പതിനാലാം കേരള നിയമസഭ
പത്താം സമ്മേളനം

നക്ഷത്ര ചിഹ്നമിടാത്ത ചോദ്യം നം. T1616 07/03/2018-ലെ മറുപടി

കാവേരി നദീ ജലതർക്കത്തിൽ സുപ്രീം കോടതി പുറപ്പെടുവിച്ച വിധി

ചോദ്യം		ഉത്തരം
ശ്രീ. എൻ.എ. നെല്ലിക്കുന്ന്		**പിണറായി വിജയൻ (മുഖ്യമന്ത്രി)**
എ)കാവേരി നദീ ജലതർക്കത്തിൽ സുപ്രീം കോടതി പുറപ്പെടുവിച്ച വിധി സർക്കാർ പരിശോധിച്ചിട്ടുണ്ടോ ;	എ) & ബി)	കാവേരി നദീ ജലതർക്കത്തിൽ സുപ്രീം കോടതി വിധി സർക്കാർ പരിശോധിച്ച് വരികയാണ്. വിധിയുടെ സോഫ്റ്റ് കോപ്പി ഉള്ളടക്കം ചെയ്യുന്നു.
ബി)വിധി കേരളത്തെ അനുകൂലമായാണോ പ്രതികൂലമായാണോ ബാധിക്കുന്നതെന്ന് വ്യക്തമാക്കാമോ ; വിധി നടപ്പിലാക്കുമ്പോൾ കേരളത്തിനുണ്ടാകാൻ പോകുന്ന ഗുണവും ദോഷവും വിലയിരുത്തിയിട്ടുണ്ടോ ; സുപ്രീം കോടതി വിധിയുടെ പകർപ്പ് ലഭ്യമാക്കാമോ ;		
സി) കാവേരിയിൽ നിന്ന് അർഹതപ്പെട്ട ജലം നേടിയെടുക്കുന്നതിൽ സംസ്ഥാനം പരാജയപ്പെട്ടതിനു പിന്നിൽ വെള്ളത്തിന്റെ ആവശ്യവും അതു ഉപയോഗിക്കാനുള്ള സംവിധാനങ്ങളും കൃത്യമായി ധരിപ്പിക്കുന്നതിലുണ്ടായ വീഴ്ചയാണെന്നത് ശരിയാണോ എന്ന് വ്യക്തമാക്കാമോ ;	സി)	ശരിയല്ല
ഡി) 10 വർഷം മുമ്പ് കാവേരി ട്രൈബ്യൂണൽ മുൻപാകെ ഇക്കാര്യം ബോധിപ്പിക്കുന്നതിൽ വന്ന പോരായ്മ സുപ്രീം കോടതിയിലും ആവർത്തിച്ചു എന്ന ആക്ഷേപം ശ്രദ്ധയിൽപ്പെട്ടിട്ടുണ്ടോ ; എങ്കിൽ ഈ ആക്ഷേപം വസ്തുതാപരമാണോ എന്ന് വ്യക്തമാക്കാമോ ;	ഡി)	വസ്തുതാ പരമല്ല.
ഇ)ഡൽഹിയിൽ ആരംഭിച്ച കാവേരി സെൽ കഴിഞ്ഞ വർഷം അടച്ചു പൂട്ടിയതും നദീജല പ്രശ്നത്തിനുള്ള സംസ്ഥാന തല സെല്ലിന്റെ പ്രവർത്തനം അവസാനിപ്പിച്ചതും കേരളത്തിന് ദോഷം ചെയ്തു എന്നത് ശരിയാണോ ;	ഇ)	ശരിയല്ല.

എഫ്) നദീജലം പങ്കു വെയ്ക്കൽ ചട്ടമനുസരിച്ച് കുടിവെള്ളത്തിനാണ് ആദ്യ പരിഗണന എന്നിരിക്കെ ജലത്തിന്റെ ആവശ്യം തെളിയിക്കാൻ സർക്കാർ നിർദ്ദേശിച്ച പദ്ധതികളിൽ മിക്കതും ജലവൈദ്യുത പദ്ധതികളായിരുന്നു എന്നത് കേരളത്തെ ദോഷകരമായി ബാധിച്ചു എന്നത് ശരിയാണോ; വ്യക്തമാക്കാമോ ?

എഫ്) ശരിയല്ല. കേരളം സമർപ്പിച്ച പദ്ധതികൾ വിവിധോദ്ദേശ പദ്ധതികളാണ്. വിവിധോദ്ദേശ പദ്ധതികൾ ജലസേചനത്തിനും ജലവൈദ്യുതിക്കും വേണ്ടി ഉപയോഗിക്കുന്നതാണ്. ഇവയിൽ Trans basin diversion ഉള്ളതു കൊണ്ട് പ്രസ്തുത പദ്ധതികൾക്കുള്ള അനുമതി സുപ്രീം കോടതി നിഷേധിക്കുകയുണ്ടായി. എന്നാൽ ബാണാസുര സാഗർ വിവിധോദ്ദേശ പദ്ധതിയെ സംബന്ധിച്ച് ജലസേചനത്തിന് 0.84 ടി.എം.സി ജലം കേരളത്തിന് അനുവദിച്ചിട്ടുണ്ട്.

കാവേരി ബേസിനിൽ ഉൾപ്പെടുന്ന ഓരോ സംസ്ഥാനങ്ങളുടെയും നദീതടത്തിന്റെ ജനസംഖ്യയുടെ അനുപാതത്തിന് അനുസരിച്ചാണ് കുടിവെള്ളത്തിനുള്ള ജലവിഹിതം സുപ്രീം കോടതി കണക്കാക്കിയിട്ടുള്ളത്. കേരളത്തിന്റെ കാവേരി ബേസിനിൽ ഉൾപ്പെടുന്ന നദീതടത്തിലെ ജനസംഖ്യയുടെ അനുപാതത്തിൽ കുടി വെള്ളം നൽകിയിട്ടുണ്ട്.

സെക്ഷൻ ഓഫീസർ

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2453 OF 2007

The State of Karnataka by its Chief Secretary … Appellant(s)

Versus

State of Tamil Nadu by its Chief Secretary & Ors. … Respondent(s)

WITH

CIVIL APPEAL NO. 2454 of 2007

State of Kerala through the Chief Secretary …Appellant(s)
to Government

Versus

State of Tamil Nadu through the Chief Secretary …Respondent(s)
to Government and others

CIVIL APPEAL NO. 2456 OF 2007

State of Tamil Nadu through the Secretary …Appellant(s)
Public Works Department

Versus

State of Karnataka by its Chief Secretary …Respondent(s)
Government of Karnataka & Ors.

J U D G M E N T

Dipak Misra, CJI

I N D E X

In this batch of Appeals, the assail is to the award dated 05.02.2007 passed by the Cauvery Water Disputes Tribunal (for brevity, "the Tribunal") constituted under Section 3 of the Inter-State Water Disputes Act, 1956 (for brevity, "the 1956 Act") by three States, namely, Karnataka, Tamil Nadu and Kerala as each of them is aggrieved by the allocation and sharing of water of river

Cauvery according to individual perception, perspective and understanding. It is worthy to mention here that there are two principal States, namely, State of Karnataka and State of Tamil Nadu who as adversaries take the centre stage. The other two, State of Kerala and Union Territory of Pondicherry (presently named as "Puducherry") in their own way, attacked the award and also seriously criticized the stand and stance of the main protagonists because of their dominant, assertive and adamant attitude by which they not only feel neglected and discriminated but have also been compelled to harbour the idea that two of them have created impediment in their rightful due concerning the release of water.

A. <u>The proceedings in this Court in the present Appeals</u>

2. Before the hearing of the Appeals commenced, on being moved by the State of Tamil Nadu, State of Karnataka and the Central Government, certain orders came to be passed. It is necessary to adumbrate the nature of orders passed by this Court, for without the said narration, it will be an incomplete narrative. We may immediately state that we shall devote some space to the genesis of the disputes as it travels beyond 100 years and the learned counsel for the parties have argued with vigour and energy in that regard.

The said submissions shall be noted and addressed in due course. Be it noted, at one stage, the issue of entertainability of the appeals by special leave was raised by the Union of India and this Court had to deal with it and delivered a judgment in ***State of Karnataka v. State of Tamil Nadu and others***[1]. Certain other orders also reflected the stand of the contesting States and where and how they were to be guided by the cherished principle of rule of law by accepting the order of the Court and not take a deviant path.

3. Though the award was passed on 5th February, 2007, yet it was published by requisite notification dated 19th February, 2013. On 10.05.2013, in I.A. No. 5/2013 in Civil Appeal No. 2456 of 2007, a two-Judge Bench, taking note of the notification dated 19th February, 2013 and also considering the fact that the said notification was under consideration of the Central Government, passed an order constituting a Supervisory Committee as a pro tem measure for implementation of the final order of the Cauvery Water Disputes Tribunal dated February 5, 2007 which was notified vide notification dated February 19, 2013. The two-Judge Bench ordered that the said Supervisory Committee shall consist of Secretary,

[1] (2017) 3 SCC 362

Union Ministry of Water Resources as Chairman and the Chief Secretaries of the respective States of Karnataka, Tamil Nadu, Kerala and Union Territory of Puducherry as members.

4. The order clarified that the aforesaid pro tem arrangement was without prejudice to the pending civil appeals, namely, Civil Appeal Nos. 2453 of 2007, 2454 of 2007 and 2456 of 2007. Further, the order granted liberty to the Central Government to apply for modification of the said arrangement as and when necessary.

5. I.A. No. 10 of 2016 in Civil Appeal No. 2456 of 2007 was filed by the State of Tamil Nadu wherein Mr. Shekhar Naphade, learned senior counsel who had appeared for the applicant, had contended that the State of Karnataka had not been complying with the directions given by the Tribunal in its final order and that the said order had been flagrantly violated. Further, during the course of arguments, Mr. Naphade had pointed out that if the water was not released by the State of Karnataka, the 'samba' crops would be absolutely damaged which would lead to an unacceptable plight to be faced by the farmers of the State of Tamil Nadu.

6. Per contra, Mr. Fali S. Nariman, learned senior counsel who had appeared for the State of Karnataka, had drawn the attention of the Bench to paragraph 'D' of Clause IX of the final order of the Tribunal which reads as under :-

> "D. The Authority shall properly monitor the working of monthly schedule with the help of the concerned States and Central Water Commission for a period of five years and if any modification/adjustment is needed in the schedule thereafter, it may be worked out in consultation with the party States, and help of Central Water Commission for future adoption without changing the annual allocation amongst the parties."

Learned senior counsel for the State of Karnataka had submitted that it is obligatory on the part of the State of Tamil Nadu to approach the Supervisory Committee that was constituted vide notification dated 22nd May, 2013. Mr. Nariman had also drawn the attention of the Bench to paragraphs 2 and 3 of the notification which deal with the constitution and the role of the Supervisory Committee.

For better appreciation, we think it condign to reproduce the said paragraphs. They read as under:-

"*Constitution of the Supervisory Committee*:-

(1) There shall be a Committee under this scheme to be known as the Supervisory Committee (hereinafter referred to as the Committee).

(2) The Committee referred to in sub-rule(1) shall consist of the following, namely:-

(a)	Secretary, the Ministry of Water Resources, Government of India	Chairman *Ex officio*
(b)	Chief Secretaries to the State, Governments of Karnataka, Tamil Nadu, Kerala and the Union Territory of Puducherry or his duly nominated representative	Members, *Ex officio*
(c)	Chairman, Central Water Commission	Members, *Ex officio*
(d)	Chief Engineer, Central Water Commission Secretary	Member-Secretary

3. *Role of the Committee*:- The role of the Committee shall be to give effect to the implementation of the Order dated the 5th February, 2007 of the Tribunal:

Provided that in case of any doubt or difficulty, the Chairman, Supervisory Committee and, if necessary, any of the parties may apply to Hon'ble Supreme Court for appropriate directions with notice to the other States and the Union Territory."

During the course of proceedings of the said I.A. No.10 of 2016, Mr. Nariman, learned Senior Counsel handed over a note to the Bench which contained certain suggestions, foremost of them being that the State of Karnataka shall release 10000 cusecs per day (about 0.86 TMC) from 7th September, 2016 to 12th September, 2016. Mr. Naphade, on the other hand, submitted that instead of 10000 cusecs per day (about 0.86 TMC), there should be release of 20000 cusecs of water per day.

7. The Bench, after giving a patient hearing to the learned counsel for both the parties, passed an order on 5th September, 2016 in the following terms:-

> "(a) The applicant, the State of Tamil Nadu, shall approach the Supervisory Committee within three days from today. Response, if any, by the State of Karnataka be filed within three days therefrom.
>
> (b) The Supervisory Committee shall pass appropriate direction in this regard within four days from the date of filing of the reference keeping in view the language employed in the final order of the Tribunal. Be it clarified, the Supervisory Committee is bound by the language used in the order passed by the Tribunal.
>
> (c) Coming to the immediate arrangement, keeping in view the gesture shown by the State of Karnataka and the plight that has been projected with agony by Mr. Naphade, we think it appropriate to direct that 15 cusecs

of water per day be released at Biligundulu by the State of Karnataka for ten days.

(d) The State of Tamil Nadu is directed to release water proportionately to the Union Territory of Puducherry."

8. On 06.09.2016, the matter was taken up as there was a mistake as the order dated 05.09.2016 incorrectly mentioned 10 cusecs and 20 cusecs in paragraph 1 and 15 cusecs in sub-paragraph (c) which required to be read as 10000 cusecs, 20000 cusecs and 15000 cusecs respectively. The corrections were carried out on that day.

9. An application for modification of the order dated 05.09.2016, viz., I.A. No.12 of 2016 in I.A. No.10 of 2016 in Civil Appeal No.2456 of 2007 was mentioned on 11.09.2016 which was taken up on 12.09.2016 on the basis of an affidavit for urgent hearing.

10. Vide paragraph 3 of the said affidavit, the deponent had submitted that modification of the interim order dated 5th September, 2016 passed by this Court was necessary because of spontaneous agitations in various parts of the State of Karnataka which had paralyzed normal life and resulted in destruction of public and private properties worth hundreds of crores of rupees.

The deponent had further submitted that modification was required having regard to the ground realities, needs and requirements as stated in the application.

11. The Court, after perusal of the said affidavit and the annexed application for modification, noted that the application contained certain averments which cannot be conceived of to be filed in a court of law seeking modification of an earlier order. The Court categorically stated that agitation in spontaneity or propelled by some motivation or galvanized by any kind of catalystic component can never form the foundation for seeking modification of an order. The Court observed that its order was bound to be complied with by all concerned and it is the obligation of the executive to maintain law and order and to see that the Court's order is complied with in letter and spirit. The Court further observed that citizens cannot become law unto themselves; and when a court of law passes an order, it is the sacred duty of the citizens to obey the same. The Court also expressed anguish over the pleadings in the application and also the affidavit filed for urgency and deplored the same.

12. Mr. Nariman, learned senior counsel appearing for the State of Karnataka, unequivocally accepted during the hearing that the aforesaid affidavit was erroneously drafted. However, he contended that the prayer in essence required reconsideration of the order. The Court thereafter proceeded to deal with the proponements of Mr. Nariman in respect of the reliefs sought for in the application. The application mainly sought for the modification of order of this Court dated 05.09.2016 (as corrected on 06.09.2016) and an order to the effect to keep in abeyance Clause (c) of the directions of this Court in its order dated 05.09.2016 as corrected on 06.09.2016.

13. After giving due consideration to the exhaustive arguments presented by the senior counsel for both the States, the Court was of the view that the prayer of abeyance did not deserve acceptance and, accordingly, rejected the same. As far as the prayer for modification was concerned, the Court modified the order dated 5th September, 2016 to the extent that the State of Karnataka shall release 12000 cusecs of water per day and that the said direction shall remain in force till 20th September, 2016. The Court also directed the Supervisory Committee to arrive at a decision in conformity with the final order of the Tribunal with respect to the

situation of shortage of water and plight of farmers in both the States.

14. On 20.9.2016, I.A. No.12 of 2016 in I.A. No.6 of 2016 in Civil Appeal No.2456 of 2007 was taken up. After referring to its earlier orders, the Court considered the submissions advanced by the learned counsel for the parties and took note of the directions of the Tribunal for consideration of constituting the Cauvery Management Board. The Court, thereafter, directed the Union of India to constitute the Cauvery Management Board within four weeks and produce before the Court after four weeks the notification indicating that the said Board has been constituted. As an interim measure, the Court directed the State of Karnataka to release 6000 cusecs of water from 21st September, 2016 till 27th September, 2016.

15. On 27.09.2016, the Court sought the assistance of the learned Attorney General for India to apprise the Central Government to discuss with both the States so that an interim solution could be arrived at. On 30.09.2016, the minutes of the proceedings were produced by learned Attorney General for India and Mr. Nariman, learned senior counsel appearing for the State of Karnataka,

produced two letters and requested the same to be taken on record and the said prayer was acceded to. Proceeding further, however, the Court modified the order dated 5th September, 2016. The two letters pertained to the communication between Mr. Nariman and the State Government relating to compliance of this Court's order. It is not necessary to refer to the episode in detail. It is worthy to state here that on 04.10.2016, the matter was taken up as it was mentioned by the learned Attorney General for India. The mentioning related to modification of the earlier order. On that day, as the order of this Court was complied with and that sage controversy was put to rest. Mr. Nariman assisted the Court. We think it necessary to state here that Mr. Nariman had courageously lived upto the highest tradition of the Bar and we had recorded our uninhibited accession. Be it noted, after hearing learned counsel for the parties and Mr. Mukul Rohatgi, learned Attorney General for India, the Court constituted a High Power Technical Team to arrive at an interim solution and directed the State of Karnataka to release 2000 cusecs of water from 7.10.2016 till 18.10.2016.

16. On the next date of hearing, i.e., 18.10.2016, the report of the Committee was filed but it was noticed that the Committee had not

suggested anything with regard to the quantity of water. At this juncture, the learned Attorney General for India submitted that the appeals are not maintainable. The same stand was taken by Mr. A.S. Nambiar, learned senior counsel appearing for the Union Territory of Puducherry. On that day, the issue also arose for consideration of the nature of the interim order. Regarding the release of 2000 cusecs of water from 7.10.2016, it was submitted by Mr. Madhusudan R. Naik, learned Advocate General of Karnataka assisting Mr. Nariman for the State of Karnataka, that the order dated 18.10.2016 had been complied with. After noticing the submissions with regard to the release of water by way of interim measure, it was decided to hear the matter on merits. On that day, the earlier order passed by this Court was reiterated to the effect that the executive of both the States shall see to it that peace and harmony would be maintained in both the States and that the citizens do not become law unto themselves. Further, it was ordered that it would be the obligation of the executive to ensure that when the matter is heard and the interim order has been passed and that when the State of Karnataka is complying with the order, mutuality of respect between both the States and the citizens should be

maintained. The order further impressed upon the fact that maintenance of law and order and care for public property is a sign of elevated democracy.

17. We have paraphrased the interim orders as we are disposed to think that they deserve to be reproduced as the same is necessary for what we are going to say in the final judgment.

B. <u>Maintainability of the Appeals by Special Leave</u>

18. As stated earlier, the learned Attorney General for India raised the issue with regard to the maintainability of the appeals. In the reported judgment ***State of Karnataka*** (supra), the Court has held that when judged by the principles of statutory interpretation to understand the legislative intendment of Section 6(2), it is clear as crystal that the Parliament did not intend to create any kind of embargo on the jurisdiction of this Court. The said provision was inserted to give the binding effect to the award passed by the Tribunal. The Court opined that the fiction has been created for that limited purpose. Section 11 of the 1956 Act bars the jurisdiction of the courts and needless to say, that is in consonance with the language employed in Article 262 of the Constitution. The

Founding Fathers had not conferred the power on this Court to entertain an original suit or complaint and that is luminescent from the language employed in Article 131 of the Constitution and from the series of pronouncements of this Court. The Court further held that Section 6 cannot be interpreted in an absolute mechanical manner and the words "same force as an order or decision" cannot be treated as an order or decree for the purpose of excluding the jurisdiction of this Court. Elaborating the same, it was held that it cannot be a decree as if this Court has adjudicated a matter and passed a decree. The Parliament has intended that the same shall be executed or abided as if it is a decree of this Court. The Court further ruled that a provision should not be interpreted to give a different colour which has a technical design rather than serving the object of the legislation. The exposition of the principles of law relating to fiction, the intendment of the legislature and the ultimate purpose and effect of the provision compelled the Court to repel the submissions raised on behalf of the Union of India that Section 6(2) bars the jurisdiction conferred on this Court under Article 136. At that stage, the Court clarified in the following words:-

> "We would like to clarify one aspect. The learned Senior Counsel appearing for the State of Karnataka as well as the State of Tamil Nadu have commended us to various authorities which we have already referred to in the context of Article 136 of the Constitution, but the purpose behind the said delineation is to show the broad canvas of the aforesaid constitutional provision in the context of maintainability of the civil appeals. How the final order passed by the Tribunal would be adjudged within the parameters of the said constitutional provision has to be debated when we finally address the controversy pertaining to the subject-matter of the civil appeals."

