for advancing" these two interests. See *Degen*, 517 U.S. at 828, 116 S. Ct. at 1783. This Court agrees. Finally, Plaintiffs argue that the fugitive disentitlement doctrine should be applied because they have been prejudiced by Defendants' escape "to the extent that they relied in good faith upon this Court's decision requiring Union Carbide to submit to the jurisdiction of India's courts, only to find that the Defendant was unwilling to abide by the mandatory and binding civil judgment of the Supreme Court of India in October 1991 specifically mandating [criminal] prosecution." See Pls.' Mem. of Law in Support of Cross-Motion to Strike at 24. The case before this Court, however, which was dismissed on grounds of *forum non conveniens*, was a civil action. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, [*25] India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986). After the case was dismissed by this Court, Defendants did submit to the jurisdiction of India's courts and all civil claims against Defendants were subsequently settled in India. See *Union Carbide Corp. v. Union of India*, 1990 AIR (S.C.) 273; *Union Carbide Corp. v. Union of India*, 1992 AIR (S.C.) 248. Moreover, even if Plaintiffs are correct that Union Carbide violated an order of the Supreme Court of India compelling Union Carbide to appear in criminal proceedings, which Union Carbide disputes, this Court rejects the argument that there is any prejudice to Plaintiffs as a result which would warrant applying the fugitive disentitlement doctrine to strike Defendants' motions in this case.

For the reasons stated above, Plaintiffs' cross-motions are denied.

B. Defendants' motions to dismiss, deny class certification, and/or for summary judgment

Defendants move to dismiss the Amended Complaint, deny class certification, and/or for summary judgment, pursuant to Rules 12(b)(6), 23(c) and 56 of the Federal Rules of Civil Procedure, on the grounds that: (1) Plaintiffs lack standing to bring such [*26] claims, individually or as a class action, because the Indian Government has the exclusive right to assert any claims they may have arising out of the disaster; (2) Plaintiffs' claims arising out of the Bhopal gas disaster are barred because they have been settled, extinguished, and enjoined by final Orders of the Supreme Court of India as part of the \$ 470 million global settlement of all claims arising out of the disaster; (3) Plaintiffs fail to state a claim under the Alien Tort Claims Act upon which relief can be granted; (4) Union Carbide has fully complied with the Orders of this Court and the Supreme Court of India; (5) Plaintiffs may not maintain their environmental pollution claims as a class action because there is no commonality of claims among members of the putative class, Plaintiffs' claims are not typical, Plaintiffs will not adequately represent the interests of the class, and common questions do not predominate; and (6) Plaintiffs may not maintain their individual environmental pollution claims under any of the "laws, agreements, resolutions and treaties" they cite.

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of [*27] Civil Procedure should be granted only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)). The factual allegations set forth in the complaint must be accepted as true, see *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1990), and the court must draw all reasonable inferences in favor of plaintiff. See *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir. 1998).

A motion for summary judgment may be granted under Fed. R. Civ. P. 56 if the entire record demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support [*28] an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)). When viewing the evidence, the Court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990); see *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). Although the movant initially bears the burden of showing that there are no genuine issues of material fact, once such a showing is made, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Unsupported allegations will not suffice to create a material issue of fact. See *Goenaga*, 51 F.3d at 18. Rather, the party opposing the motion must produce sufficient evidence to permit a reasonable jury to return a verdict in its favor. *Anderson*, 477 U.S. at 248. [*29]

The Court will now consider Defendants' arguments.

1. Whether Plaintiffs lack standing to bring such claims because the Indian Government has the exclusive right to assert any claims Plaintiffs may have arising out of the disaster

Defendants first argue that Plaintiffs lack standing to bring this action because, under the Bhopal Act, the Indian Government has the exclusive right to assert any claims Plaintiffs may have arising out of the Bhopal disaster. Defendants rely on the Second Circuit's decision in *Bi* in arguing that Plaintiffs lack standing here. As discussed above, the Second Circuit in *Bi* dismissed two class actions brought to recover damages for injuries stemming from the Bhopal disaster, stating that, with regard to the Bhopal Act's grant of exclusive representation to the Indian government:

We are deferring to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. . . . We hold that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents [*30] the victims in courts around the world, we will not pass judgment on that determination, and we will permit

only the foreign government access to our courts to litigate those claims, subject of course to our own requirements for standing.

See *Bi*, 984 F.2d at 586. Defendants maintain that Plaintiffs in the present action similarly lack standing. The Court agrees.