19. Referring to para 82 of the judgment, it is submitted by Mr. Nariman, learned senior counsel for the State of Karnataka, that this Court should exercise the wide powers bestowed in it under Article 136 of the Constitution in a case of this nature and exercise its discretion. Similar was the submission of learned senior counsel appearing for the other States. Be it clarified that each one is a contesting appellant as also respondent.

20. Keeping in view the controversy at hand, we think it appropriate to advert to the other legal issues and appreciate the factual score on the required parameters which will be unfolded in the course of our deliberations. We do not presently intend to state it as wide or broad approach or restricted or narrow approach. The said concept shall be dwelled upon at the relevant stage.

C. Stand of all parties pertaining to remand of the matter to the Tribunal after deliberation of the legal issues

21. At the commencement of the hearing of the appeals, a serious criticism was advanced on behalf of the State of Karnataka that after the hearing before the Tribunal was closed, the State of Tamil Nadu filed an affidavit which was marked as TN Ext. 1665 and when objections were raised, the Tribunal had assured that the said document would not be relied upon but unfortunately the Tribunal had referred to the contents of the affidavit and relied upon the same. Be it noted, the said affidavit came into existence because of the *suo motu* order passed by the Tribunal on 12.11.2002 which is as follows:-

> "During the course of hearing of arguments it transpired that most of the riparian States which are party to the proceedings cultivate paddy and allow at least 2-3 inches of water to remain in fields throughout till the crop matures. We are told that this is the traditional practice which is being followed:
>
> In many States in India paddy crops, after transplantation, are watered from time to time and a particular level of water need not remain in the fields throughout. It need not be pointed out that traditional practice, which is being followed in Cauvery basin states obviously will consume and require more water in the fields.

> Since 1973, different recommendations have been made requesting the riparian States before us to practice economy while utilizing waters of river Cauvery.
>
> Learned Additional Advocate General, appearing on behalf of the State of Tamil Nadu stated that during last several years, steps have been taken to improve the water use efficiency. Similar stand has been taken on behalf of the States of Karnataka, Kerala and the Union Territory of Pondicherry.
>
> It need not be impressed that it better scientific methods are adopted in cultivation of paddy, the requirement of water is bound to be less.
> All the party States and the Union Territory of Pondicherry shall file their respective Affidavits within six weeks from today, as to what steps have already been taken to reduce the requirement of water for cultivation and what steps are likely to be taken in near future. In the Affidavit it should also be stated as to what minimum delta is required for different crop varieties in their respective States."

22. It is assiduously urged that though the said affidavit has been filed in reply to the affidavits filed by the State of Karnataka in pursuance of the *suo motu* order passed by the Tribunal, yet the affidavit of the State of Tamil Nadu for the first time furnished its scientific crop water requirement, that is, a detailed statement of computed crop water requirement system fed by Mettur and other schemes in the basin and the Tribunal, contrary to the principles of law of evidence and in violation of the principal facet of natural

justice, took the same on record and marked it as Ext. 1665. The Tribunal, as averred by the senior counsel for the State of Karnataka, had clarified that the affidavit filed by Tamil Nadu would not be relied upon in support of its case and that the case would be considered on the facts and documents already brought on record.

23. The said submission was equally seriously resisted by the State of Tamil Nadu by stating that the said affidavit did not contain anything new but was only a compilation of the materials already brought on record. As the debate continued, it was suggested to the learned counsel for the parties whether it would be advisable to remit the matter to the Tribunal on the said score. At this juncture, Mr. Nariman, learned senior counsel appearing for the State of Karnataka, submitted that considering more than 27 years had elapsed from the date of constituting the Tribunal and also considering that all the State parties to the dispute were before this Court and that each of them had challenged the Tribunal's final order, it would be appropriate for this Court to exercise its authority under Article 136 of the Constitution of India and decide the matter finally. He submitted that as per judicial pronouncements, the power of this Court under Article 136 read with Article 142 being

plenary, is exercisable outside the purview of ordinary law in cases where the need of justice demands interference as in the present case. The current dispute is a unique one affecting the lives of millions of people and the stakes involved are unparalleled. He submitted that remanding the matter to the Tribunal for fresh consideration would be an exercise in futility and a drain on the resources of all the parties concerned which must be eschewed.

24. We may fruitfully state here that all the learned counsel, at least on this issue, unanimously stated that the remand is no solution to such a dispute and this Court should decide the legal and factual issues so that the controversy is put to rest. Thereafter, the hearing of the appeals continued. Accordingly, we shall proceed to decide the various legal issues which are of priority and upmost concern and thereafter advert to the approach to be adopted in the obtaining factual matrix.

D. Reference of the dispute to the Tribunal

25. The State of Tamil Nadu lodged a request before the Government of India raising a water dispute and requesting for adjudication of the same by a Tribunal constituted under Section 3

of the 1956 Act. In the said complaint dated 6th July, 1986, it was stated on behalf of the State of Tamil Nadu that a water dispute had arisen with the Government of Karnataka by reason of the fact that the interests of the State of Tamil Nadu and the inhabitants thereof in the waters of Cauvery, which is an inter-State river, had been prejudicially affected. The relevant part of the said communication reads as follows:-

> "(a) the executive action taken by the Karnatka State in constructing Kabini, Hemavathi, Harangi, Swrnavathi and other projects and expanding the aycut--
>
> (i) Which executive action has resulted in materially diminishing the supply of waters to Tamil Nadu.
> (ii) Which executive action has materially affected the prescriptive rights of the ayacutdar already acquired and existing;
> (iii) Which executive action is also in violation of the 1892 and 1924 agreements; and
>
> (b) the failure of the Karnataka Government to implement distribution and control of the Cauvery waters.
>
> The bilateral negotiations hitherto held between the States of Karnataka and Tamil Nadu have totally failed.
>
> Also all sincere attempts so far made by the Government of India to settle this long pending water dispute by negotiations since 1970 have totally failed.

> Therefore, this request is made by the Government of Tamil Nadu to the Government of India under Section 3 of the Inter-State Water Disputes Act, 1956 to refer this water dispute to a Tribunal."

26. The complaint referred to the matters connected with the dispute and the efforts made for settling the disputes by negotiations. The broad features pointed out are the "River Cauvery", "Development of Irrigation in the Cauvery Basin", "The Inter-State Agreements of 1892 and 1924", "Violation of the aforesaid two agreements by Karnataka", "Tamil Nadu's concern", "Tamil Nadu's first call for adjudication in September, 1969", "Tamil Nadu's formal request for adjudication in February, 1970", Tamil Nadu's continued participation in the discussion and negotiations", "Filing of suit by Tamil Nadu in the Supreme Court", "Prime Minister's advice", "The Cauvery Fact Finding Committee (CFFC)", "Consideration of the proposals put forth by the Union Government", "Last bilateral discussions with Karnataka held on 23rd November, 1985", "Chief Ministers' meeting held at Bangalore (now known as Bengaluru) on 16 June, 1986" and the narration of the events. Thereafter, there was a request for expeditious action for

referring the dispute to the Tribunal. The said part reads as follows:-

> "From 1974-75 onwards, the Government of Karnataka has been impounding all the flows in their reservoirs. Only after their reservoirs are filled up, the surplus flows are let down. The injury inflicted on this State in the past decade due to the unilateral action of Karnataka and the suffering we had in running around for a few TMC of water every time the crops reached the withering stage has been briefly stated in note (Enclosure—XXVIII). It is patent that the Government of Karnataka have badly violated the inter-State agreements and caused irreparable harm to the age old irrigation in this State. Year after year, the realisation at Mettur is falling fast and thousands of acres in our ayacut in the basin are forced to remain fallow. The bulk of the existing ayacut in Tamil Nadu concentrated mainly in Thanjavur and Thiruchirappalli districts is already gravely affected in that the cultivation operations are getting long delayed, traditional double crop lands are getting reduced to single crop lands and crops even in the single crop lands are withering and failing for want of adequate wettings at crucial times. We are convinced that the inordinate delay in solving the dispute is taken advantage of by the Government of Karnataka in extending their canal systems and their ayacut in the new projects and every day of delay is adding to the injury caused to our existing irrigation.
>
> The Government of Tamil Nadu are of the firm view that the "water dispute with the Government of Karnataka has arisen by reason of the fact that the interests of the State of Tamil Nadu and the inhabitants thereof in the waters of Cauvery, which is an inter-State liver have been affected prejudicially by —

(a) the executive action taken by the Karnataka State in constructing Kabini, Hemavathi, Harangi, Swarnavathi and other projects and expanding the ayacuts:

(i) which executive action has resulted in materially diminishing the supply of waters to Tamil Nadu;

(ii) which executive action has materially affected the prescriptive rights of the avacutdars already acquired and 'existing; and

(iii) which executive action is also in violation of the 1892 and 1924 Agreements ; and

(b) the failure of the Karnataka Government, to implement the terms of the 1892 and 1924 Agreements relating to the use, distribution and control of the Cauvery waters.

The bilateral negotiations hitherto held between the States of Karnataka and Tamil Nadu have totally failed.

Also all sincere attempts so far made by the Government of India to settle this long pending water dispute by negotiations since 1970 have, totally failed.

I am therefore to request the Central Government to refer the Cauvery Water Dispute to a Tribunal for adjudication under the provisions of Section 4 of the inter-State Water Disputes Act, 1956 without any delay."

27. On the basis of the aforesaid letter of request, the Central Government, by the notification dated June 2, 1990, constituted the Tribunal and passed the following order of reference:-

"No. 21/1/90-WD
Government of India
(Bharat Sarkar)
Ministry of Water Resources
(Jal Sansadhan Mantralaya)
New Delhi, June 2, 1990

Reference

In the exercise of the powers conferred by sub-section (1) of Section 5, of the Interstate Water Disputes Act, 1956 (33 of 1956), the Central Government hereby refers to the Cauvery Water Disputes Tribunal for adjudication, the water disputes regarding the interstate river Cauvery and the river valley thereof, emerging from Letter No. 17527/K2/82-110 dated July 6, 1986 from the Government of Tamil Nadu (copy enclosed).

By order and in the name
of the President of India
(M.A. Chitale)
Secretary, (Water Resources)
Chairman,
The Cauvery Water Disputes Tribunal,
New Delhi"

E. <u>The initial proceedings before the Tribunal</u>

28. During the pendency of the reference, the Government of Tamil Nadu filed CMP No.4 of 1990 praying that the State of Karnataka be directed not to impound or utilize the water of

Cauvery river beyond the extent impounded or utilized by them as on May 31, 1972 as agreed to by the Chief Ministers of the basin States and the Union of India for irrigation and power. It was also prayed that an order be passed restraining the State of Karnataka from notifying any new projects, dams, reservoirs, canals, etc., and/or from proceeding further with the construction of projects, dams, reservoirs, canals, etc., in the Cauvery basin. The Union Territory of Puducherry filed CMP No. 5 of 1990 on 8.9.1990 seeking an interim order directing the State of Karnataka and Kerala to release the water already agreed to during the months of September to March. An emergent petition was filed by the State of Tamil Nadu forming the subject matter of CMP No.9 of 1990 to direct the State of Karnataka to release at least 20 TMC of water as the first installment pending formal orders in CMP No.4 of 1990. The said prayers were seriously opposed by the State of Karnataka and the State of Kerala on merits as well as on a preliminary objection that the Tribunal had no power or jurisdiction to entertain the said petitions and to grant any interim relief. The Tribunal upheld the objections raised by the State of Karnataka and the State of Kerala holding that the said applications were not

maintainable in law and, accordingly, dismissed the same. Aggrieved by the said orders, special leave petition was filed for seeking leave to assail the said order. This Court passed the judgment in ***State of Tamil Nadu v. State of Karnataka and others***[2] wherein the majority view stated by N.M. Kasliwal, J. is extracted below:-

> "22. The above passage clearly goes to show that the State of Tamil Nadu was claiming for an immediate relief as year after year, the realisation at Mettur was falling fast and thousands of acres in their ayacut in the basin were forced to remain fallow. It was specifically mentioned that the inordinate delay in solving the dispute is taken advantage of by the Government of Karnataka in extending their canal systems and their ayacut in the new projects and every day of delay is adding to the injury caused to their existing irrigation. The Tribunal was thus clearly wrong in holding that the Central Government had not made any reference for granting any interim relief. We are not concerned, whether the appellants are entitled or not, for any interim relief on merits, but we are clearly of the view that the reliefs prayed by the appellants in their C.M.P. Nos. 4, 5 and 9 of 1990 clearly come within the purview of the dispute referred by the Central Government under Section 5 of the Act. The Tribunal has not held that it had no incidental and ancillary powers for granting an interim relief, but it has refused to entertain the C.M.P. Nos. 4, 5 and 9 on the ground that the reliefs prayed in these applications had not been referred by the Central Government. In view of the above circumstances we think it is not necessary for us to decide in this case, the larger

[2] 1991 Supp (1) SCC 240

> question whether a Tribunal constituted under the Interstate Water Disputes Act has any power or not to grant any interim relief. In the present case the appellants become entitled to succeed on the basis of the finding recorded by us in their favour that the reliefs prayed by them in their C.M.P. Nos. 4, 5 and 9 of 1990 are covered in the reference made by the Central Government. It may also be noted that at the fag end of the arguments it was submitted before us on behalf of the State of Karnataka that they were agreeable to proceed with the CMPs on merits before the Tribunal on the terms that all party States agreed that all questions arising out of or connected with or relevant to the water dispute (set out in the respective pleadings of the respective parties), including all applications for interim directions/reliefs by party States be determined by the Tribunal on merits. However, the above terms were not agreeable to the State of Tamil Nadu as such we have decided the appeals on merits."

Sahai, J. opined thus:-

> "I agree with brother Kasliwal, J. that under the constitutional set up it is one of the primary responsibilities of this Court to determine jurisdiction power and limits of any tribunal or authority created under a statute. But I have reservations on other issues including the construction of the letter dated July 6, 1986. However, it is not necessary for me to express any opinion on it since what started as an issue of profound constitutional and legal importance fizzled out when the States of Karnataka and Kerala stated through their counsel that they were agreeable for determination of the applications for interim directions on merits."

29. In view of the aforesaid directions, the Tribunal heard the said applications of Karnataka and Puducherry. Before the Tribunal,

objections were again raised on behalf of the State of Karnataka with regard to the maintainability of the applications filed by the State of Tamil Nadu and Union Territory of Puducherry for interim relief. The Tribunal did not countenance that objection and expressed the view that the directions given by this Court were binding on it. The Tribunal proceeded to decide the applications on merits and, vide its order dated June 25, 1991, and on a detailed analysis of the materials available, it directed the State of Karnataka, as an interim measure, to ensure that 205 TMC of water is available in Tamil Nadu's Mettur Reservoir in a year from June to May. The modalities for regulating the release of water so fixed were also laid down with a further direction that 6 TMC of water for Karaikal region of the Union Territory of Puducherry would be delivered by the State of Tamil Nadu. The State of Karnataka was restrained from increasing its area under irrigation by the waters of the river of Cauvery beyond the existing 11.2 lakh acres. In issuing this direction, the Tribunal was guided by the consideration that pending final adjudication, the rights of the parties ought to be preserved and it was also ensured that by the unilateral action of one party, the other party was not prejudiced from getting

appropriate relief at the time of passing of final orders. In quantifying the volume of 205 TMC of water to be released by the State of Karnataka from its reservoirs for Tamil Nadu's Mettur reservoir, the Tribunal construed the average of the annual flow of waters of the river Cauvery into the reservoir of Mettur Dam in Tamil Nadu as the reasonable basis. For the said purpose, amongst other aspects, it took note of the inflow of water into Mettur Dam for a period of 10 years, i.e., 1980-81 to 1989-90 and worked out the figure by leaving out of scrutiny the abnormally good years and bad years and, thus, arrived at the figure of 205 TMC. While entertaining the grievance of State of Tamil Nadu to the effect that the releases ought to be made timely to meet the need of cultivation of crops for which it set down the norms, it noted that the State of Kerala had not applied for any interim order.

F. The issue of Ordinance by the State of Karnataka and the Presidential Reference

30. The State of Karnataka, however, on 25.07.1991, promulgated an Ordinance captioned "**The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991**" which, for all intents and purposes,

sought to negate the effect of the interim order dated 25.06.1991.

The said Ordinance reads as follows:-

> "An Ordinance to provide in the interest of the general public for the protection and preservation of irrigation in irrigable areas of the Cauvery basin in Karnataka dependent on the waters of the Cauvery river and its tributaries.
>
> Whereas the Karnataka Legislative Council is not in session and the Governor of Karnataka is satisfied that circumstances exist which render it necessary for him to take immediate action, for the protection and preservation of irrigation in the irrigable areas of the Cauvery basin in Karnataka dependent on the water of Cauvery river and its tributaries.
>
> Now, therefore, in exercise of the power conferred under clause (1) of Article 213 of Constitution of India, I, Khurshed Alam Khan, Governor of Karnataka, am pleased to promulgate the following Ordinance, namely:
>
> 1. *Short title, extent and commencement.*— (1) This Ordinance may be called the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991.
>
> (2) It extends to the whole of the State of Karnataka.
>
> (3) It shall come into force at once.
>
> 2. *Definition.*— Unless the context otherwise requires:
> (*a*) 'Cauvery basin' means the basin area of the Cauvery river and its tributaries lying within the territory of the State of Karnataka.

(*b*) 'Irrigable area' means the areas specified in the Schedule.

(*c*) 'Schedule' means the Schedule annexed to this Ordinance.

(*d*) 'Water year' means the year commencing with the first of June of a calendar year and ending with the thirty-first of May of the next calendar year.

3. *Protection of irrigation in irrigable area.*— (1) It shall be the duty of the State Government to protect, preserve and maintain irrigation from the waters of the Cauvery river and its tributaries in the irrigable area under the various projects specified in the Schedule.

(2) For the purpose of giving effect to sub-section (1) the State Government may abstract or cause to be abstracted, during every water year, such quantity of water as it may deem requisite, from the flows of the Cauvery river and its tributaries, in such manner and during such intervals as the State Government or any officer, not below the rank of an Engineer-in-Chief designated by it, may deem fit and proper.

4. *Overriding effect of the Ordinance.*— The provisions of this Ordinance, (and of any Rules and Orders made thereunder), shall have effect notwithstanding anything contained in any order, report or decision of any Court or Tribunal (whether made before or after the commencement of this Ordinance), save and except a final decision under the provisions of sub-section (2) of Section 5 read with Section 6 of the Inter-State Water Disputes Act, 1956.

5. *Power to remove difficulties.*— If any difficulty arises in giving effect to the provisions of this Ordinance, the State

> Government may, by order, as occasion requires, do anything (not inconsistent with the provisions of this Ordinance) which appears to be necessary for purpose of removing the difficulty.
>
> 6. *Power to make rules*.— (1) The State Government may, by notification in the official Gazette make rules to carry out the purpose of this Ordinance.
>
> (2) Every rule made under this Ordinance shall be laid as soon as be after it is made, before each House of the State legislature while it is in session for a total period of thirty days which may be comprised in one session or in two or more sessions and if before the expiry of the said period, either House of the State legislature makes any modification in any rule or order or directs that any rule or order shall not have effect, and if the modification or direction is agreed to by the other House, such rule or order shall thereafter have effect only in such modified form or be no effect, as the case may be."

31. The notification mentioned a schedule of area which refers to irrigable areas in the Cauvery basin of Karnataka under various projects including minor irrigation works. The State of Karnataka instituted a suit under Article 131 against the State of Tamil Nadu and others seeking a declaration that the order of the Tribunal granting interim relief was without jurisdiction. In the meantime, the Ordinance stood replaced by the Act 27 of 1991 and the said Act reproduced the provisions of the Ordinance in verbatim except that in Section 4 of the Act, the words 'any court' were omitted and

Section 7 was added repealing the Ordinance. After the Act was passed, the President under Article 143, on July 27, 1991, referred three questions for opinion of this Court. The reference reads as follows:-

> "WHEREAS, in exercise of the powers conferred by Section 4 of the Inter-State Water Disputes Act, 1956 (hereinafter referred to as "the Act"), the Central Government constituted a Water Disputes Tribunal called "the Cauvery Water Disputes Tribunal" (hereinafter called "the Tribunal") by a notification dated June 2, 1990, a copy whereof is annexed hereto, for the adjudication of the Water Dispute regarding the Inter-State River Cauvery;
>
> WHEREAS on June 25, 1991, the Tribunal passed an interim order (hereinafter referred to as "the Order"), a copy whereof is annexed hereto;
>
> WHEREAS, differences have arisen with regard to certain aspects of the Order;
>
> WHEREAS, on July 25, 1991, the Governor of Karnataka promulgated the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 (hereinafter referred to as "the Ordinance"), a copy whereof is annexed hereto;
>
> WHEREAS, doubts have been expressed with regard to the constitutional validity of the Ordinance and its provisions;
>
> WHEREAS, there is likelihood of the constitutional validity of the provisions of the Ordinance, and any

action taken thereunder, being challenged in courts of law involving protracted and avoidable litigation;

WHEREAS, the said differences and doubts have given rise to a public controversy which may lead to undesirable consequences;

AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Ramaswamy Venkataraman, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:

(1) Whether the Ordinance and the provisions thereof are in accordance with the provisions of the Constitution;

(2) (*i*) Whether the Order of the Tribunal constitutes a report and a decision within the meaning of Section 5(2) of the Act; and

(*ii*) Whether the Order of the Tribunal is required to be published by the Central Government in order to make it effective;

(3) Whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute."

32. To deal with the reference, the Constitution Bench narrated the factual background that had led to the reference. After analyzing various aspects, the opinion was expounded in the following terms:-

> "Question No. 1: The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 passed by the Governor of Karnataka on July 25, 1991 (now the Act) is beyond the legislative competence of the State and is, therefore, ultra vires the Constitution.
>
> Question No. 2: (i) The order of the Tribunal dated June 25, 1991 constitutes report and decision within the meaning of Section 5(2) of the Inter-State Water Disputes Act, 1956;
>
> (ii) the said Order is, therefore, required to be published by the Central Government in the official Gazette under Section 6 of the Act in order to make it effective.
>
> Question No. 3: (i) A Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute when a reference for such relief is made by the Central Government;
>
> (ii) whether the Tribunal has power to grant interim relief when no reference is made by the Central Government for such relief is a question which does not arise in the facts and circumstances under which the Reference is made. Hence we do not deem it necessary to answer the same."

33. The aforesaid decision also noted a certain aspect which has been highlighted by the State of Karnataka in the course of

arguments and we shall be dealing with it in extenso at a later stage. In paragraph 4 of the judgment, the Court stated:-

> "4. There were two agreements of 1892 and 1924 for sharing the water of the river between the areas which are predominantly today comprised in the States of Karnataka and Tamil Nadu, and which were at the time of the agreements comprised in the then Presidency of Madras on the one hand and the State of Mysore on the other. The last agreement expired in 1974…."

Again in paragraph 11, the Court observed:-

> "…… In the said letter, Tamil Nadu primarily made a grievance against the construction of works in the Karnataka area and the appropriation of water upstream so as to prejudice the interests downstream in the State of Tamil Nadu. It also sought the implementation of the agreements of 1892 and 1924 which had expired in 1974."

34. The State of Karnataka, still undaunted by such reverses, filed an application before the Tribunal to recall its order dated 25.06.1991 citing several grounds justifying such review. The Tribunal, vide its order dated 07.04.1992, however, declined to interfere with its earlier order dated 25.06.1991 with the observation that in case, thereafter, there was any change in circumstance or undue hardship in a particular year to any party, it would be open to such party to approach it for appropriate

orders. The stage being thus set, following the submissions of the respective statements of cases, counters and rejoinders, the Tribunal framed the following issues:-

"(1) Are both the Agreements of 1892 and 1924 or either of them, invalid?

(2) Are both the Agreements of 1892 and 1924 or either of them invalid because of the alleged oppression or because the same were between the "unequal Riparian States" as claimed by the State of Karnataka?

(3) Are both the Agreements of 1892 and 1924 binding and enforceable upon all the parties to the present reference (dispute)?

(4) Are both the Agreements of 1892 and 1924, in so far as the river Cauvery and its tributaries are concerned invalid, on the ground that the then Chief Commissioner's Province of Coorg, Podukottai State, Travancore State and the French settlement of Pondicherry and Karaikal, were not parties to the said Agreement?

(5) Whether the circumstances, that, the Agreements of 1892 and 1924 were not executed also on behalf of the then Chief Commissioner's Province of Coorg, Podukottai State, Travancore State and the French settlement of Pondicherry and Karaikal, made the said Agreements not binding and unenforceable against parties to the present reference.

(6) Is the State of Karnataka estopped from challenging both the Agreements of 1892 and 1924 or either of them, on the ground that it had said to have been acted upon?

(7) Is the State of Karnataka entitled to contend that in any view of the matter the State of Tamil Nadu had waived the rights claimed by it under the Agreements of 1892 and 1924?

(8) Has there been any breach of both the Agreements of 1892 and 1924 or either of them, by any of the States. If so, what is the effect of any such breach upon the rights of the parties to the present reference?

(9) Did both the Agreements of 1892 and 1924 or either of them provide for a fair and equitable distribution of waters of the river Cauvery and its tributaries to the parties of these Agreements?

(10) (i) Could there be prescriptive rights as claimed by the State of Tamil Nadu/Union Territory of Pondicherry, in their pleadings.

(ii) If the answer to (i) is in affirmative, what was the nature of such prescriptive rights, and

(iii) Whether the Agreements of 1892 and 1924 or either of them, were in recognition of the prescriptive rights as claimed by the State of Tamil Nadu?

(11) Have both the Agreements of 1892 and 1924 or either of them ceased to be operative and enforceable and binding because of subsequent events including enactment of various laws and happening of changed circumstances?

(12) What would be the true and proper construction of both the Agreements of 1892 and 1924, and their legal consequences?

(13) Were the Rules of Regulation in Annexure I to the Agreement of 1924 arbitrary, unconscionable and

excessive to the requirements of the areas which then formed part of the Province of Madras?

(14) Whether the Rules and Regulation in Annexure I to the Agreement of 1924, are arbitrary and inequitable on the ground that the same were excessive to the requirements of the areas which now form the part of the State of Tamil Nadu?

(15) Does the entire Agreement of 1924 stand terminated at the expiry of 50 years from the date of its execution? Does not the said agreement continue to subsist even after the expiry of the period of 50 years, subject to the modifications to be made to it in accordance with clause 10(xi) of the same Agreement? What is the true scope and effect of clause 10(xi) of the Agreement?

(16) If the answer to the first part of issue 15 is in the affirmative, whether the 1892 Agreement ought to continue in force until a new Agreement is entered into or the respective rights of the basin States are determined in accordance with law?

(17) What is the present relevance and also the effect of the deliberations of the Cauvery Fact Finding Committee, and of the Study Team conducted by Shri CC Patel, Additional Secretary to the Government of India, and also of reports, measures and surveys conducted by other agencies?

(18) Upon a true and proper assessment made according to the reliable and scientific method, what would be the approximate available surface waters of the Cauvery basin including the delta region?

(19) Whether the Agreement of 1892 was operative and enforceable also in respect of those tributaries of the river Cauvery which were not specifically mentioned in the Schedule 'A' to the said Agreement?

(20) What is the extent of additional/alternative means of water resources available in the Cauvery basin by appropriate exploitation of ground water potentials and by trans-basin diversion?

(21) What is the approximate volume of ground water in each one of the States/Union Territory which are parties to the Reference and whether the said availability of ground water, if any, should be relevant in making fair and equitable distribution of the Cauvery river waters?

(22) What should be the basis on which the availability of waters be determined for apportionment, namely, dependability or on percentage basis? If it is on percentage basis, what ought to be the said percentage?

(23) Whether there is wastage of waters in appreciable volume or quantity, either in the basin or in the delta areas of the Cauvery river? If so, what is its effect, if any, on the fair and equitable distribution of waters of the river Cauvery?

(24) Whether directions need be issued to the parties for ensuring that the cropping patterns are compatible with the rainfall and the river flows and other relevant factors and whether such directions, if any, would be feasible and germane for making equitable and fair distribution of the waters of the river Cauvery?

(25) What is the extent of the return flow of water used in irrigation by the different parties and what would be its effect on the apportionment of Cauvery waters among them?

(26) What is the extent of drought prone/affected areas in the Cauvery basin region in each of the party

States, and what is its effect, if any, in making equitable apportionment of waters?

(27) Should trans-basin diversion of the water of rivers Kabini and Bhavani be permitted for generation of power and for irrigation and water supply by the State of Kerala? If so, to what extent and subject to what conditions and with what safeguards?

(28) Whether generation of power by trans-basin diversion of water by the parties would be legal and justified, particularly, if a part of such power would be utilised by the people of the river basin itself?

(29) Are the States of Karnataka and Tamil Nadu resorting to trans-basin diversion of the waters of river Cauvery? If so, whether those States can be permitted to object to the proposed trans-basin diversion of the water by the State of Kerala?

(30) Should any preference or priority be given to utilization of water in a manner such that it can generate power as well as meet the needs of irrigation and water supply within the basin/outside the basin area?

(31) What is the extent of the contribution by the different States to the total flow in the Cauvery river and what would be its relevance for equitable apportionment of waters to the party States?

(32) Whether directions are required to be issued to ensure that the waters of the Cauvery and its tributaries maybe developed by each of the States, singly or jointly, to generate maximum hydroelectric power without detriment to irrigation uses?

(33) Is the State of Karnataka entitled to compensation for the loss suffered as averred in paragraphs 18.9 to 18.11 of the Statement of Case of Karnataka and

as per averments in paragraphs 34 to 41 of the Counter of Karnataka to the Statement of Case of Tamil Nadu?

(34) Whether any order/direction should be issued upon any one or more of the States for regulated release of the Cauvery waters and whether in that event compensation is to be awarded in favour of the parties, prejudicially affected thereby?

(35) To what extent should Kerala be permitted to utilise the waters generated in Kerala when such utilisation in Kerala would secure either more or equal benefit for the country and its people than by its utilisation in any of the other States?

(36) Whether the State of Kerala requires a part of Cauvery water for generation of power, and, if so, to what extent?

(37) Whether shortage of food in any of the States would be a relevant factor to be taken into consideration in making the apportionment of the Cauvery water?

(38) Whether the backwardness, under-developed and allegedly neglected area of a particular State would be relevant matters in making a fair and equitable distribution of the water of the Cauvery river?

(39) Whether the construction works executed by the State of Tamil Nadu in the Upper Bhavani, Vargarpallam West and Vargarpallam East, have unreasonably deprived the rights of the State of Kerala in the natural flow of the waters of the river Cauvery and, if so, to what effect?

(40) Whether the executive action taken by Karnataka in constructing Kabini, Hemavathi, Harangi, Suvarnavathy and other projects and expanding its ayacuts has prejudicially affected the interests of

Tamil Nadu and Pondicherry, materially diminished the supply of waters to Tamil Nadu and Pondicherry and materially affected the prescriptive rights claimed by Tamil Nadu and Pondicherry on behalf of their ayacutdars?

(41) Whether the above said executive action taken by Karnataka is in violation of 1892 and 1924 Agreements?

(42) Whether the State of Tamil Nadu is entitled to compensation for the loss, damage and injury caused by the failure on the part of Karnataka to implement the terms of 1924 Agreement after 1974?

(43) If the answer to the above issue No.42 is in the affirmative, what is the amount of compensation to which Tamil Nadu is entitled?

(44) What is the equitable share of the Union Territory of Pondicherry in the waters of the inter-State river Cauvery?

(45) Is the understanding reached between the then Governor of French Settlement in India Pondicherry and the then Governor of Madras on 6thSeptember, 1926 to maintain adequate supply of water to the French Territory still subsisting and as such enforceable against the State of Tamil Nadu?

(46) Whether the projects executed by the States of Karnataka and Tamil Nadu have unreasonably impaired the free flow of water of the river Cauvery into the Union Territory of Pondicherry?

(47) On what basis should the available waters be determined?

(48) How and on what basis should the equitable apportionment be made?

(49) What directions, if any, should be given for the equitable apportionment and for the beneficial use of the waters of the river Cauvery and its tributaries?

(50) What directions, if any, are required to be given regarding the sharing of distress and surplus among the concerned parties to the reference in the event of the waters of the Cauvery falling short of the allocated quantum or being surplus to the same?"

35. Subsequent thereto, evidence was recorded. However, prior to the arguments, the issues, for the purpose of convenience, were regrouped finally as hereunder:-

"**Sl.No.**	**Subject**	**Issue No**.
1.	Agreements of 1892 and 1924	
a)	Arbitrary and inequitable	9, 13 & 14
b)	Prescriptive rights and other claims	10 & 40
c)	Construction and review of agreements	12, 15 & 16
d)	Breach of agreements and Consequences	8, 33, 40 to 43
e)	Constitutional and legal validity and enforceability	1 to 7,11 & 19
2.	Availability of water – surface flows, additional/ alternative resources	18, 20 to 22, 25, 27, 29, 31 & 47
3.	Equitable apportionment and related subjects:	26, 31, 34,37, 38, 47 to 50
i)	Cropping pattern	
ii)	Trans-basin diversion	
iii)	Relevant date of apportionment	

iv) Relevance of projects completed or otherwise."

36. Reverting to the sequence of events, the Central Government finally, to give effect to the interim order dated 25.06.1991 passed by the Tribunal, by notification dated 11.08.1998, framed a scheme titled "The Cauvery Water (Implementation of the Interim Order of 1991 and all subsequent Related Orders of the Tribunal) Scheme, 1998 which, amongst others, provided for the constitution of the Cauvery River Authority, delineated its role, powers and functions.

37. The Cauvery River Authority (Conduct of Business) Rules, 1998 were also framed and given effect to from 14.07.2000 in order to regulate the conduct of business of the Cauvery River Authority as provided in Clause 3(2) of the Cauvery Water (Implementation of the Interim Order of 1991 and all subsequent Related Orders of the Tribunal).

G. <u>The genesis of the controversy</u>

38. Having stated the issues framed before the Tribunal, we would have proceeded to deal with the primary legal issues. However, it is requisite to state the genesis of the reference to the Tribunal.

Having narrated the facts to this extent, we think it appropriate to go to the narration of events which have been graphically exposited before us. It goes back to the year 1799. We do not intend to refer to the unnecessary facets except those which had been expounded to espouse the legal aspect. The first agreement between the Madras Presidency and the State of Mysore was entered into in the year 1892. Prior to entering into the said agreement, there was correspondence between the British Resident in Mysore and the Government of Madras. It is worthy to note here that after the defeat of Tipu Sultan by the British, the Wadiyars, Rulers of the State of Mysore, were decored with the crown under Subsidiary Alliance Treaty in 1799. The State of Mysore undertook certain works in its territory pertaining to restoration of river which was protested by the Collector of Tanjore in the Madras Presidency. The correspondence continued which is not necessary to be referred to. In the year 1881, the Viceroy and the Governor General of India, by an Instrument of Transfer 1881, restored the administration of the Princely State of Mysore to another scion of the Wadiyar family by signing the "Sanad" described as "Instrument of Transfer". Be it stated here, the State of Karnataka asserts that it was not a treaty

but a “Sanad” as is reflected from the communication made by the British Foreign Secretary in his dispatch of 1874. The relevant part reads as follows:-

> "He is in reality the recipient of favours - the person who benefits by the avowedly liberal policy of Government - and it seems to me to be in every way more becoming that the Government should attach its own conditions to its gift, and that these should be set forth in a Sanad or patent to be granted by Government to the Maharaja."

39. As contended by the State of Karnataka, the “Instrument of Transfer” of 1881 placed the Maharaja in possession of the territories of Mysore and in the administration thereof, and declared that he would be entitled to hold possession thereof and administer them only so long as he fulfilled the conditions prescribed in the Instrument of Transfer. Emphasis has been laid on paragraphs 22 and 23 of the said instrument. After the year 1881, the British Government of Madras Presidency raised objections as regards the fact that there was continued implementation of the schemes for restoration of tanks in Mysore by stating that the Presidency of Madras had a right to uninterrupted natural flow in the river. On 13th June, 1889, the British Resident in Mysore thought it appropriate to remind the Dewan of Mysore that the British

Resident could not accept the Dewan's stand and that Mysore had the right to utilize to the fullest extent the natural water forces flowing through its territory. The relevant part of the letter reads thus:-

> "In the first place international law is not applicable to a feudatory State like Mysore in its dealings with the paramount power. Even if it were so, international law would not give Mysore the right claimed. Its position with reference to Madras territory is something similar to that of Switzerland ... The principle which should be taken as your guide in this important question is that no scheme for stopping the flow of water from Mysore into Madras territory will be permitted if it can be shown to be detrimental to the interests of the latter."

40. On 20.11.1889, the British Government of Madras Presidency issued the following order:-

> "The Mysore Government cannot claim to improve its irrigation works by impounding or diverting the supply of streams which feed works in British territory and to the water of which the British Government has acquired a prescriptive right."

41. As the factual matrix would unroll, on 10.05.1890, a conference was held at Ooty where the Princely State of Mysore put forward its claim for the restoration of irrigation works which had been inaugurated during the British Government Administration in Mysore (1831-1881), but the claim was rejected by the then British

Resident who formally expressed the opinion that the assertion of unlimited rights of Mysore was extreme and untenable. The minutes, among other things, recorded thus:-

> "... After some argument the Diwan stated his position as follows: ...Madras rights extend only to the supply which has been actually turned to account for irrigation..."
>
> "Mr. Stokes said that ...He refused to admit that the Madras rights to the flow in the rivers was limited to the amount actually turned to account for irrigation, and contended that Madras is entitled by prescription to the whole flow allowed to pass the frontier, at which point Mysore loses all right or interest in it..."

42. As the time passed, the Government of India, on 21st August, 1891, clarified in a publication in the Official Gazette of India No. 1700/E the relationship between the Government of India as represented by the Queen Empress of India on the one hand and the "native States" in India on the other. It read as follows:-

> "The principles of International Law have no bearing upon the relations between the Government of India as representing the Queen Empress on the one hand, and the native States under the suzerainty of her Majesty on the other. <u>The paramount supremacy of the former, presupposes and implies the subordination of the latter."</u>
>
> [emphasis is supplied]

43. On 21.01.1892, the order was passed by the British Government of Madras directing that the consent of Madras Government should be obtained before the new reservoir is

constructed within the Mysore State and in the event of disagreement between the two Governments, the matter has to be settled by arbitration.

44. In view of the above, the agreement was entered into between the Madras Government and State of Mysore on 18.02.1892. Clause 1 defines New Irrigation Reservoirs. Clause 3 defines Repair of Irrigation Reservoirs. Clause 4 states that any increase of capacity other than what falls under "Repair of Irrigation Reservoirs" as defined shall be regarded as a "New Irrigation Reservoir". Clauses 2, 3 and 5 are reproduced below:-

> "II. The Mysore Government, shall not, without the previous consent of the Madras Government, or before a decision under rule 4 below, build (a) any "New Irrigation Reservoirs" across any part of the fifteen main rivers named in the appended Schedule A; or across any stream named in Schedule B below the point specified in Column 5 of the said Schedule B, or in any drainage area specified in the said Schedule B, or (b) any "new anaicut" across the streams of Schedule A, Nos. 4 to 9 and 14 and 15, or across any of the streams of Schedule B, or across the following streams of Schedule A, lower than the points specified hereunder:
>
> Across 1. Tungabhadra – lower than the road crossing at Honhalli,
> Across 10. Cauvery – lower than the Ramaswami anaicut, and

Across 13. Kabani – lower than the Rampur anaicut.

III. When the Mysore Government desires to construct any "New Irrigation Reservoir" or any new anaicut the previous consent of the Madras Government under the last preceding rule, then full information regarding the proposed work shall be forwarded to the Madras Government and the consent of that Government shall be obtained previous to the actual commencement of work. The Madras Government shall be bound not to refuse such consent except for the protection of prescriptive right already acquired and actually existing, the existence, extent and nature of such right and the mode of exercising it being in every case determined in accordance with the law on the subject of prescriptive right to use of water and in accordance with what is fair and reasonable under all the circumstances of each individual case.