Plaintiffs, however, argue that the power of the Indian Government to act as the exclusive representative of claimants before any courts outside India is not automatic. Rather, Plaintiffs maintain that the Bhopal Act expressly requires the Indian Government to assert its right and to obtain permission from foreign courts in order to act as exclusive representative of Plaintiffs in courts outside of India. In so arguing, Plaintiffs rely on certain language included in section 3 of the Bhopal Act: "Provided that 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, the Central Government shall represent, and act in place of, or along with such claimant, if such court [*31] or other authority so permits." (emphasis added). Contrary to Plaintiffs' contention, this provision clearly states that it applies only to claims that were pending prior to the enactment of the Bhopal Act, which is not the case here. The language of section 3 of the Bhopal Act, taken as a whole, likewise demonstrates that this provision applies only to cases filed prior to the enactment of the Bhopal Act:

3. Power of Central Government to represent claimants.- (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 person.

(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 suit or other proceeding, and

(b) entering into a compromise.

(3) The provisions of sub-section [*32] (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 commencement 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.

See *Krohley Aff*, Ex. B. Thus, it is clear that the Bhopal Act requires the Indian Government to obtain permission from foreign courts to act as exclusive representative of the victims only in cases that were pending prior to the enactment of the Bhopal Act. The language of the Supreme Court of India that Plaintiffs rely on to support their contention is not to the contrary.

Plaintiffs rely on language from *Sahu*, providing:

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 [*33] force will not come into force in substituting the Central Government in place of the

victims [or] their heirs and 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.

Sahu, 1990 AIR (S.C.) 1480, 1504 (emphasis added). Again, this language clearly addresses cases filed prior to the enactment of the Bhopal Act. In Sahu, the Supreme Court affirmed that section 3 of the Bhopal Act substitutes the Central Government in place of the victims and that it applies to suits instituted before the enactment of the Bhopal Act whether inside or outside India "but makes a distinction in the case of any such suit . . . pending immediately before the commencement of this Act in or before any Court . . . outside India, and provides that the Central Government shall represent . . . such claimant, if such Court . . . so permits." See *id.* The Indian Supreme Court therefore made it clear that the permission requirement applies only in cases filed prior to the Bhopal Act's enactment. Moreover, the Court in Sahu explicitly rejected Plaintiffs' contention that [*34] victims had the right to sue along with the Indian government, finding that "Secs. 3 and 4 are categorical and clear. . . . 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." See *id.* at 1533. Thus, the Court finds no merit to Plaintiffs' argument.

For the reasons stated above, this Court concludes that Plaintiffs lack standing to bring this action.

2. Whether Plaintiffs' claims are barred because they have been settled, extinguished, and enjoined by final Orders of the Indian Supreme Court

Defendants argue that Plaintiffs' claims are also barred by the terms of the \$ 470 million global settlement that was directed by the Supreme Court of India in 1989. As set out above, on February 14, 1989, the Supreme Court of India directed Union Carbide to pay \$ 470 million in full settlement of "all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster." The Supreme Court directed that "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, [*35] and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending." See *Union Carbide Corp., v. Union of India*, AIR 1990 (S.C.) at 275. The Court issued a second order on February 15, 1989 which modified certain payment terms, and again provided that, upon full payment, all future claims would be enjoined:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in the future against any Corporation, Company, or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any Court or authority are hereby enjoined and shall not be proceeded with before such Court or authority except for dismissal or quashing in terms of this order.

See *id.* The Indian government acted as exclusive representative of all claimants under the authority of the Bhopal Act in agreeing to [*36] settle all claims arising out of the disaster. In Sahu, the Supreme Court upheld the validity of the Bhopal Act and the exclusivity of the Indian

government's right to act in place of the claimants. In considering the validity of the Bhopal Act, the Sahu Court noted 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 . . . claims or rights arising out of such criminal liability." See AIR 1990 (S.C.) at 1529. According to the Sahu Court, the claims covered by the Bhopal Act "include[] 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." See *id.* In *Union Carbide Corp., v. Union of India*, AIR 1992 (S.C.) 248, the Indian Supreme Court set aside and modified the February 1989 settlement agreement in part, stating that "in the particular facts and circumstances, it is held that the quashing of the criminal proceeding was not justified. The criminal proceedings are, accordingly, directed to be proceeded with." The Court left "the settlement and the orders [*37] dated 14/15th February, 1989--except to the extent set aside or modified pursuant to other findings--undisturbed." Thus, the settlement of the civil claims was left intact.

Defendants maintain that Plaintiffs' claims are claims "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" and, therefore, constitute civil claims barred by the settlement agreement. Plaintiffs, however, contend that their claims are outside the scope of both the settlement and the Bhopal Act because their claims are, at least in part, for violations of international criminal law. For example, count 1 of the Amended Complaint alleges that Defendants violated international criminal law under the ATCA, 28 U.S.C. § 1350. Thus, Plaintiffs allege that, pursuant to the Indian Supreme Court's ruling in *Sahu* that criminal liability is not the subject-matter of the Bhopal Act and that "there is no curtailment of any right with respect to any criminal liability," they are not barred from bringing these claims arising from Defendants's criminal liability under international law. The Court disagrees. [*38]

Plaintiffs are asserting civil claims and seeking compensatory, punitive, and exemplary damages under the ATCA. Indeed, the ATCA provides for jurisdiction only for civil claims, not criminal claims: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "This statute confers subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995). To support the argument that the ATCA provides a remedy for offenses that are "essentially criminal violations," Plaintiffs rely on the following language in *Kadic*:

Although the jurisdiction authorized by section 404 [of the Restatement (Third) of the Foreign Relations Law of the United States] is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized [*39] by the Alien Tort Act.