V. The consent of the Madras Government is given to new irrigation reservoirs specified in the appended Schedule C, with the exception of the Srinivasasagara new reservoir across the Pennar, the Ramasamudram new reservoir across the Chitravati and the Venkatesasagara new reservoir across Papaghni. Should, owing to the omission of the Mysore Government to make or maintain these works in a reasonable adequate standard of safety, irrigation works in Madras, themselves in a condition of reasonably adequate safety, be damaged, the Mysore government shall pay to the Madras government reasonable compensation for such damage.

As regards the three new reservoirs excepted above the admissibility of any compensation from Mysore to Madras on account of loss accruing to Madras irrigation works from diminution of supply of water caused by the construction of the said works, will be referred to the Government of India whose decision will be accepted as

> final and should such compensation decided to be admissible, the decision of the Government of India as to the amount thereof will be accepted, after submission to them of the claims of Madras which would be preferred in full detail within a period of five years after the completion of said works."

45. As stated in Clause 2, there are two Schedules, namely, Schedule A and Schedule B which do not require any reference. We may note here that on 18.02.1924, another agreement was entered. The prefatory note to the said agreement contains reference to the 1892 agreement, Clause 2 refers to Clause 3 of the 1892 agreement and certain disputes that had arisen between the two States and the reference to arbitration and the award in the year 1914, rectification of the award by the Government of India and the decision in appeal with the Secretary of State for India who had reopened the question. It is necessary to state what had been mentioned in the said reopening of the question:-

> "6. Whereas thereupon the Mysore Government and the Madras Government with a view to an amicable settlement of the dispute entered into negotiations with each other; and
>
> 7. Whereas as the result of such negotiations, certain Rules of Regulation of the Krishnarajasagara reservoir were framed and agreed to by the Chief Engineers of the Mysore and Madras Governments on the 26th day of July

of the year 1921, such Rules of Regulation forming Annexure I to this agreement; and

8. Whereas, thereafter, the technical officers of the two Governments have met in conference and examined the question of extension of irrigation in their respective territories with a view to reaching an amicable arrangement; and

9. Whereas as the result of such examination and conference by the technical officers of the two Governments, certain points with respect to such extension were agreed to respectively by the Chief Engineer for Irrigation, Madras, and the Special Officer, Krishnarajasagara Works, at Bangalore, on the 14th day of September 1923, such points forming Annexure III to this agreement."

46. In the said backdrop, the Mysore Government and the Madras Government entered into the 1924 agreement. We think it appropriate to reproduce the entire part of the said agreement as that is the fulcrum of the stand of the State of Tamil Nadu:-

"(i) The Mysore Government shall be entitled .to construct arid the Madras Government do hereby assent under clause III of the 1892 agreement to the Mysore Government constructing a dam and a reservoir across and on the river Cauvery at Kannambadi, now known a6 the Krishnarajasagara, such dam and reservoir to be of a storage capacity of not higher than 112 feet above the sill of the under-sluices now in existence corresponding to 124 feet above bed of the river before construction of the dam, and to be of the effective capacity of 44,827 million cubic feet, measured from the 6ill of the irrigation sluices constructed at 60 feet level above the bed of the river up

to the maximum height of 124 feet above the bed of the river; the level of the bed of the river before the construction of the reservoir being taken as 12 feet below the sill level of the existing under-sluices; and such dam and reservoir to be in all respects as described in schedule forming Annexure II to this agreement.

(ii) The Mysore Government on their part hereby agree to regulate the discharge through and from the said reservoir strictly in accordance with the Rules of Regulation set forth in the Annexure I, which Rules of Regulation shall be and form part of this agreement.

(iii) The Mysore Government hereby agree to furnish to the Madras Government within two years from the date of the present agreement dimensioned plans of anicuts and sluices or open heads at the off-takes of all existing irrigation channels having their source in the rivers Cauvery, Lakshmanathirtha and Hemavathi, showing thereon in a distinctive colour all alterations that have been made subsequent to the year 1910, and further to furnish maps similarly showing the location of the areas irrigated by the said channels prior to or in the year 1910.

(iv) The Mysore Government on their part shall be at liberty to carry out future extensions of irrigation in Mysore under the Cauvery and its tributaries to an extent now fixed at 110,000 acres. This extent of new irrigation of 110,000 acres shall be in addition to and irrespective of the extent of irrigation permissible under the Rules of Regulation forming Annexure I to this agreement, viz, 1,26,000 acres plus the extension permissible under each of the existing channels to the extent of one-third of the area actually irrigated under such channel in or prior to 1910.

(v) The Madras Government on their part agree to limit the new area of irrigation under their Cauvery Metur

project to 301,000 acres, and the capacity of the new reservoir at Metur, above the lowest irrigation sluice to ninety-three thousand five hundred million cubic feet.

Provided that, should scouring sluices but constructed in the dam at a lower level than the irrigation sluice, the dates on which such scouring sluices are opened shall be communicated to the Mysore Government.

(vi) The Mysore Government and the Madras Government agree, with reference to the provisions of clauses (iv) and (v) preceding, that each Government shall arrange to supply the other as soon after the close of each official or calendar year, as may be convenient, with returns of the areas newly brought under irrigation, and with the average monthly discharges at the main canal heads, as soon after the close of each month as may be convenient.

(vii) The Mysore Government on their part agree that extensions of irrigation in Mysore as specified in clause (iv) above shall be carried out only by means of reservoirs constructed on the Cauvery and its tributaries mentioned in Schedule A of the 1892 agreement. Such reservoirs may be of an effective capacity of 45,000 million cubic feet, in the aggregate and the impounding therein shall be so regulated as not to make any material diminution in supplies connoted by the gauges accepted in the Rules of Regulation for the Krishnarajasagra forming Annexure I to this agreement, it being understood that the rules for working such reservoirs shall be so framed as to reduce to within 5 percent any loss during any impounding period, by the adoption of suitable proportion factors, impounding formula or such other means as may be settled at the time.

(viii) The Mysore Government further agree that full particulars and details of such reservoir schemes, and of

the impounding therein, shall be furnished to the Madras Government to enable them to satisfy themselves that the conditions in clause (vii) above will be fulfilled. Should there arise any difference of opinion between the Madras and Mysore Governments as to whether the said conditions are fulfilled in regard to any such scheme or schemes, both the Madras and Mysore Governments agree that such difference shall be settled in the manner provided in clause (xv) below.

(ix) The Mysore Government and the Madras Government agree that the reserve storage for power generation purposes now provided in the Kriahnaraja sagra may be utilized by the Mysore Government according to their convenience from any other reservoir hereafter to be constructed, and the storage thus released from the Krishnarajasagra may be utilized for new irrigation within the extent of 110,000 acres provided for in clause(iv) above.

(x) Should the Mysore government so decide to release the reserve storage for power generation purposes from the Krishnarajasagra, the working tables for the new reservoir from which the power water will then be utilized shall be framed "after taking into consideration the conditions specified in clause (vii) above and the altered conditions of irrigation under the Krishnarajasagara.

(xi) The Mysore Government and the Madras Government further agree that the limitations and arrangements embodied in clauses (iv) to (viii) supra shall at the expiry of fifty years from the date of the execution of these presents, be open to reconsideration in the light of the experience gained and of an examination of the possibilities of the further extension of irrigation within the territories of the respective Governments and to such modifications and additions as may be mutually agreed upon as the result of such reconsideration.

(xii) The Madras Government and the Mysore Government further agree that the limits of extension of irrigation specified in clauses (iv) and (v) above shall not preclude extensions of irrigation effected solely by improvement of duty, without any increase of the quantity of water used.

(xiii) Nothing herein agreed to or contained shall be deemed to qualify or limit in any manner the operation of the 1892 agreement in regard to matters other than those to which this agreement relates or to affect the rights of the Mysore Government to construct new irrigation works on the tributaries o the Cauvery in Mysore not included in Schedule A of the 1892 agreement

(xiv) The Madras Government shall be at liberty to construct new irrigation works on the tributaries of the Cauvery in Madras and, should the Madras Government construct; on the Bhavani, Amaravati or Noyil rivers in Madras, any new storage reservoir, the Mysore Government shall be at liberty to construct, as an offset, a storage reservoir in addition to those referred to in clause (vii) of this agreement on one of the tributaries of the Cauvery in Mysore, of a capacity not exceeding 60 per cent of the new reservoir in Madras.

Provided that the impounding in such reservoirs shall not diminish or affect in any way the supplies to which the Madras Government and the Mysore Government respectively are entitled under this agreement, or the division of surplus water which, it is anticipated, will be available for division on the termination of this agreement as provided in clause (xi).

(xv) The Madras Government and the Mysore Government hereby agree that, if at any time there should arise any dispute between the Madras Government and the Mysore Government touching the

interpretation or operation or carrying out of this agreement, such dispute shall be referred for settlement to arbitration, or if the parties so agree shall be submitted to the Government of India."

47. As is noticeable, Clause 10(ii) provided that the Mysore Government had agreed to regulate the discharge through and from the concerned reservoir strictly in accordance with the Rules of Regulation set forth in Annexure I, which Rules of Regulation shall be and form part of that agreement. The relevant part of Annexure I is reproduced below:-

"7. The minimum flow of the Cauvery that must be ensured at the upper anicut before any impounding is made in the Krishnarajasagara, as connoted by the readings of the Cauvery dam north gauge, shall be as follows:-

Month		*Readings of the Cauvery Dam North gauge.*
June	..	Six and a half feet.
July and August	..	Seven and a half feet
September	..	Seven feet.
October	..	Six and a half feet.
November	..	Six feet.
December	..	Three and a half feet.
January	..	Three feet.

8. The discharges connoted by the gauge readings set forth in rule 7 shall, in the case of regulation during the irrigation season (vide rule 9) of 1921, be deducted from the average discharge curve derived from the joint

gaugings of the Cauvery at the Cauvery dam made in the four years ending 1920. The said discharges shall be revised, if necessary, after completion of the joint gaugings of 1921 and shall be used for the purpose of regulation for the five years ending 1926. The said discharges shall be finally revised and adopted for all subsequent regulation, at the conclusion of the joint gauging of the year 1926, on the basis of the joint gaugings of the ten years ending 1926.

9. The south-west monsoon shall, for the purpose of these rules be considered to extend from the 1st June to the 30th September, both days inclusive, and the north-east monsoon from the1st October to the 31st January, both days inclusive. The irrigation season shall be taken to extend from the 1st June to the 31st January, both days inclusive. All dates in this rule shall have reference to the Upper Anicut."

48. Annexure III of the agreement pertains to the extent of irrigation of Mysore and Madras. The relevant part is as follows:-

"2.The extent of future extension of irrigation in Mysore under the Cauvery and its tributaries mentioned in Schedule A of the 1892 agreement shall be fixed at 110,000 acres, and Madras shall have their Cauvery-Mettur project as revised in 1921 with their new area of irrigation fixed at 301,000 acres, ..."

49. It is worthy to note here that another agreement was entered into between both the governments in the year 1929 to clarify Rules 7 and 8 of the Rules of Regulation pertaining to the Krishna Raja Sagara reservoir which is as follows:-

"AGREEMENT

WHEREAS on the 18th February 1924 an agreement between the Governments of Mysore and Madras was signed and whereas by clause 10(2) of the said agreement the Mysore Government agreed to regulate the discharge through and from the Krishnarajasagara reservoir strictly in accordance with the Rules of Regulation being Annexure I to the said agreement;

and

WHEREAS disputes had arisen between the two Governments in regard to the interpretation, operation and carrying out of rules 7 and 8 of the said Rules and Regulation;
And

WHEREAS both the Governments have submitted the matters in dispute to the Arbitration of the Honourable Mr. Justice Page with Messrs. Howley and Forbes as assessors.

Now the two Governments have agreed in lieu of an award in that behalf to adopt finally for all Regulation subsequent to 1st July 1929, the following discharges for the respective months in place of the averages referred to in clause 8 of Annexure I:-

June for 61/2 feet gauge	.. 29,800 cusecs.
July and August for 71/2 ft. gauge	.. 40,100 "
September for 7 feet gauge	.. 35,000 "
October for 6 1/2 feet gauge	.. 29,800 "
November for 6 feet gauge	.. 25,033 "
December for 31/2 feet gauge	.. 8,913 "
January for 3 feet gauge	.. 6,170 "

and in rule 10, defining the impounding formula, C will denote the said above mentioned discharges.

> THIS agreement is without prejudice to the other questions outstanding between the parties in regard to the clauses of the agreement other than clauses 7 and 8 of the Rules of Regulation.
>
> 17th June 1929.
>
> (Signed) R. RANGA RAO) Officiating Chief Secretary to the Govt. of Mysore
>
> (Signed) A.G. LEACH, Secretary to the Government Public Works and Labor Department, Madras."

50. In 1934, a new reservoir at Mettur which was constructed by Madras became operational pursuant to Clause 10(v) of the agreement of 1924 and the Madras Government had agreed to limit "the new areas of irrigation under their Cauvery Mettur project (Project Report of 1921) to 301,000 acres" and the capacity of "the new reservoir at Mettur" to 93.5 TMC. In the said order, the State of Madras started planning of Nhawan reservoir under Clause 10 (xiv) of the agreement of 1924 and, as a result, Mysore became entitled to construct a reservoir of 60% of the capacity planned by Madras and, accordingly, Mysore proposed Kabini Reservoir as an offset reservoir under Clause 10(xiv) of the said agreement. In this regard, the finding of the Tribunal is as follows:-

> "Regarding Kabini project, the objection of Madras was that the proposal of Mysore for transfer of half of power

> storage from Krishnarajasagar to Kabini was not permissible although according to the State of Karnataka it was permissible under Clasue 10(ix) of the agreement. Apart from objection regarding the transfer of power storage with regard to Kabini other objections had also been raised. From the notes of discussion between the then engineers of the two States on 11th and 12th March, 1940 (Tamil Nadu Vo,VII/Exh.445 page 148) it appears that the two Chief Engineers of Madras and Mysroe Governments finally agreed on the impounding in reservoir to be built on Kabini during the critical months from June to January, applying the Rule 10 of Rules of Regulation of KRS (Annexure I to the Agreement). The notes of discussions and agreements between the two Chief Engineers were duly signed by them, and no further action was taken by the State of Madras. Any agreement between the two chief engineers was subject to the approval of the State of Madras and the Government of Mysore. Then by letter dated 21st May. 1945 the Secretary to Maharaja of Mysore made a request to the Resident in Mysore to obtain the concurrence of the Madras Government. There was no reply from Madras Government although the contents of the aforesaid letter had been communicated to the Government of Madras. No explanation was furnished as to why when the Chief Engineers of two States had fixed and settled the impounding formula in terms of the agreement of 1924. for the reservoir on Kabini. the State of Madras was not communicating its approval. Because of that the project on Kabini as planned by Mysore in 1933 under clause 10(iv) of the agreement remained unimplemented."

51. In the year 1935, the British Parliament enacted the Government of India Act, 1935 (for short, “the 1935 Act”). In the year 1947, the Indian Independence Act, 1947 (for brevity, “the 1947 Act”) came into force. The Maharaja of Mysore had executed

an agreement "Instrument of Accession" initially only on two subjects, namely, defence and external affairs and communications which was accepted by the Governor General of India on 16.08.1947. Thereafter, a White Paper was released on Indian States and "Standstill Agreement" was entered into between the Dominion of India and the Maharaja of Mysore. A supplementary "Instrument of Accession" was executed on 01.06.1949 for all matters enumerated in List I and List II of the Seventh Schedule of the 1935 Act which was contained in the said supplementary agreement. After coming into force of the Constitution of India, the 1947 Act stood repealed by reason of the provisions contained in Article 395 of the Constitution of India and the erstwhile province of Madras under the 1935 Act became a Part A State of Madras with effect from 26.01.1950. On 01.11.1956, the new State of Mysore was formed by the States Reorganisation Act, 1956 (for short, 'the Reorganisation Act").

52. In August 1972, the State of Tamil Nadu filed a suit OS No. 1 of 1971 against the State of Mysore which was permitted to be withdrawn with liberty to file a fresh suit if necessary. On 29.05.1972, the Chief Ministers of Mysore, Tamil Nadu and Kerala

discussed with the Union Minister for Irrigation and Deputy Minister. The relevant part of the discussion reads as follows:-

> "Note on discussions regarding Cauvery held at New Delhi on 29th May, 1972"
>
> "Discussions were held on 29th May, 1972 at New Delhi between the Chief Ministers of Mysore, Tamil Nadu and Kerala. Union Minister for Irrigation and Power and Deputy Ministers were present. The Chief Ministers were assisted by Ministers of respective States, those present were as follows:
>
> I. Tamil Nadu:
>
> 1. Thiru M. Karunanidhi, Chief Minister
> 2. Thiru S. Madhavan, Minister for Law
> 3. Thiru SJ. Sadiq Pasha, Minister for Public Works
>
> II. Mysore:
> 1. Shri D. Devaraj Urs, Chief Minister
> 2. Shri M.N. Nanja Gouda, Minister for State for Major Irrigation
>
> III. Kerala:
> 1. Shri C. Achutha Menon, Chief Minister
> 2. Shri T.K. Divakaran, Minister for Public Works
>
> Union Minister for Irrigation and Power stated that river problems are best settled through negotiations and this was the course the Central Government was adopting for the last few years in settling the differ rences on the use® of waters of Cauvery. Earlier, it was aimed to arrive at an interim agreement to be valid till 1974. when the earlier agreement of 1924 would have come up for review after 50 years, as provided in the agreement. Now, as 1974 is near, this attempt has been given up in favour of finding an overall approach to solve the problem amicably

amongst the several States. (Emphasis supplied) The discussions amongst the Chief Ministers revealed general consensus on the three following points as in para 2:

> 2.1 A serious attempt should be made to resolve by negotiations the Cauvery dispute between eh States as eariy as possible.
>
> 2.2. The Centre may appoint a Fact Finding Committee consisting of Engineers, retired Judges and if necessary, Agricultural Experts to collect all the connected data pertaining to Cauvery waters, its utilization and irrigation practices as well as projects both existing, under construction and proposed in the Cauvery basin. The Committee will examine adequacy of the present supplies or excessive use of water for irrigation purposes. The Committee is only to collect the data and not make any recommendations. The Committee may be asked to submit its report in three months time.
>
> 2.3 Making use of the data, discussions will be held between the Chief Ministers of the three States to arrive at an agreed allocation of waters for the respective States.
>
> 3. Union Government will assist in arriving at such a settlement in six months, and in the meanwhile, no State will take any steps to make the solution of the problem difficult either by impounding or by utilizing water of Cauvery beyond what it is at present."

53. Pursuant to the above, the Cauvery Fact Finding Committee (CFFC) was set up by the Government of India. The terms of the reference to the CFFC were as follows:-

"(i) To collect all the connected data pertaining to Cauvery waters; its utilization at different points of time: irrigation practices; as well as projects both existing, under construction, and proposed in the Cauvery basin.

(ii) To examine adequacy of the present supplies or excessive use of water for irrigation purposes.

(iii) To collect data relevant to the use of water in different States like the physical and other features; cultivated areas; existing and proposed uses for domestic and industrial water supply; hydro-electric power generation, navigation, salinity control and other non-irrigational purposes.

(iv) Any other connected matters."

54. The CFFC submitted a report on 15.12.1972. The relevant part of the report is reproduced below:-

"As desired in the above resolution, we hereby submit our report.

The data was received from Kerala on 21st September, 1972 from Mysore on 19th October, 1972 and Tamil Nadu on 24th October, 1972. Both Mysore and Tamil Nadu supplemented their data during their discussions with the Committee at New Delhi from 7th to 14th November, 1972. Some clarifications and elucidations had been asked for from the States during the discussions and again during the visit of the Committee to Mysore and Tamil Nadu from 6th to 8th December, 1972. The replies from the State Governments have not yet been received. The data supplied by the three States runs into 20 volumes. In addition, they have left with the Committee project reports for their study which also run into 36 volumes. As this voluminous data requires very careful examination and scrutiny, the Committee "had asked for further extension

> of one month from 15th December, 1972 to 15th January, 1973. But the same has not been agreed to.
>
> In view of the above, the Committee had no alternative but to submit its report on 15th December, 1972, though it has not been possible to do full justice to this important work.
>
> In accordance with the note on discussions regarding Cauvery held at New Delhi on 29th May, 1972, between the Union Minister for Irrigation and Power and the Chief Ministers of Kerala, Mysore and Tamil Nadu {a copy of which had been supplied to the Committee) "the Committee is only to collect the data and not make any recommendations". As such, the Committee has refrained from making any recommendations."

55. On 14.08.1973, an additional report was submitted. In October, 1973, the States of Mysore, Tamil Nadu and Kerala desired the Government of India to make a study on the scope of economy in the use of water and in pursuance of the same, the C.C. Patel Committee was constituted. The Committee made various recommendations and an estimate of irrigation water requirement in each State. On 12.08.1976, a Committee with Mr. E.C. Saldhana, Member, Central Water Commission, as Chairman was set up by the Central Government with the following terms of reference:-

> "(i) To assess the requirement of water of the existing areas under irrigation as well as new areas which are proposed to be brought under irrigation taking into consideration the availability of water from the rainfall within the respective command areas:

> (ii) To assess the availability of water for use in a normal year taking into consideration integrated operation of the reservoirs and the demand pattern of releases:
>
> (iii) To recommend regulation of supplies in normal or good years for protecting the existing ayacuts as well as for the new areas, taking into consideration the savings to be effected progressively in Tamil Nadu including Karaikal region of Pondicherry and Karnataka."

56. In March 1977, a draft report was submitted to the Government of India. As is manifest, discussions, deliberations and negotiations went on between the two States and eventually, as stated earlier, on 06.07.1986, the State of Tamil Nadu lodged a complaint under the 1956 Act with the Government of India raising water dispute thereby requesting for adjudication of the water dispute by a tribunal.

57. We have already noted that the State of Karnataka had brought out an ordinance and how the Court has dealt with the same.

58. Having noted the aforesaid and observing what the Constitution Bench had stated, we may proceed to deal with the contentions canvassed on behalf of both the States with regard to the validity of the agreements.

H. Doctrine of Paramountcy and its extinction on coming into force of the Indian Independence Act, 1947

59. Mr. Nariman, learned senior counsel, has attacked both the agreements on two counts, namely, (i) the Maharaja of Mysore was not in a position to enter into an agreement on equal terms with the Madras Government as the communications would show, and further, (ii) the manner in which the agreements were reached, the status conferred by the British Government and the Maharaja, the orders passed by the British Government from time to time and eventually, the order of the Secretary of State for India who upheld the appeal of the British Government of Madras against the Griffin Award clearly show the subservience of the Maharaja of Mysore to the paramount power of the British Crown. He has drawn our attention to a passage of the Griffin Award which is as under:-

> "The Secretary of State holds that the Government of Madras were within their rights in appealing to him, firstly because the procedure prescribed in rule IV of the agreement of1892 was varied in the Arbitration Proceedings and, secondly, because, while the Agreement of1892 was and is valid as between the Governments of Madras and Mysore, this does not relieve him (i.e. the Secretary of State) of his genera! responsibility for intervening in any matter in which it seems to him that the public interest is threatened with injury, even if the possible injury would be consequent on action taken

> under an award given, or purporting to be given, under rule IV".

60. Relying on the same, it is propounded by Mr. Nariman that a binding arbitration award between the Indian State and a Province in British Government was not regarded as binding by the Secretary of State and he could refuse to recognize it and from the said, the Doctrine of Paramountcy is manifest and that alone should be treated as sufficient to treat the agreements as absolutely unfair, arbitrary and unreasonable. Learned senior counsel would contend that when in such a situation the agreement had been entered into, the same cannot be regarded as valid in law after India got independence and should be declared as null and void under the Constitution of India that came into force on 26th January, 1950. It is urged by him that having regard to the regime of paramountcy and taking note of the fact that the Crown had the paramount power and exercised the same in favour of the Madras Government ignoring whatever objection could be raised then by the Dewan of Maharaja of Mysore, the agreement cannot be constituted as valid and acceptable in law. The argument on the factual score by Mr. Nariman has been seriously contested by Mr. Rakesh Dwivedi, learned senior counsel appearing for the State of Tamil Nadu,

urging that the agreements were arrived at after several correspondences and proper consideration. He has also drawn our attention to the letter dated 12.02.1924 from the Dewan of Mysore to the Secretary of the Maharaja. The said letter reads thus:-

> "I have discussed the whole matter this morning with my colleagues and they entirely approve of my recommendations. I feel relieved and proud that after four years of strenuous fight. I am able to put up for His Highness approval a settlement which is eminently satisfactory and favourable to Mysore and its future generations.
>
> PS. - Sir Visvesvaraya has gone away to Bhadravathi, so, I cannot speak to him. I have already discussed all the main points with him a week ago and he was fully satisfied that we got all we could and had a very satisfactory settlement."

61. Referring to the language employed in the said letter, it is submitted by Mr. Nariman that the same does not really indicate anything that can be considered as consent or acceptance but instead reflects some kind of resignation. He has emphasized on the words "that we got all we could" to highlight that it is reflective of compulsive surrender having no choice and accepting whatsoever has been given in the absence of any option. He would further submit that the agreement of 1924 only permitted the State of Mysore to undertake irrigation in the Princely State on certain

terms. It was because of the unilateral imposition by the paramount power.

62. In this context, it is also necessary to refer to what Mr. Dwivedi, learned senior counsel, has drawn our attention to from the letter of the Dewan of Mysore to the Maharaja of Mysore. The said part reads as follows:-

> "I am sending tonight with this letter a complete comprehensive agreement embracing all the points of dispute, bringing forward every clause as agreed to up to date during the past 4years of discussion and signed by the technical officers of the two Governments. It will be seen that we have given a concession to Madras in regard to the Bhavani Project and have got, in return, a quid pro quo that we shall be entitled to have an additional reservoir. The other points are already settled. The whole case has caused me, during the past few days, considerable anxiety and I honestly now think that with the concession now obtained and with the finality in regard to the krishnarajasagara, taken together with the possibility of an additional development of 110,000 acres during the next 50 years, Mysore interests are fully safeguarded even though Mysore now agrees to the Metur project slightly enlarged. We have made a very still fight over this question, and as Madras have climbed their other contentions and are prepared to sign the agreement as now submitted, we may, with good grace, yield on this one point so far as only the additional 1,500 m.c. ft. extra storage is concerned, which is negligible and conclude the dispute once for all.
>
> I have discussed the whole matter this morning with my colleagues and they entirely approve of my

> recommendations. I feel relieved and proud that after four years of strenuous fight, I am able to put up for His Highness approval a settlement which is eminently satisfactory and favourable to Mysore and its future generations."

63. Elaborating the stand of paramountcy, this Court has been apprised of certain factual aspects. In 1929, certain disputes arose between the two Governments pertaining to the interpretation, operation and carrying out of Rules 7 and 8 of the Rules of Regulation of 1921 (Annexure to the Agreement of 1924) and under Clause 10(ii), the matters in dispute were referred to arbitration of Mr. Justice Page of the Calcutta High Court and during the arbitration, both the Governments agreed to adopt the same as final as regards the discharges at the upper Anicut and certain further aspects. In 1934, a new reservoir at Mettur which was constructed by Madras became operational pursuant to clause 10(v) of the Agreement of 1924 and the Madras Government agreed to limit the new areas of irrigation under the Cauvery-Mettur project to 301,000 acres and the capacity of the new reservoir at Mettur to 93.5 TMC. It is the stand of the State of Karnataka that when the Mettur Dam became operational with effect from 1934, the natural flow for upper Anicut which was at a considerable distance below Mettur

could not be maintained at the stipulated six and a half to seven and a half ft. equal to 29800 cusecs to 40100 cusecs since the water of the upstream flowed into Mettur reservoir. Despite the same, as urged by Mr. Nariman, clause 10(ii) of the Agreement of 1924 required strict observance of Rule 7 of the Rules of Regulation and was not altered and it was so because of the paramount power exercised by the authority and it did not desire the anomaly to be corrected. Various other aspects have been stressed upon to highlight that the State of Mysore had no authority to bargain and it was compelled to succumb to the paramount exercise of power. We are at present not referring to the specific reservoirs as that shall be dealt with at a later stage.

64. The legal validity of the agreement of the year 1924 was challenged before the Tribunal and it has addressed whether the agreement has become constitutionally invalid. Adverting to the same, the Tribunal has opined that when the 1924 Agreement was entered into, the Government of India Act, 1919 was in force. Section 30 of the said Act enabled the Governor General in Council to make any contract for the purpose of that Act. The Government

of India Act, 1919 was repealed by the Government of India Act, 1935.

65. On behalf of the State of Tamil Nadu, reliance was placed on Section 177 of the Government of India Act, 1935 to sustain the contention that the 1924 Agreement continued to be in force and when British paramountcy lapsed on 15th August, 1947, the agreement did not lapse automatically due to the proviso to Section 7(1) of the Indian Independence Act, 1947. It is further put forth that the agreement continued to be in force in the absence of denouncement of those agreements by either party or by superseding them by any fresh agreement. That apart, the State of Mysore which was a Princely State at the time of its accession to the Dominion of India executed both the "Instruments of Accession" and the "Standstill Agreement" under which the agreement continued between the State of Madras and the then State of Mysore. After the Constitution came into force, the liabilities and obligations arising out of the said agreements under Articles 294-B and 295(2) devolved on the two States and after the reorganization of the States in November, 1956, the terms of the agreement made earlier are to be treated as binding on the successor State or States

under Section 87(1) of the Reorganisation Act. The contention of the State of Karnataka before the Tribunal was that the Agreement of 1924 is not covered by Section 177 of the Government of India Act, 1935 and as such, it lapsed after coming into force of the said Act.

66. The Tribunal referred to Section 177(1), noted the submissions of the learned counsel for the parties and held thus:-

> "7. On a plain reading of Section 177(1) of the Government of India Act 1935 aforesaid it is apparent that it conceived contract to be made by or on behalf of the Secretary of State in Council. On the facts furnished on behalf of the State of Karnataka itself it appears that the Agreement which had been initially signed by the Dewan of Mysore and Secretary to the Government of 88 Madras on 18th February 1924 was also signed by the Maharaja of Mysore as well as the Governor of Madras. It was also approved by the Secretary of State and that approval was communicated by telegram dated 18th June 1924. Thereafter, the Government of India approved and confirmed the said agreement on 11th July 1924 which is apparent from the note made on the photo copy of the agreement by the Political Secretary. In this background, it shall be deemed that the said agreement had been executed on behalf of the Secretary of State in Council. Merely because in the agreement it had not been mentioned that it was being executed on behalf of the Secretary of State in Council, shall not make the agreement invalid. It is well known that in such matters a presumption has to be raised that official acts have been performed by complying with the requirement of the law. According to us after lapse of about 80 years from the date of the execution of the agreement it shall be a futile attempt to examine the legal validity of the execution of the agreement of the year 1924 which had

> been acted upon by the then State of Madras and the Government of Mysore in respect of sharing of the water of Cauvery and its tributaries including in respect of construction of reservoirs over Cauvery and its tributaries by two States. Pursuant to that agreement KRS was constructed and became functional in the year 1931 within Mysore and Mettur was constructed by Madras which became functional in the year 1934. The reservoirs on tributaries within the States of Mysore/Karnataka and Madras/Tamil Nadu have also been constructed and they are functioning. No dispute was raised at any stage on behalf of the Mysore or Karnataka till 89 the expiry of the period of 50 years in 1974, in respect of any defect in the execution of the agreement of the year 1924 or that it was not binding on Mysore/Karnataka."

67. The submission was structured on the basis of the 1947 Act and the judgment rendered in ***Dr. Babu Ram Saksena v. State***[3]. The Tribunal analyzed the said decision and the views of Patanjali Sastri, J. who delivered his opinion on behalf of M.H. Kania, CJ and himself and the opinion rendered by B.K. Mukherjee, J. Be it noted, Fazal Ali, J. agreed with both Sastri, J and Mukherjee, J. and opined that the appeal deserved to be dismissed. Mahajan, J. concurred with Mukherjee, J. After noting the facts, the Tribunal observed thus:-

> "16. It appears that three remaining Hon'ble Judges Fazl Ali, J, Mahajan,J, and Das,J, agreed with the opinion

[3] 1950 SCR 573 : AIR 1950 SC 155

> aforesaid expressed by Hon'ble Justice Mukherjea. The majority of the Judges in the aforesaid Supreme Court case dismissed the appeal taking special facts and circumstances of that particular case, i.e. the merger of the Tonk State along with several other States and giving rise to the United State of Rajasthan. In the process of merger Tonk had lost its identity and had relinquished its life. As such a treaty previously concluded had lapsed."

68. After so stating, the Tribunal distinguished the said decision as the factual matrix is different. It has been held by the Tribunal that the State of Mysore was a ruling State and after accession, it became a Group B State under the Constitution of India and at no stage, there has been any merger of the said State with any other State by which the Ruling State of Mysore stood extinguished or relinquished as in the case of State of Tonk which was the subject matter of controversy in ***Dr. Babu Ram Saksena*** (supra). Thereafter, the Tribunal has held:-

> "According to us the aforesaid judgment of the Supreme Court is of no help to the State of Karnataka. No other decision or provision was brought to our notice in support of the contention that the Agreement of the year 1924 ceased to exist after the Indian Independence Act 1947 came into force. The result will be that it shall be deemed that the said Agreement of 1924 survived and continued even after the coming into force of the Indian Independence Act 1947 and the Constitution of India."

69. Mr. Nariman, learned senior counsel, has assiduously and astutely canvassed about the doctrine of paramountcy. For the said purpose, he has drawn our attention to Section 7 of the 1947 Act. The said provision reads as follows:-

> "7.(1) As from the appointed day(a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;
>
> (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and
>
> (c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise:
>
> Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any

> such agreement as is therein referred to which relate to customs, transit and communications, -posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.
>
> (2) The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words " Indiae Imperator " and the words " Emperor of India " and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm."

70. According to Mr. Nariman, after coming into force of the said provision, the agreements lapsed and the finding of the Tribunal that they continued because of the "Standstill Agreement" or the constitutional provisions as enshrined under Article 295(2) is absolutely erroneous. In this context, we may refer to the "Standstill Agreement" which is a part of the White Paper on Indian State issued by the Government of India, Ministry of States. In part 4 of the said White Paper, accession of the States to the Dominion of India is mentioned and it refers to the lapse of paramountcy. Paragraph 82 deals with "Standstill Agreement". It reads as follows:-

> "Standstill Agreements, the acceptance of which was made by the Government of India conditional on accession by the States concerned were also entered into between the Dominion Government and the acceding States. The Standstill Agreements (Appendix IX), provided for the continuance for the time being of all subsisting agreements and administrative arrangements in matters of common concern between the States and the Dominion of India or any part thereof."

71. It is submitted by Mr. Nariman that the "Standstill Agreement" dated 09.08.1947 which was actually executed by the Maharaja of Mysore stipulated that nothing in the said agreement could include the exercise of any paramountcy function and, therefore, the "Standstill Agreement" will not cover the State of Mysore. Learned senior counsel would contend that with the coming into force of the Constitution of India on 26.01.1950, the 1947 Act passed by the Parliament stood repealed by reason of the provision of Article 395 of the Constitution and Mysore became a Part B State under the Constitution and the erstwhile province of Madras became a Part A State. According to him, even if the "Standstill Agreement" executed between the Maharaja of Mysore and the Dominion of India was operative and existing, it came to an end. According to him, the 1947 Act did not survive beyond the final accession of the State of Mysore to the Union of India and "Standstill Agreement" entered

into by the Government of India with various Indian States including the provincial State of Mysore were purely temporary arrangements designed to maintain *status quo* in respect of administrative matters. He has seriously criticized the finding of the Tribunal and contended that the Tribunal has failed to take proper note of the decision in ***Dr. Babu Ram Saksena*** (supra). He has commended us to certain passages to bolster the argument:-

> "The Attorney-General appearing for the Government advanced three lines of argument in answer to that contention. In the first place, the standstill agreement entered into with the various Indian States were purely temporary arrangements designed to maintain the status quo ante in respect of certain administrative matters of common concern pending the accession of those States to the Dominion of India, and they were superseded by the Instruments of Accession executed by the Rulers of those States. Tonk having acceded to the Dominion on the 16th August, 1947, the standstill agreement relied on by the appellant must be taken to have lapsed as from that date. .....
>
> As we are clearly of opinion that the appellant's contention must fail on this last ground, we consider it unnecessary to pronounce on the other points raised by the Attorney General especially as the issues involved are not purely legal but partake also of a political character, and we have not had the views of the Governments concerned on those points."

72. We have already referred to the decision in ***Dr. Babu Ram Saksena*** (supra) and how the Tribunal has dealt with the same.

The emphasis of Mr. Nariman is on the words "partake also of a political character". Stress is laid that when an agreement partakes a political character, the doctrine of paramountcy clause melts into insignificance by virtue of Section 7 of the 1947 Act. In this regard, he has placed reliance on ***Hemchand Devchand v. Azam Sakarlal Chhotamlal***[4]. The effort of the learned senior counsel is to draw a distinction between categories of political cases and those which fall in the other categories. The relied upon passages from the said judgment read as follows:-

> "The real question is whether in cases like those now before their Lordships the action of the tribunals in Kathiawar, and of the Governor in Council on appeal from those tribunals, is properly to be regarded as judicial or as political. And at this point a distinction arises between the two cases under appeal; because the first of them has been disposed of as a civil, the second as a political, case.
>
> x x x x x
>
> The further appeal to the Secretary of State in Council is a fact of clearer import. In Lord Salisbury's Despatch of the March 23, 1876, the practice of such appeals is dealt with as a thing at that date already fully established, and it continues to the present day in civil as well as in political cases. This system of appeal to the Secretary of State affords strong evidence that the intention of Government is and always has been that the jurisdiction exercised in connection with Kathiawar should be political and not judicial in its character."

[4] (1905) 33 IA 1 : (1906) ILR 33 Cal 219

And again:-

> "Such cases can only be justly disposed of on principle of equity in the fullest sense of the term, and not in the circumscribed sense, which is familiar to the practice of the High Courts; and sometimes consideration must be given to the political expediency which underlies the relation in which the Government stands to the protected States."

73. Placing reliance on the said passages, it is urged by him that when the Secretary of State was dealing with such a case, the said case was regarded as "political" and not "judicial" in character as was later authoritatively stated in the letter of the Viceroy of India – that is, Lord Reading's letter dated 27.03.1926 to the Nizam of Hyderabad – which set out the doctrine of paramountcy in classical terms. Elaborating further, it was contended by him that the appeal preferred by the Government of Madras against the Griffin Award which was in favour of the Maharaja of Mysore was allowed and the Maharaja of Mysore was described as the head of a "Vassal State", and hence, he was not in a position to negotiate or bargain with the paramount power on equal terms and was compelled to go for amicable settlement on compulsion. In this regard, inspiration has been drawn from the decision in ***H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and others***

v. Union of India and another[5]. Shah, J., speaking for the majority, observed:-

> "100. In the era before 1947 the term "State" applied to a political community occupying a territory in India of defined boundaries and subject to a single Ruler who enjoyed or exercised, as belonging to him, any of the functions and attributes of internal sovereignty duly recognised by the British Crown. There were in India more than 560 States: forty out of those States had treaty relations with the Paramount Power: a larger number of States had some form of engagements or Sanads, and the remaining enjoyed in one or the other form recognition of their status by the British Crown. The treaties, engagements and Sanads covered a wide field, and the rights and obligations of the States arising out of those agreements varied from State to State. The rights that the British Crown as the Paramount Power exercised in relation to the States covered authority in matters external as well as internal. The States had no international personality, the Paramount Power had exclusive authority to make peace or war, or to negotiate or communicate with foreign States. The Paramount Power had the right of intervention in internal affairs which could be exercised for the benefit of the head of the State, of India as a whole, or for giving effect to international commitments."