See *id.* at 240. Contrary to Plaintiffs' argument, this language makes it clear that the ATCA provides jurisdiction only for civil claims. There is no question that all civil claims are enjoined pursuant to the 1989 settlement agreement. Plaintiffs cannot get around this by arguing that their civil claims here arise from Defendants' criminal liability. As Defendants correctly point out, "to construe the settlement as covering civil liability based on some legal theories, but not on others,

related to the same injuries, deaths and damages, would effectively nullify the settlement." Accordingly, Plaintiffs claims are barred by the 1989 settlement agreement.

Finally, the Court rejects Plaintiffs' contention that Defendants cannot claim the benefit of the settlement agreement because it has violated the terms of the settlement in contravention of this Court's Orders and the Orders of the Supreme Court of India. First, the Court rejects Plaintiffs' contention that Defendants have violated the Order of this Court directing Defendants to submit to jurisdiction in India. As discussed above with respect to Plaintiffs' cross-motion, the case before [*40] this Court that was dismissed on grounds of forum non conveniens, was a civil action, see *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), and after the case was dismissed by this Court, Defendants did submit to the jurisdiction of India's courts. Again, as discussed above, all civil claims against Defendants were subsequently settled in India. See *Union Carbide Corp. v. Union of India*, 1990 AIR (S.C.) 273; *Union Carbide Corp. v. Union of India*, 1992 AIR (S.C.) 248.

Second, the Court rejects Plaintiffs' allegation that Defendants violated the final judgment of the Supreme Court of India. Plaintiffs argue that the Supreme Court of India modified the settlement agreement in *Union Carbide Corp. v. Union of India*, 1992 AIR (S.C.) 248, to incorporate prosecution as a material term of the settlement and that Defendants, by failing to submit to the criminal jurisdiction of the Indian courts, have failed to abide by a material term of the settlement. This Court disagrees. In setting aside and modifying the settlement agreement, the Supreme Court of India stated: "In the particular facts and [*41] circumstances, it is held that the quashing of the criminal proceeding was not justified. The criminal proceedings are, accordingly, directed to be proceeded with." See 1992 AIR (S.C.) at 312. The Indian Supreme Court also noted, "we leave the settlement and the orders dated 14/15th February, 1989--except to the extent set aside or modified pursuant to other findings--undisturbed." See *id.* at 309. There is no language that Plaintiffs point to where the Indian Supreme Court stated that Defendants must submit to the criminal jurisdiction of the Indian courts as a condition or term of the settlement agreement. Rather, the plain language of *Union Carbide Corp. v. Union of India*, 1992 AIR (S.C.) 248, simply set aside the quashing of the criminal proceedings and restored the status quo. The Court additionally notes that, in 1994, when the Indian Supreme Court was petitioned to order Union Carbide to appear in the criminal case as a condition to permitting the sale of its UCIL shares, which had been attached by Order of the Bhopal Court, the Supreme Court rejected the application in an Order dated October 20, 1994. See *Krohley Aff., Ex. H.*

Finally, contrary to Plaintiffs' [*42] allegations, there is no indication that Defendants failed to abide by the Supreme Court of India's directive at 1992 AIR (S.C.) at 313 that: "On humanitarian consideration and in fulfillment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of eight years." See *Krohley Aff., Ex. I* (the 1992 Trust Deed establishing the Bhopal Hospital Trust); *Krohley Aff., Ex. J* (Trustee's September 11, 1995 "Application for Directions" to the Indian Supreme Court and subsequent directions of the Supreme Court). Although Plaintiffs maintain that Defendants compounded its breach of the settlement agreement by conveying its properties in India to the "Bhopal Hospital Trust" when the Supreme Court of India "ordered [Union Carbide] to utilize its own unencumbered funds to pay for the hospital, not

funds attached by the Bhopal District Court," Plaintiffs fail to point to any language of the Indian Supreme Court so directing the Defendants.

Having found that Plaintiffs lack standing to bring this action and, additionally, that Plaintiffs' claims are barred by the 1989 settlement [*43] agreement, the Court concludes that it need not address the parties' remaining arguments.

Conclusion

For the reasons stated above, Defendants' motions to dismiss and/or for summary judgment are granted and Plaintiffs' cross-motions to strike are denied. The Court orders this case closed and directs the Clerk of the Court to remove this case from the Court's active docket.

SO ORDERED.

Dated: New York, New York

August 28, 2000

JOHN F. KEENAN

United States District Judge