74. Further, the Court referred to the Cabinet Mission which announced its Plan on May 16, 1946 for the entry of the States into the proposed Union of India and simultaneously declared that the paramountcy of the British Crown could neither be retained nor

[5] (1971) 1 SCC 85

transferred to the new Government. The Court also took note of the Indian (Provisional Constitution) Order, 1947 which extensively amended Sections 5 and 6 of the Government of India Act, 1935. The Court dwelt upon the inheritance of the paramountcy power of the British Crown and, in that context, held:-

> "131. We are unable to agree with the Attorney-General that the "old unidentified concept of paramountcy of the British Crown" was inherited by the Union, by reason of the instruments of accession and merger agreements and that "recognition of Rulership was a 'gift of the President', and not a matter of legal right, existing as it did in the area of paramountcy and remaining with the Government of India". The British Crown did not acquire paramountcy rights by any express grant, cession or transfer, it exercised paramountcy because it was the dominant power. Paramountcy had no legal origin, and no fixed concept: its dimensions depended upon what in a given situation the representatives of the British Crown thought expedient. Paramountcy meant those powers which the British authorities by the might of arms, and in disregard of the sovereignty and authority of the States chose to exercise. But that paramountcy lapsed with the Indian Independence Act, 1947: even its shadows disappeared with the integration of the States with the Indian Union. After the withdrawal of the British power and extinction of paramountcy of the British power the Dominion Government of India did not and could not exercise any paramountcy over the States. In clause 3 of the Standstill Agreement it was expressly recited that.... Nothing in the agreement includes the exercise of any paramountcy functions". The relations between the States and the Dominion Government were strictly governed by the instruments executed from time to time. Subject to the power conferred in respect of certain

> matters of common interest to legislate and exercise executive authority the Princes had sovereignty within their territories. With the advent of the Constitution the States ceased to exist, and the Princes and Chiefs who were recognized as Rulers were left with no sovereign authority in them. It is difficult to conceive of the government of a democratic Republic exercising against its citizens "paramountcy" claimed to be inherited from an imperial power. The power and authority which the Union may exercise against its citizens and even aliens spring from and are strictly circumscribed by the Constitution.
>
> 132. The fundamentals on which paramountcy rested i.e. the compulsion of geography and the essentials for ensuring security and special responsibility of the Government of India to protect all territories in India survived the enactment of the Indian Independence Act, for between August 15, 1947 and the date of integration of the various States, the Government of India was the only fully sovereign authority. But paramountcy with its brazen-faced autocracy no longer survived the enactment of the Constitution. Under our Constitution an action not authorised by law against the citizens of the Union cannot be supported under the shelter of paramountcy. The functions of the President of India stem from the Constitution — not from a "concept of the British Crown" identified or unidentified. What the Constitution does not authorise, the President cannot grant. Rulership is therefore not a privilege which the President may in the exercise of his discretion bestow or withhold."

75. Relying upon the said authority, it is canvassed by Mr. Nariman that the agreements of 1892 and 1924 were relatable to paramountcy functions and, therefore, the "Standstill Agreement" of Mysore could not be held to have continued the said two

agreements since they are relatable to paramountcy and, in fact, after the lapse of suzerainty of the British Crown under the 1947 Act, both the agreements are bound to be treated to have been lapsed. In this context, he has drawn inspiration from certain passages of the book “Integration of Indian States” by Mr. V.P. Menon who has commented on the provisions of Section 7 of the 1947 Act. The comments of the learned author in this regard are as follows:-

> "The next question was whether, even if paramountcy lapsed, all agreements of a commercial, economic or financial character between the States on die one hand and the British Government, the Secretary of State, and the Governor-General on the other, would cease to be legally effective. I pointed out that there were several important agreements which had been entered into for the common benefit of the States and British India where paramountcy did not enter, such as the agreement of 1920 with Bahawaipur and Bikaner regarding the Sutlej Valley canals project, and the Government of India agreement on salt with Jaipur and Jodhpur. The mutual rights and obligations- of parties under such agreements could not be regarded as lapsing on the withdrawal of paramountcy. On the commencement of the Government of India Act of 1935, the Crown's rights and obligations had become for all practical and constitutional purposes the rights and obligations of the Central Government and were secured as such by the provisions of the Act. The financial commitments of the Central Government under agreements of this type were considerable. I therefore took the view that it would be best that these

agreements should continue to be binding both on the States and on the successor Governments.

Sir Conrad Corfield. on behalf of the Political Department contested my point of view. He referred to a meeting between himself and Lord Pethick-Lawrence at which it had been agreed that the abolition of the Crown Representative would automatically cause paramountcy to become void, together with any subsisting agreements between the Crown and the States. Sir Conrad did not agree with the view that paramountcy did not enter into the Sutiej Valley Canals Agreement of 1920 and the Jaipur and Jodhpur Salt Agreements. The first of these had been entered into on behalf of Bahawaipur by a Council of Regency controlled by the paramount power while the ruler was a minor. The Jaipur and Jodhpur Salt Agreements wee typical of those which States had been required to conclude with the paramount power during the latter half of the nineteenth century in the interests of the central revenues. The Political Adviser was unable to entertain the view that the agreements should be continued after the lapse of paramountcy.

Lord Mountbatten did not take sides in this conflict of opinion. He merely forwarded both my view as well as that of the Political Department to the India Office.

It was about this time that the Secretary of State intimated that the Indian Independence Bill should include a specific denunciation of the treaties with the Indian States. Normally speaking, treaties were terminated by ‘acts of State', but there was no reason why, on an occasion of this importance and in the peculiar circumstances, this should not be done by an Act of Parliament which would emphasize the legal position whereby paramountcy did not pass to the new Indian Dominions. This was considered by the Viceroy's advisers; they deprecated any such formal denunciation of treaties.

> Meanwhile the Secretary of State's opinion in regard to the continuance of existing agreements was received. He stated that His Majesty's Government fully appreciated the importance attached by the Reforms Commissioner to the avoidance if possible of complete severance of relations with the States and the necessity for negotiations between parties over the whole field. But he considered that the views of the Political Department must prevail, as they were in line with His Majesty's Government's policy as stated in the Cabinet Mission memorandum. It was impossible to distinguish between agreements freely negotiated and those imposed. In any case, all had been made under the authority of the Crown and not of the executive Governments - central or provincial - of British India...."
>
> [Emphasis supplied]

76. He has also drawn strength from the other Water Disputes Tribunals, namely, Narmada, Krishna and Godavari. His principal emphasis is on the fact that the agreements entered into between the two States were for political considerations as the State of Mysore was a princely State under the British suzerainty and the State of Madras was a province of British India and the disputes were never settled by application of international law but through authoritative decision of the British Crown. In essence, the submission is that after coming into force of the 1947 Act, the agreements became extinct by operation of law.

77. In this regard, we may usefully refer to the authority in ***State of Tamil Nadu v. State of Kerala and another***[6] which was dealing with the water level of Mullaperiyar Dam after it was solved by this Court on 27.02.2006 in ***Mullaperiyar Environmental Protection Forum v. Union of India and others***[7]. The controversy had arisen because the Kerala State legislature had enacted the law immediately thereafter fixing and limiting full reservoir level to 136 ft. The Constitution Bench referred to the Periyar Lake Lease Agreement dated 29.10.1886 which allowed the masonry dam to come up across Periyar reservoir. The agreement stipulated many aspects. In 1979, the Government of Kerala had entered into a correspondence with the Tamil Nadu Government to take immediate steps to strengthen the dam keeping in view the safety of the Mullaperiyar Dam. Simultaneously, the Kerala Government also requested the Central Government to depute a team from the Central Water Commission (CWC) to inspect the Dam and suggest strengthening measures. In pursuance of the request from the Kerala Government, the CWC held meeting and three level measures, (i) emergency, (ii) medium, and (iii) long term were

[6] (2014) 12 SCC 696
[7] (2006) 3 SCC 643

suggested to strengthen the Dam. In the meantime, it was recommended that the water level in the reservoir be kept at 136 ft. In the second meeting held on 29.04.1980, it was opined that after the completion of emergency and medium-term strengthening measures, the water level in the reservoir can be restored up to 145 ft. In the year 1998, the State of Tamil Nadu had a grievance that despite the measures being suggested by CWC, no consensus could be reached between the State Governments, that is, Tamil Nadu and Kerala, to raise the water level in the Mullaperiyar Reservoir beyond 136 ft. Various writ petitions were filed in both the High Courts and, eventually, the matters stood transferred to this Court and some directions were issued in ***Mullaperiyar Environmental Protection Forum*** (supra). The Expert Committee, after discussion, opined that the water level in the Mullaperiyar Reservoir could be raised to 142 ft as that would not endanger the safety of the main Dam, including spillway, Baby Dam and earthen bund. The Constitution Bench referred to the first litigation before this Court, the Kerala Irrigation and Water Conservation Act, 2003, the Kerala Irrigation and Water Conservation (Amendment) Act, 2006, the second litigation before this Court, grounds of challenge to the 2006

(Amendment) Act and the defence put forth by the State of Kerala. Certain issues were framed by the Court out of which four questions being relevant for the present purpose are reproduced below:-

> "4. (*b*) Whether the pleas relating to validity and binding nature of the deed dated 29-10-1886, the nature of Periyar River, structural safety of the Mullaperiyar Dam, etc. raised by the first defendant in its defence, are finally decided by the judgment of this Court dated 27-2-2006 in *Mullaperiyar Environmental Protection Forum* v. *Union of India* and consequently first defendant is barred from raising or reagitating those issues and pleas in this suit, by the principle of res judicata and constructive res judicata?
>
> 5. Whether the suit based on a legal right claimed under the lease deed executed between the Government of the Maharaja of Travancore and the Secretary of State for India on 29-10-1886, is barred by the proviso to Article 131 of the Constitution of India?
>
> 6. Whether the first defendant is estopped from raising the plea that the deed dated 29-10-1886 has lapsed, in view of subsequent conduct of the first defendant and execution of the supplemental agreements dated 29-5-1970 ratifying the various provisions of the original deed dated 29-10-1886?
>
> 7. Whether the lease deed executed between the Government of the Maharaja of Travancore and Secretary of State for India on 29-10-1886 is valid, binding on first defendant and enforceable by plaintiff against the first defendant?"

78. Be it noted, initially, the matter was heard by a three-Judge Bench and later on, it was referred to the Constitution Bench as some of the issues framed in the suit involved decision on certain substantial questions of law concerning interpretation of the Constitution. Dealing with the issues on the 1886 lease agreement, the Court posed the question – whether it is an existing contract under the 1935 Act. Reference was made to Section 177 of the 1935 Act and interpreting the same, the Court held:-

> "41. Section 177 of the 1935 Act, omitting the unnecessary part reads,
>
> > "177. (1) … any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State-in-Council shall, as from that date—
> >
> > (*a*) if it was made for the purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province…."
>
> By virtue of this provision, the existing contracts of the Secretary of State-in-Council would have the effect as if they had been made on behalf of the Province. When we see the 1886 Lease Agreement in the light of Section 177 of the 1935 Act, there remains no doubt at all that lease that was executed by the Secretary of State-in-Council for the Presidency of Madras (Madras Province)

> had the effect as if it had been made on behalf of the Presidency of Madras or for that matter Madras Province. To put it differently, by legal fiction created under Section 177(1)(*a*), the Presidency of Madras (Madras Province) became lessee under the 1886 Lease Agreement. We have, therefore, no hesitation in accepting the submission of Mr Vinod Bobde, learned Senior Counsel for Tamil Nadu that by virtue of Section 177 of the 1935 Act, as from the commencement of the 1935 Act, the Government of the Province of Madras is deemed to be substituted as the lessee in the 1886 Lease Agreement."

79. Thereafter, the Court addressed the issue of the effect and impact of the events between 18.07.1947 and 26.01.1950 which relate to the 1947 Act and the Constitution of India. The Court referred to the "Standstill Agreement" which was entered into between the State of Travancore and the Dominion of India, the omission of Section 177 of the 1935 Act and the merger of two States – Travancore and Cochin. Analysing further, the Court referred to Section 7 of the 1947 Act and observed thus:-

> "45. As noted above, the 1947 Act came into effect from 15-8-1947. Section 7 deals with the consequences of the setting up of the new dominions. Clause (*b*) of sub-section (1) of Section 7 declares that suzerainty of His Majesty over the Indian States lapses. On lapsing of suzerainty, it provides for lapsing of all treaties and agreements in force between His Majesty and the Rulers of Indian States from that date. The proviso appended to sub-section (1), however, continues such agreements unless the provisions in such agreement are denounced

by the Ruler of the Indian State or are superseded by a subsequent agreement.

46. It is the contention of Mr Harish N. Salve that firstly, 1886 Lease Agreement lapsed by virtue of main provision of Section 7(1)(*b*) of the 1947 Act as it comprehends all treaties and agreements and secondly, the Maharaja of Travancore denounced all agreements including the 1886 Lease Agreement.

47. It is true that Section 7(1)(*b*) of the 1947 Act uses the expression "all treaties and agreements" but, in our opinion, the word "all" is not intended to cover the agreements which are not political in nature. This is clear from the purpose of Section 7 as it deals with lapsing of suzerainty of His Majesty over the Indian States and the consequence of lapsing of suzerainty. Obviously, the provision was not intended to cover the agreements and treaties other than political. We, accordingly, hold that Section 7(1)(*b*) concerns only with political treaties and agreements."

And again:-

"53. It is argued by Mr Harish N. Salve that the Standstill Agreement, which is between parties different from those who had executed the 1886 Lease Agreement, is a fresh agreement which brought into force, for the time being, contractual obligations between the Maharaja of Travancore and the Dominion of India. As the parties were different and the 1947 Act provided for the lapse of the British suzerainty over the Princely States, the question of continuance of the 1886 Lease Agreement does not arise. In any case, the learned Senior Counsel for Kerala argues that the Standstill Agreement could not survive after the deletion of Section 177 of the 1935 Act. We find no merit in these arguments. The Standstill Agreement is not a fresh agreement between the

Dominion of India and the State of Travancore as suggested by Mr Harish N. Salve. The Standstill Agreement was intended for the benefit of the parties who were parties to the agreements and arrangements, which were matters of common concern existing between the Crown and the State of Travancore. In the background of Instrument of Accession, it became necessary to have some arrangement so that the existing agreements and arrangements between the Crown and the Indian States continued. We do not think that the Standstill Agreement is political in nature as contended on behalf of Kerala.

54. The argument that the Standstill Agreement could not survive after the deletion of Section 177 with effect from 15-8-1947 by virtue of India (Provisional Constitution) Order, 1947 is also without substance. Section 177 was deleted because it could no longer work and because the Dominion of India was to come into being with provinces as part of the Dominion and there was to be no Secretary of State-in-Council. We are in agreement with Mr Vinod Bobde, learned Senior Counsel for Tamil Nadu that deletion of Section 177 was prospective and it did not affect the deeming that had already taken place in 1935. The Standstill Agreement, in our view, cannot be said to have been wiped out by the deletion of Section 177.

x x x x x

56. The argument that there is no successor of Crown is irrelevant because by virtue of Section 177, the Government of Province of Madras had already become lessee in the 1886 Lease Agreement by deeming in 1935 itself. The Standstill Agreement continued the 1886 Lease Agreement between the Province of Madras and the State of Travancore. The 1886 Lease Agreement did not lapse under the main provision of Section 7(1)(*b*) of the 1947 Act. There was no unequivocal and unambiguous

> denouncement of the 1886 Lease Agreement by the Ruler of Travancore under proviso to Section 7(1)(*b*). The Province of Madras was beneficiary of the Standstill Agreement. Surely, deletion of Section 177 has not affected the rights of Province of Madras."

80. The Court analysed the opinions of the learned Judges expressed in ***Dr. Babu Ram Saksena*** (supra) and eventually held thus:-

> "61.5. A careful consideration of the judgment by Mukherjea, J. in *Ram Babu Saksena* would show that His Lordship's opinion has no application to a non-political agreement such as the 1886 Lease Agreement. The observation of Mukherjea, J., "When as a result of amalgamation or merger, a State loses its full independent power of action over the subject-matter of a treaty previously concluded, the treaty must necessarily lapse. …" is in the context of an extradition treaty which is purely political in nature. In our view, *Ram Babu Saksena* is clearly distinguishable and does not help Kerala in its argument that the 1886 Lease Agreement lapsed on merger of the two States, Travancore and Cochin, into the United State of Travancore and Cochin."

81. The Constitution Bench also addressed the issue whether the 1886 lease agreement was an Act of State and opined that the 1886 lease agreement is not political in nature. It distinguished the Constitution Bench decision in ***Virendra Singh and others v. State of U.P.***[8] and ruled that the said decision is distinguishable

[8] (1955) 1 SCR 415 : AIR 1954 SC 447

and that the 1886 lease agreement is an ordinary agreement and not political in nature. It is worthy to note that the Constitution Bench addressed the scope of Article 363 and Article 131, scanned both the Articles and held:-

> "73. Article 131 of the Constitution deals with the original jurisdiction of this Court. Subject to the provisions of the Constitution, this Court has original jurisdiction in any dispute, inter alia, between the Government of India and any State or States on one side and one or more other States on the other if and insofar as the dispute involves any question (whether of law or fact) on which the existence of legal right depends. However, by the proviso appended thereto, the jurisdiction of this Court is barred if the dispute to which a State specified in Part B of the First Schedule is a party if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument was entered into or executed before the commencement of the Constitution and has or has been continued in operation after such commencement.
>
> 74. There is similarity of provision in Article 363 and proviso to Article 131. The original jurisdiction conferred on this Court by the main provision contained in Article 131 is excepted by virtue of the proviso in the matters of political settlements. By making provisions such as Article 363 and proviso to Article 131, the political settlements have been taken out of the purview of judicial pronouncements. Proviso appended to Article 131 renders a dispute arising out of any treaty, agreement, covenant, engagement, sanad or similar instrument which is political in nature executed before the commencement of the Constitution and which has or has been continued in operation, non-justiciable and

jurisdiction of this Court is barred. The jurisdiction of this Court is not taken away in respect of the dispute arising out of an ordinary agreement. The instruments referred to and described in the proviso are only those which are political in nature. Non-political instruments are not covered by the proviso.

75. The 1886 Lease Agreement does provide for resolution of disputes between the parties to the agreement by way of arbitration: it contains an arbitration clause. The submission of Kerala that enforcement of any award under the arbitration clause would be political in nature is misplaced. The assumption of Kerala that the 1886 Lease Agreement was not justiciable and enforceable in court of law prior to the Constitution as no court in Travancore would obviously entertain a claim against Maharaja and no court outside the State of Travancore have jurisdiction over the Maharaja of Travancore is not relevant at all and devoid of any merit.

76. We are in complete agreement with the view taken by this Court in *Mullaperiyar Environmental Protection Forum* that the 1886 Lease Agreement would not come within the purview of Article 363 and jurisdiction of this Court is not barred. As a necessary corollary, the dispute arising out of the 1886 Lease Agreement is not barred under Article 131 proviso as well. Moreover, the principal challenge laid in the suit pertains to the constitutional validity of the 2006 (Amendment) Act for which Article 363 or for that matter under Article 131 proviso does not come into operation at all."

82. Commenting on the aforesaid decision, it is contended by Mr. Nariman that in ***Madhav Rao Scindia*** (supra), the majority had clearly expressed the view that paramountcy no longer survived

after the coming into force of the Constitution of India. In the said decision, it has been clearly spelt out that it is difficult to conceive of the Government of a democratic Republic exercising against its citizens "paramountcy claim to be inherited, imperial power". According to Mr. Nariman, when everything has come to an end, the concept of restriction to 'political nature', as has been held in ***State of Tamil Nadu v. State of Kerala*** (supra), sounds a discordant note.

83. Mr. Dwivedi, learned senior counsel, per contra, would submit that the decision in ***State of Tamil Nadu*** (supra) does not run counter to the principle stated in ***Madhav Rao Scindia***. According to him, ***Madhav Rao Scindia*** exclusively dealt with a political situation. To bolster the said aspect, he has drawn our attention to the "Standstill Agreement" which does not apply to any paramountcy function. He has also laid stress on the passage that discusses about *quid pro quo* for agreeing to surrender the power and authority by the rulers and that is why it was enacted in the Constitution that the Princes who had signed the covenant of the nature specified should be recognized as rulers. In essence, the submission is that if the authority in ***Madhav Rao Scindia's*** case

is appositely read and understood, it dealt with the abolition of Privy Purses by the President of India and how the action was erroneous and how the Court treated it to be of political nature.

84. It is absolutely manifest that the ruling in ***Madhav Rao Scindia*** (supra) states that after coming into force of the 1947 Act, the paramountcy lapsed and after the integration of the States with the Indian Union, the shadow of paramountcy faded and the Government of India became the full sovereign authority. After the Constitution came into force, the exercise of power by the State over its citizens stood circumscribed by the Constitution. In the said case, the doctrine of paramountcy has no play. The two agreements, on a studied scrutiny, do not indicate any aspect that can be called political or touching any facet of the sovereignty of India. The agreements covered the areas of larger public interest like construction of dams and irrigation of land existing within the two States, namely, the State of Mysore and the State of Madras and had nothing to do with political arrangement. Therefore, we are not inclined to accept the submission of Mr. Nariman that after coming into force of the 1947 Act and thereafter the Constitution of

India, the agreements of 1892 and 1924 became inoperative and totally extinct.

I. Infraction of Article 363 and non-maintainability of the dispute on the basis of agreements

85. The next plank of submission pertains to the constitutional infraction of Article 363. Article 363 reads as follows:-

> "**Article 363. Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.–** (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument
>
> (2) In this article
>
> (a) Indian State means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and
>
> (b) Ruler includes the Prince, Chief or other person recognised before such commencement by His

> Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

86. Pressing into service the aforesaid Article, it is contended by Mr. Nariman that the said Article commences with a non-obstante clause but subject to the provisions of Article 143 and that would exclude anything contained in Article 262(1) and, therefore, the bar under Article 363(1) must prevail. He has criticized the finding of the Tribunal which has placed reliance on the judgment of this Court in the ***Privy Purse*** case placing reliance on the view of Hegde, J. which is not the majority view because the majority spoke through Shah,J. It is urged by him that the finding of the Tribunal that Article 363 cannot bar the investigation of any complaint including a complaint regarding the agreement which has been executed by the then Ruler of a Princely State like Mysore which became an Indian State within the Dominion of India, a State under the First Schedule after coming into force of the Constitution is untenable. That apart, the Tribunal has opined that once the dispute is referred to the Tribunal which has exclusive jurisdiction under the Constitution to examine the dispute in respect of use, distribution or control of waters of any inter-state river or river valley, the said jurisdiction cannot be controlled or curtailed by

Article 363 and in case of agreement relating to sharing of water of inter-State river, the Tribunal has to examine the claims of the different riparian States in the background of such agreement and, therefore, the enquiry is not barred under Article 363 of the Constitution. Attacking the said findings, it is canvassed by Mr. Nariman that the Tribunal has failed to appreciate the fact that Articles 262 and 263 operate in entirely different fields, for Article 262 is only an exception how a particular matter relating to inter-State river water disputes between States of India have to be decided because it is not decided by the exclusive remedy provided in Article 131 of the Constitution but by an alternative mode now prescribed by the Parliament by law under Article 261(2), that is, the 1956 Act. It is further put forth by him that the agreements of the present nature come within the purview of Article 363 and to substantiate the said argument, he has placed reliance on ***State of Seraikella v. Union of India and another***[9].

87. It is submitted by Mr. Dwivedi, learned senior counsel for the State of Tamil Nadu, that the bar of jurisdiction of this Court under Article 363 of the Constitution relates only to certain clauses of

[9] 1951 SCR 474 : AIR 1951 SC 253

agreements, treaties, covenants, engagements, "Sanad", etc. The expression "other similar instruments' clearly indicates that it is not as if all kinds of agreements and treaties would come within the purview of the said provision. Article 363 covers only such political agreements executed between the Rulers of Indian States and the Government of the Dominion of India between 1947 and 1950. From the intrinsic language of Article 363 read with the proviso to Article 131, it is clear that the bar of jurisdiction of the Court applies only to disputes arising out of political agreements.

88. He has referred to the debates of the Constituent Assembly especially the observations made by Dr. B.R. Ambedkar as the Chairman of the Drafting Committee while moving the draft Constitution for consideration by the Constituent Assembly. The said observations are extracted hereunder:-

> "On the 15th August 1947 we had 600 Indian States in existence. Today by the integration of the Indian States with Indian Provinces or merger among themselves or by the Centre having taken them as centrally administered areas, there have remained some 20 or 30 States as viable States. This is a very rapid process and progress. I appeal to those States that remain to fall in line with the Indian Provinces and to become full units of the Indian Union on the same terms as the Indian Provinces. They will thereby give the Indian Union the strength it

> needs. They will save themselves the bother of starting their own Constituent Assemblies and drafting their own separate constitution, and they will lose nothing that is of value to them. I feel hopeful that my appeal will not go in vain and that before the Constitution is passed, we will be able to wipe off the differences between the Provinces and the Indian States."
>
> (*B. Shiva Rao (Ed.), The Framing of India's Constitution – Select Documents, Volume IV, at p.434)*

89. The learned senior counsel would submit that the purpose of Article 363 was to protect the Government of India from purely political agreements which had been entered into between the Rulers of the Indian States and the Dominion of India or its predecessor Governments so as to prevent any obstruction to the smooth accession of the Indian States to the Dominion of India.

90. To appreciate the submissions advanced before this Court, we are required to analyse what has been said by this Court in ***State of Seraikella***. In the said case, a suit was filed under the Original Jurisdiction of the Federal Court as it was functioning before the Constitution of India came into force. The State of Seraikella was a State in Orissa and on 16th August, 1947, the plaintiff-State acceded to the Dominion of India by virtue of the Instrument of Accession executed by its Ruler and accepted by the Governor

General under Section 6 of the Government of India Act, 1935. After coming into force of the Indian Independence Act, 1947, the Dominion of India was set up under the Government of India Act, 1935 as adopted which provided that the Indian State may accede to the Dominion of India by an Instrument of Accession. It was expressly provided that by executing the said instrument, the Ruler should not be deemed to have committed to the acceptance of any future Constitution of India or to fetter his discretion to enter into arrangements with the Government of India under any such future Constitution. Various other postulates which were part of the instrument have been taken note of by the Constitution Bench. It is worthy to note that apart from the initial instrument, no supplement instrument was executed by the Ruler and no amendment of the 1947 Act was accepted by him. A "Standstill Agreement" was also executed by the Ruler under which it was agreed that matters of common concern as specified in the Schedule to the agreement would continue between the Dominion of India and the said State until new agreements were made in that behalf. The controversy arose in the suit as the plaintiff-State claimed to have merged in the province of Bihar. It was contended

by the plaintiff that the Government of Orissa wrongfully and illegally purported to administer the plaintiff-State by virtue of the Notification of 23.12.1947 under the Indian Independence Act, 1947. It was claimed that the Act was *ultra vires* and had no binding effect on the plaintiff-State. It was also contended that the agreement dated 15.12.1947 was void for want of consideration and was inoperative. It was further canvassed that on 18th May, 1948, without the consent and approval of the plaintiff-State or its Ruler, the Province of Bihar absolutely illegally took over the administration of the State and passed the Seraikella and Kharsawan States Order, 1948. It was also asserted that the Dominion of India had no authority to go beyond the Instrument of Accession and further had no authority to delegate powers to the Province of Bihar to administer the plaintiff-State. The Constitution Bench, noting various facts and commenting on coming into effect of the Constitution of India and the jurisdiction conferred on the Court under Article 131, proceeded to analyse the scope and ambit of Article 363 of the Constitution. Dwelling upon the same, Kania, C.J. opined that the all-embracing opening words of Article 363 in terms override all provisions of the Constitution, but are made

subject only to the provisions of Article 143 which enables the President to consult the Supreme Court on matters referred to and, therefore, clearly override the operation of Article 374(2) also. The jurisdiction of the Supreme Court having been stated in Articles 131 to 136, Article 363 provides that notwithstanding anything contained in those articles and other articles of the Constitution, neither the Supreme Court nor any other court will have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, "Sanad" or other similar instrument which was entered into or executed before the commencement of this Constitution and which had or had been continued in operation after such commencement. If, therefore, the dispute arises in respect of a document of that description and if such document had been executed before the Constitution by a Ruler and which was or had continued in operation after such commencement, this Court has no jurisdiction to determine such issue. The learned Chief Justice repelled the argument that the Article is prospective and not retrospective and, hence, it only covers the cases which are filed in the Supreme Court after the Constitution came into force and did not affect suits filed in the

Federal Court before the Constitution of India came into operation. Thereafter, he adverted to the assertions made in the plaint and stated that the only question which remained for decision was whether on the structure of the plaint, the dispute raised in the suit arose out of the provision of a treaty, agreement, covenant, engagement, "Sanad" or any other similar instrument. Eventually, Kania, C.J. held:-

> "I have already noticed above that the dispute in respect of the agreement of the 15th December, 1947, is immaterial for the present discussion. If the plaintiff repudiates that agreement he is seeking to enforce his rights after ignoring the same. If the plaintiff (as noticed in four of the suits) relies on this agreement, it becomes a part of the Instrument of Accession under Section 6(5) of the Government of India Act, 1935, and the dispute will still have to be considered having regard to the terms of the two documents viz. the original Instrument of Accession and the supplementary Instrument. The question thus resolves itself into an analysis of the plaint and to find out what the plaintiff seeks to get by his suit. Apart from the fact that in prayers (*f*) and (*g*) of his plaint he seeks to enforce his rights under the Agreement of the 15th December, 1947, it appears clear that the whole ambit of the suit is to enforce his Instrument of Accession. The plaintiff contends firstly that it had signed the Instrument of Accession through its Ruler. The State next complains that, acting beyond the powers given over under the Instrument of Accession, the Dominion of India and the State of Bihar are trespassing wrongfully on its legislative and executive functions, that the Dominion of India and the State of Bihar are making laws which they have no power to make having regard to the Instrument

of Accession, and are wrongfully interfering with the administration of the State beyond the rights given to them under the Instrument of Accession. The whole plaint is nothing else except the claim to enforce the plaintiff's right under the Instrument of Accession. The dispute therefore in my opinion clearly is in respect of this Instrument of Accession and is covered by Article 363(1) of the Constitution of India. The question of the validity of the different enactments and orders is also based on the rights claimed under the Instrument of Accession so far as the plaintiff is concerned. On the side of the defendants, the position is that they admit the Instrument of Accession and they do not claim that they are exercising the disputed rights under that Instrument. Their contention is that the Agreement of the 15th of December, 1947, was validly signed and is binding and enforceable against the plaintiff. The defendants contend that their action in passing the disputed legislation and orders and the action in taking over the administration are all based on that Agreement of 15th December, 1947. If the plaintiff contends that that Agreement is not binding on it, it cannot enforce its rights under the original jurisdiction of the Court. If the plaintiff has a grievance and a right to a relief which the defendants contend it has not, the forum to seek redress is not the Supreme Court exercising its original jurisdiction on the transfer of the suit from the Federal Court. According to the defendants, the situation in those circumstances will be of a Sovereign Independent State trespassing on the territories, powers and privileges of another neighbouring independent State. To redress a grievance arising out of such action on the part of the defendants, the Supreme Court is not the forum to give relief. The issue is answered in the negative, costs in the cause."

91. Bose, J., in his separate opinion, addressed the Issue No.1 which was to the following effect:-

> "*1.* Whether having regard to the subject-matter of the suit and the provisions contained in Article 363(1) of the Constitution of India, this Hon'ble Court has jurisdiction to entertain the suit?"
>
> Answering the said issue, he opined:-
>
> "Even so, it is next contended, Article 363, which enacts a general rule of non-interference by courts in certain classes of disputes, cannot control the operation of Article 374(2), which is a special provision providing that suits, appeals and proceedings pending in the Federal Court at the commencement of the Constitution shall stand removed to the Supreme Court and that the Supreme Court shall have jurisdiction to hear and determine the same. There would be considerable force in this argument but for the opening words of Article 363(1), namely, "notwithstanding anything in this Constitution." These words clearly indicate that the bar to the exercise of jurisdiction enacted in Article 363 controls the operation of Article 374(2)and excludes the rule of construction invoked by the plaintiffs."

92. The aforesaid decision has to be appositely understood and appreciated. Mr. Nariman would submit that any controversy relating to any agreement is not entertainable by this Court. According to him, a complaint for raising a dispute under Article 262 of the Constitution can be independent without the base or foundation of the 1892 and 1924 agreements but to structure the stand on the fulcrum of the agreements would run counter to

Article 363 of the Constitution as has been held by the Constitution Bench in ***State of Seraikella*** (supra). It is also proponed by him that the later decision in ***State of Tamil Nadu v. State of Kerala*** (supra) has not taken note of the earlier decision and introduced the element of political agreement and categorized agreements into distinct ones, namely, political agreement and ordinary agreement. The argument deserves keen scrutiny. We have extensively discussed the facts in ***State of Seraikella*** (supra) and the view expressed therein. As is perceptible to us, the Constitution Bench, in actuality, was dealing with a political issue as there is constant reference to the "Instrument of Accession" and the claim was to enforce the instrument and further to declare the legislative and executive action of the Dominion of India and the State of Bihar as illegal. The stand of the respondent, namely, Dominion of India, was that it was acting as per the Instrument of Accession. The rival stands and the analysis made thereon clearly reflect the political nature of the controversy.

93. Sastri, J., in his concurring opinion, stated:-

> "22. ... The controversies regarding these matters are but contentions whereby the parties seek to establish, on the

one hand, that the Instrument of Accession still governs their mutual rights and obligations and, on the other, that that Instrument stands superseded and is no longer in force. Issues have no doubt been framed in regard to these matters but they cannot, in my opinion, be considered to be disputes for the purposes of Article 131 or Article 363(1). These articles deal with the jurisdiction of Courts and they envisage disputed claims to substantive legal rights. The claims in these suits are undoubtedly based on the respective Instruments of Accession and they are repudiated because those Instruments of Accession are said to have been superseded by reason of the alleged agreement of December, 1947. These claims are disputes to which Article 363(1) clearly applies. The other so-called disputes are only incidental and ancillary controversies raised with a view to support or overthrow the claims and cannot, in my opinion, affect the operation of the bar under that Article any more than, for instance, Issue 5 relating to the necessity for notice to the defendants under Section 80 of the Civil Procedure Code.

23. Nevertheless, it is contended, the article has no application here and it cannot operate retrospectively and applies only to disputes arising after the commencement of the Constitution. I am unable to accept this restricted interpretation of Article 363(1). While the Article undoubtedly postulates the continued operation of the treaties, agreements, etc., entered into or executed before the commencement of the Constitution and giving rise to the disputes, it does not require, as a condition of its application, that such Disputes should arise after the commencement of the Constitution. I see no reason for importing a restriction which a plain grammatical construction of the language employed does not warrant. It is not correct to say that the wider construction would make the operation of the article retrospective, for the bar to interference by the court operates only after the Constitution came into force irrespective of the disputes

concerned having arisen before or after the commencement of the Constitution. It was said that the article should not be construed so as to bar the trial of pending suits or proceedings. But this is not a case of a pending action in a court which continues to function. The Federal Court, in which the suits were pending, and which had exclusive jurisdiction to deal with them, was abolished and a new court, the Supreme Court of India, was created with original jurisdiction strictly limited to disputes relating to legal rights between States recognised as such under the Constitution. But as the States specified in Part B of the First Schedule had a semi-sovereign status before the Constitution, agreements with them were in the nature of international treaties and covenants, and disputes arising out of them would not lie in municipal courts. That principle is given effect to, so far as the Supreme Court's original jurisdiction is concerned, by the proviso to Article 131 which defines such jurisdiction and, in regard to all courts and in respect of all proceedings, by Article 363(1). The reason for applying that principle is greater, not less, in regard to such disputes arising before the Constitution when these States, then known as Indian States, enjoyed a higher degree of political freedom. Furthermore, the construction contended for by the plaintiffs as applied to Article 131 would mean that the Court would, notwithstanding the proviso, have jurisdiction in respect of such disputes, provided they arose before the commencement of the Constitution. If that had been intended, one would expect that such jurisdiction would have been conferred by positive enactment, instead of being left to be derived by implication from a proviso intended to delimit the jurisdiction conferred by that article. It seems to me, therefore, that the proviso to Article 131 must be construed as applicable to disputes of the kind mentioned arising both before and after the commencement of the Constitution. If so, Article 363(1) must receive the same construction, the language employed being essentially the same."

94. Relying on the aforesaid opinion of Sastri. J., it is submitted by Mr. Nariman that each of the agreements of 1892 and 1924 executed by the Ruler of a semi-sovereign state has to be regarded as an international treaty, covenant or agreement as in any case even under common law which continues under the provisions of Article 372 and thus, the municipal courts or authorities would not have jurisdiction to adjudicate upon them, for Article 363 clearly stipulates that municipal courts do not interfere in such agreements where one of the parties has a semi-sovereign status. In essence, the contention is that the agreements are not liable to be adjudicated in a court of law or tribunal as has been held by the Constitution Bench in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)***[10] to the effect that the entire "judicial power of the State" under Article 131 relating to adjudication of water disputes stood transferred under the law enacted under Article 262(1), that is, the 1956 Act and the finding recorded by the Tribunal is not a court and, therefore, Article 363(1) would not

[10] 1993 (Supp) (1) SCC 96

apply to it is incorrect. According to him, the agreements are not to be looked into for any purpose.

95. To appreciate the submission, we may refer to the analysis put forth by the Tribunal in this regard. The Tribunal adverted to the decision in ***Madhav Rao Scindia*** (supra) and came to hold thus:-

> "21. The same is the position here. The Inter-State Water Disputes Act, 1956 has not been enacted under Entry 56 of the Union List of Seventh Schedule of the Constitution. It has been enacted under power vested in the Parliament by Article 262 of the Constitution. In view of Article 262 Parliament may by law provide for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter- State river or river valley. Article 262(2) has a *non-obstante* clause saying that notwithstanding anything in the Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred in clause (1). It has already been pointed out above that in exercise of this power in the Inter-State Water Disputes Act, 1956, Section 11 excludes the jurisdiction of all courts including the Supreme Court, if in Article 363(1) there is a *non- obstante* clause giving an over-riding effect, then even in Article 262(2) there is a *non-obstante* clause which read with Section 11 of the Inter-State Water Disputes Act shall exclude the jurisdiction of Supreme Court or any other court in respect of a dispute relating to use, distribution and control of waters of inter-State river or river valley. It cannot be disputed that Article 262 is a special provision providing for adjudication of any dispute in respect of use, distribution or control of waters of an inter-State river or river valley. As such on the well-known rule of

> construction *generalia specialibus non derogant,* a special provision excludes the general provision; Article 363 cannot bar the investigation in respect of any complaint including a complaint regarding the non-compliance of terms of an agreement which had been executed by the then ruler of a princely State like Mysore which became an Indian State within the Dominion of India and later after coming into force of the Constitution, a State under First Schedule of the Constitution."

96. The Tribunal, thereafter, placed reliance on ***Maharaja Shree Umaid Mills Ltd. v. Union of India***[11]***; State of Seraikella*** (supra) *and* ***H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur*** (supra) and the 1956 Act and opined:-

> "In this background, it is very difficult to hold that Article 363 of the Constitution shall govern or control the inquiry and investigation by the Tribunal in respect of a water dispute relating to interpretation of the terms of any agreement or failure of any State to implement the terms of such agreement relating to the use, distribution or control of such waters."

97. Having noted the same, we may look at what has been stated by this Court in the context of Article 363 of the Constitution. In ***Madhav Rao Scindia*** case, Hidayatullah, C.J., while dealing with the interpretation of Article 363, observed:-

> "66. I begin with Article 363. That article was quoted in extenso earlier. The learned Attorney-General used the

[11] (1963) Supp. (2) SCR 515 : AIR 1963 SC 953

historical events as background for his contention that Article 363 must be construed as giving an exclusive right of determination to the President on the subject of recognition and withdrawal of recognition. He submitted that just as an act of State cannot be questioned in a Municipal Court so also the withdrawal of recognition cannot be called in question. He cited a large number of authorities in support of his case that an act of State is not subject to the scrutiny of the Courts.

67. The question here is not one of an act of State. Nor can any assurance be drawn from the doctrine of act of State. What we have to do is to construe the article. It bars jurisdiction of Court. It has no bearing upon the rights of the Rulers as such. It neither increases nor reduces those rights by an iota. I shall presently attempt to find out its meaning. Before I do so I must say that it is a well-known rule of interpretation of provisions barring the jurisdiction of civil courts that they must be strictly construed for the exclusion of the jurisdiction of a civil court, and least of all the Supreme Court, is not to be lightly inferred. The gist of the present dispute is whether the article bars the relief to the petitioners although as held by me, the order of the President is ultra vires.

68. The article commences with the opening words "notwithstanding anything in this Constitution". These exclusionary words are no doubt potent enough to exclude every consideration arising from the other provisions of the Constitution including the Chapter on Fundamental Rights, but for that reason alone we must determine the scope of the article strictly. The article goes on to say that jurisdiction of all Courts including the Supreme Court is barred except that the President may consult the Supreme Court. Having said this the articles goes on to specify the matters on which the jurisdiction is barred. This it does in two parts. The first part is: "In any dispute arising out of any provision of a treaty etc., which

was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State to which the Government of the Dominion of India was a party and which has or has been continued in operation after such commencement". This shows that a dispute relating to the enforcement, interpretation or breach of any treaty etc., is barred from the Courts' jurisdiction. The words 'arising out of the provisions of a treaty etc.,' limit the words. Thus if a treaty, covenant, etc., is characterised as forged by any party, that would not be a dispute 'arising out of any provision of a treaty, covenant, etc.' That dispute would be whether there is a genuine treaty or not. This illustration is given by me to show that the exclusion is not all-embracing. The dispute to be barred must arise from a provision of the treaty, etc."

98. Shah, J., while speaking for the majority, interpreting Article 363, ruled:-

"133. Jurisdiction of the Courts in matters specified is excluded not because the Union of India is successor to the paramountcy of the British Crown, nor because the rights and obligations accepted and recognized by the Constitution may still be regarded as flowing from acts of State: it is only excluded in respect of specific matters by the express provision in Article 363 of the Constitution. Jurisdiction of the Courts even in those matters is not barred "at the threshold" as contended by the Attorney-General. The President cannot lay down the extent of this Court's jurisdiction. He is not made by the Constitution the arbiter of the extent of his authority, nor of the validity of his acts. Action of President is liable to be tested for its validity before the Courts unless their jurisdiction is by express enactment or clear implication barred. To accede to the claim that the jurisdiction of the Court is barred in respect of whatever the executive asserts is valid, is plainly to subvert the Rule of law. It is

therefore within the province of the Court alone to determine what the dispute brought before it is and to determine whether the jurisdiction of the Court is, because it falls within one of the two limbs of Article 363, excluded qua that dispute. The first limb of Article 363 operates to defeat the jurisdiction of the Courts only when a claim to relief founded on the covenants is disputed: the second limb of Article 363 operates when there is a dispute with respect to rights or obligations accruing or arising out of a provision of the Constitution relating to a covenant.

134. In dealing with the dimensions of exclusion of the exercise of judicial power under Article 363, it is necessary to bear in mind certain broad considerations. The proper forum under our Constitution for determining a legal dispute is the Court which is by training and experience, assisted by properly qualified advocates, fitted to perform that task. A provision which purports to exclude the jurisdiction of the Courts in certain matters and to deprive the aggrieved party of the normal remedy will be strictly construed, for it is a principle not to be whittled down that an aggrieved party will not, unless the jurisdiction of the Courts is by clear enactment or necessary implication barred, be denied his right to seek recourse to the Courts for determination of his rights. The Court will interpret a statute as far as possible, agreeably to justice and reason and that in case of two or more interpretations, one which is more reasonable and just will be adopted, for there is always a presumption against the law maker intending injustice and unreason. The Court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fairplay, unless a contrary intention is manifest from words plain and unambiguous. The provision in a statute will not be construed to defeat its manifest purpose and general values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human

rights including the right to property must, unless the mandate to precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitutional and statutory provisions alike."

And again:-

"141. … Article 363 prescribes a limited exclusion of the jurisdiction of Courts, but that exclusion does not operate upon the claim for a Privy Purse, relying upon Article 291. The question as to the jurisdiction of the Courts to entertain a claim for payment of Privy Purse did not fall to be determined in *Nawab Usman Ali Khan case*. The only question raised was whether the Privy Purse was not capable of attachment in execution of the decree of a civil court, because of the specific exemption of political pensions under Section 60(1)(*g*) of the Code of Civil Procedure. In *Kunvar Shri Vir Rajendra Singh case* the Court did not express any opinion that Article 366(22) was a provision relating to a covenant within the meaning of Article 363. In that case the petitioner who was not recognised as a Ruler by the President abandoned at the hearing of his petition his claim to the Privy Purse payable to the Ruler of Dholpur, and pressed his claim by succession under the Hindu Law to the Private property of the former Ruler. The Court was not called upon to decide and did not decide that Article 366(22) was a provision relating to a covenant within the meaning of Article 363. It is difficult to regard a word or a clause occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not fall to be answered in that judgment.

142. In the view we have expressed, the argument raised by Mr Palkhivala that even if clause (22) of Article 366 is a provision relating to the covenants, the jurisdiction of

> this Court under Article 32 to grant relief against an invalid exercise of power withdrawing recognition of the Rulers is not barred, needs no consideration.

99. Presently, we may refer to the analysis of Article 363 as has been made by the Constitution Bench in ***State of Tamil Nadu v. State of Kerala*** (supra). In the said case, the learned Chief Justice, speaking for the Court, opined that a plain reading of Article 363 leaves no manner of doubt that if the dispute arises in respect of a document of that description and if such document had been executed before the commencement of the Constitution, the interference by courts is barred. The documents referred to in Article 363 are those which are political in nature. Any dispute regarding such documents is non-justiciable. The object behind Article 363 is to bind the Indian Rulers with treaties, agreements, covenants, engagements, "Sanads" or other similar instruments entered into or executed before the commencement of the Constitution and to prevent the Indian Rulers from resiling from such agreements as the integrity of India was to be maintained at all costs and could not be affected by raising certain disputes. Thereafter, the larger Bench referred to the 'White Paper' on Indian States prepared by the Government of India in 1948 which brings

out the historical perspective which necessitated the adoption of the provisions in Article 363.

100. The Court reproduced a passage from the 'White Paper' which reads as under:-

> "Article 363 has therefore been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of courts except in cases which may be referred to the Supreme Court by the President".

101. After so stating, the Court referred to Article 131 that deals with the original jurisdiction of this Court and proceeded to state:-

> "74. There is similarity of provision in Article 363 and proviso to Article 131. The original jurisdiction conferred on this Court by the main provision contained in Article 131 is excepted by virtue of the proviso in the matters of political settlements. By making provisions such as Article 363 and proviso to Article 131, the political settlements have been taken out of the purview of judicial pronouncements. Proviso appended to Article 131 renders a dispute arising out of any treaty, agreement, covenant, engagement, sanad or similar instrument which is political in nature executed before the commencement of the Constitution and which has or has been continued in operation, non-justiciable and jurisdiction of this Court is barred. The jurisdiction of this Court is not taken away in respect of the dispute arising out of an ordinary agreement. The instruments referred to and described in the proviso are only those which are political in nature. Non-political instruments are not covered by the proviso."

102. Be it noted, the larger Bench has referred to the decision in ***Virendra Singh*** (supra) and opined thus:-

> "70.2. The exposition of above legal position by the Constitution Bench hardly admits of any doubt. Obviously, the accession of an Indian State to the Dominion of India and acceptance of it by the Dominion are acts of State and jurisdiction of the courts to go into its competency or settle any dispute arising out of them are clearly barred under Article 363 and the proviso to Article 131. As we have already held—and that is what has been held in the 2006 judgment as well—that the 1886 Lease Agreement is an ordinary agreement and that it is not political in nature, the embargo of Article 363 and the proviso to Article 131 have no application."

And again:-

> "76. We are in complete agreement with the view taken by this Court in *Mullaperiyar Environmental Protection Forum* that the 1886 Lease Agreement would not come within the purview of Article 363 and jurisdiction of this Court is not barred. As a necessary corollary, the dispute arising out of the 1886 Lease Agreement is not barred under Article 131 proviso as well. Moreover, the principal challenge laid in the suit pertains to the constitutional validity of the 2006 (Amendment) Act for which Article 363 or for that matter under Article 131 proviso does not come into operation at all."

103. On a perusal of the aforesaid, it seems to us that there is no discord or lack of concord with the view expressed in ***State of Seraikella*** (supra). We are persuaded to think so as the Constitution Bench in the earlier case was dealing with a different

kind of instrument which was indubitably of political character entered prior to coming into force of the Constitution.

104. In the case of ***Madhav Rao Scindia*** (supra), the sphere of adjudication was absolutely different. In the case at hand, the agreements in question relate to the sphere of water sharing, irrigation, etc. and have nothing to do, even remotely, with the concept of sovereignty and integrity of India and, therefore, it will be erroneous to hold that the bar under Article 363 of the Constitution would apply. It is so as both the agreements between the States do not refer to any political element and cannot be termed as political in character. The view expressed in ***State of Seraikella*** (supra), as already stated hereinbefore, related to an aspect of integrity or sovereignty of India and that is why, the bar operated. The bar under Article 363 was not allowed to stand in ***Madhav Rao Scindia*** (supra) as it was dealing with a constitutional claim of the Rulers relating to Privy Purse and the same did not have any political characteristics. In any case, the position has been absolutely made clear by the Constitution Bench in ***State of Tamil Nadu*** (popularly known as *Mullaperiyar dam case*). Therefore, it can be stated, without desiring to give rise to any controversy and

without fear of any contradiction, that the bar under Article 363 is not applicable. The submission astutely advanced on behalf of the State of Karnataka that the two agreements should not be looked into at all for the purpose of adjudication of the water dispute by the Tribunal because of Article 262 of the Constitution is unacceptable.

J. Unconscionability of the 1892 and 1924 agreements

105. It is submitted by Mr. Nariman, learned senior counsel, that both the 1892 and 1924 agreements are hit by the doctrine of unconscionability as the Princely State of Mysore and the State of Madras were on two different platforms. The State of Mysore was a vassal State and had really no authority to speak on various aspects of the agreement. In fact, it had no power to bargain and it is reflectible when the Secretary of State was able to set aside the binding award passed by the learned Arbitrator. The agreements, contends Mr. Nariman, suffer from unconscionable bargain. Learned senior counsel is critical that the Tribunal has not adverted to the principle of unconscionability at all and erroneously relied on the decision in ***New Bihar Biri Leaves Co. and others v. State of***

Bihar and others[12] and arrived at the conclusion that the agreement having been acted upon by both the parties in 1974, there was an estoppel. He has referred to Section 16 of the Indian Contract Act and the commentary by Pollock and Mulla in the book (1st Edition, 1905). The commentary commended reads as follows:-

> ""Unconscionable bargains" - Illustration (c) contemplates the case of a person already indebted to a money-lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable, but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is not of fraud, but of the unconscientious use of superior power."
>
> [Emphasis Supplied]

106. He has also referred to the 8th Edition by M.C. Setalvad in 1957 wherein it has been commented:-

> "..... Relief in case of unconscionable bargains is an old head of English equity. It was formerly associated in a special manner with sales of reversionary interests, which the Court was eager to restrain; and for some time it was the doctrine of the Court that a sale of any reversionary interest, if proved to have been made for only a little under the value, must be set aside without further inquiry. This rule was at last found so inconvenient that it was abolished by statute. But the general principles of equity in dealing with what are called "catching bargains" remain, and the third clause of

[12] (1981) 1 SCC 537

> the section now before us is apparently intended to embody them."
>
> [Underlining is ours]

107. Apart from relying on the said provision and the commentaries, he has also drawn inspiration from the authorities in ***Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly & Another.***[13]; ***O.P. Bhandari v. ITDC***[14]; ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others***[15]; and ***Balmer Lawrie & Company Limited and others v. Partha Sarathi Sen Roy and others (2J)***[16]. He has also drawn our attention to the Black's Law Dictionary by Bryan Garner, Editor-Chief (10th Edition, Thomson Reuters) wherein unconscionability has been defined thus:-

> "Unconscionability. 1. Extreme unfairness.
> Unconscionability is normally assessed by an objective standard: (1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party. 2. The principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that are unreasonably favorable to one party while precluding meaningful choice for the other party."

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[13] (1986) 3 SCC 156
[14] (1986) 4 SCC 337
[15] 1991 Supp. (1) SCC 600
[16] (2013) 8 SCC 345

108. A passage from John Westlake International Law: Part-I. Peace, Cambridge University Press, 1910 has been commended to us. The said passage reads thus:-

> "On the internal side, that is the relation of the native states to the British power, the Government of India published the following notification in its official Gazette, No. 1700 E, 21 August 1891:
>
> > "The principles of international law have no bearing upon the relations between the Government of India as representing the queen-empress on the one hand, and the native states under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter."
>
> And again :-
>
> > "Thus India is a world of itself. Not only is the action of all foreign states excluded from every part of it, but those parts which are not included in the dominions of the king-emperor are subject to a suzerainty, paramountcy or supremacy possessed by him, to which nothing parallel exists in the relations of states of international law".

109. Inspiration has also been drawn from the book Rivers in International Law (1959) by F.J. Berber, which states:-

> "The Cauvery dispute between Mysore and Madras, settled in 1925, was a dispute between two territories of which one was a province of British India and the other was a dependent princely state under British suzerainty.

> The dispute was not settled by the application of international law but through an authoritative decision of the sovereign power, or the British Crown. under its general responsibility to interfere in every matter in which according to its estimation the public interest was threatened with injury. That means that it was a typical case of the application of norms of municipal law. We can therefore extract nothing from it for our inquiry. Only one aspect in the dispute is significant for international law, namely, the endeavour to protect the rights of Karikal, at that time still a French possession. After representations by the French Ambassador in London the Indian Government in its Note of May 1, 1924, was able to state that the existing water rights of Karikal would be safeguarded. This recognition of the water rights of a neighbouring colony is in harmony with Anglo- French practice in connection with water rights in their African colonies."

110. We have also been referred to a passage from L. Oppenheim International Law (8th Edition) which is extracted below:-

> "91. The fact that the relation between the suzerain and the vassal always depends upon the special case, excludes the possibility of laying down a general rule as to the international position of vassal States. The vassal State has no relations with other States since the suzerain absorbs these relations entirety; yet the vassal remains nevertheless a half- sovereign State on account of its internal independence. This was the position of the Indian vassal States of Great Britain, which had no international relations whatever either between themselves or with foreign States. Yet instances can be given which demonstrate that" vassal States can have some subordinate international position."

111. Laying emphasis on the aforesaid passages, it is argued by Mr. Nariman that the agreements are ex facie unconscionable and smack of absolute unfairness and unreasonableness because the parties were not at arm's length and they never did possess equal bargaining power. In ***Central Inland Water Transport Corporation Limited*** (supra), the two-Judge Bench referred to Sections 16, 23 and 24 of the Contract Act and quoted some relevant passages from Chitty on Contracts (25th Edition, Vol.I). We think it appropriate to extract the said passages:-

> "These ideas have to a large extent lost their appeal today. 'Freedom of contract', it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large'. Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called '*contracts d'adhesion*' by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.

> Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation, and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of 'inequality of bargaining power'."

112. Thereafter, the learned Judges referred to the meaning of Adhesion Contract and reproduced a passage from Reinstatement of the Law—Second as adopted and promulgated by the American Law Institute, Volume II:-

> "208. *Unconscionable Contract or Term*
> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

In the Comments given under that section, it is stated at page 107:

> "Like the obligation of good faith and fair dealing (§ 205), *the policy against unconscionable contracts or terms applies to a wide variety of types of conduct.* The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. *Policing against unconscionable contracts or terms has sometimes been accomplished* by adverse construction of language, by manipulation of the rules of offer and acceptance or *by determinations that the clause is contrary to public policy* or to the dominant purpose of the contract. Uniform Commercial Code § 2-302 Comment 1 .... A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party*, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms."

113. After referring to many authors and decisions, the Court came to hold:-

> "As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognised, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of

> bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages ... which are obviously disproportionate to the performance given in return". The position according to the French law is very much the same."

114. After so stating, the Court posed the question as to whether our Court should advance with time and, thereafter, referred to Article 14 of the Constitution and ruled:-

> "It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations

> and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

And again:-

> "The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

115. We must note with profit that in the said case, the Court did not accept the stand of the appellant-Corporation that it was an ordinary contract entered by the employer with the employee but treated it as a contract with higher bargaining power by the Corporation with the workmen and that the conditions incorporated in the contract were wholly unconscionable and against the public interest, for it had the tendency to create a sense of insecurity in the minds of those to whom it applies and further it was against public good.

116. In ***Delhi Transport Corporation*** (supra), B.C. Ray, J. placed reliance on ***O.P. Bhandari*** (supra) which had followed the observations made in ***Central Inland Water Transport Corporation Limited*** (supra), and ***West Bengal State Electricity Board and others v. Desh Bandhu Ghosh and others***[17] and came to the conclusion that it was impossible to hold Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 as constitutional. Sawant, J. opined that the arbitrary rules are called Henry-VIII and the self asserting reliance on the theory of high authority was unacceptable. The said decision has been pressed into service to highlight that the majority in the Constitution bench has accepted the principle laid down in ***Central Inland Water Transport Corporation Limited*** (supra) which pertains to the bargaining power and how a contract of employment becomes unconscionable.

117. The aforesaid submission of Mr. Nariman has been vehemently opposed by Mr. Dwivedi and Mr. Naphade, learned senior counsel appearing for the State of Tamil Nadu, on two counts, namely, that the "Standstill Agreement" executed by the

[17] AIR 1985 SC 722

State of Mysore allowed the said agreement to continue and further, the agreement was not denounced as required under the proviso to Section 7(1)(c) of the 1947 Act. Though we have referred to the "Standstill Agreement" and quoted a portion of it, yet at this juncture, it is pertinent to reproduce the said agreement along with the Schedule in entirety:-

> "Agreement between the State of Mysore and the Dominion of India.
>
> WHEREAS it is to the benefit and advantage of the dominion of India as well as of the Indian States that existing agreements and administrative arrangements in the matters of common concern, should continue for the time being, between the Dominion of India or any part thereof and the India States:-
>
> Now, therefore, it is agreed between the Mysore State and the Dominion of India that:-
>
> 1. (1) Until new agreements in this behalf are made, all agreements and administrative arrangements as to matters of common concern now existing between the Crown and any Indian State shall, in so far as may be appropriate, continue as between the Dominion of India or, as the case may be, the part thereof, and the State.
> (2) In particular, and without derogation from the generality of sub-clause (1) of this clause the matters referred to above shall include the matters specified in the Schedule to this Agreement.

2. Any dispute arising out of this Agreement, or out of the agreements or arrangements hereby continued, shall unless any provision is made therein for arbitration by an authority other than the Governor General or Governor, be settled by arbitration according, as far as may be, to the procedure of the Indian Arbitration Act, 1899.

3. Nothing in this agreement includes the exercise of any paramountcy functions.

SCHEDULE

1. Air Communications
2. Arms and equipment
3. Control of commodities
4. Currency and coinage
5. Customs
6. Indian States Forces
7. External Affairs.
8. Extradition
9. Import and Export Control.
10. Irrigation and Electric Power
11. Motor Vehicles
12. National Highways
13. Opium
14. Posts, Telegraphs and Telephones
15. Railways
16. Salt
17. Central Excises, relief from double income-tax and other arrangements relating to taxation.
18. Wireless."

[Underlining is by us]

118. At this stage, we may also reproduce the proviso to Section 7(1)(c) of the 1947 Act. It is as follows:-

> "Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, -posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements."
>
> [Emphasis Supplied]

119. On a keen scrutiny of the evidence on record, there is no proof that the State of Mysore, at the relevant time, had denounced the agreement. We have already discussed the doctrine of paramountcy and how the same is not applicable to these categories of agreements. Mr. Nariman, learned senior counsel, would submit that automatic extinction of agreement because of evaporation of the doctrine of paramountcy is one thing and applicability of the said principle to treat the agreement as unconscionable is quite a distinct aspect. As held earlier, the agreements did not automatically come to an end either after coming into force of the 1947 Act or after coming into force of the Constitution because of the "Standstill Agreement" and further owing to the fact that there had been no denouncement. The bargaining power may not have

existed in 1892 or 1924 but definitely, the said power to bargain or to choose came alive after the 1947 Act and, undoubtedly, after the Constitution came into being. However, the State of Karnataka chose not to do so. If we allow ourselves to say so, it chose not to rise like a phoenix but, on the contrary, it maintained sphinx like silence at the relevant time. Therefore, we are not persuaded to accept the submission that the agreements should be declared as void because of unconscionability.

K. Status of the agreements after coming into force of the States Reorganization Act, 1956

120. Challenging the subsistence and continuance of the agreements, the next limb of submission of Mr. Nariman is that after the coming into force of the States Reorganization Act, 1956, (for short "the Reorganization Act'), the agreements became extinct for the newly formed State of Mysore was not bound by the 1924 agreement since the Part B State of Mysore had not entered into any agreement with the State of Madras. It is contended by him that the Part B State of Mysore was not the new State of Mysore and on a careful reading of the various provisions of the Reorganisation Act, it is abundantly clear that only the rights,

responsibilities, liabilities and obligations to be borne by the new State of Mysore find mention but the same has no reference to the rights and obligations under the 1924 agreement. Elaborating further, learned senior counsel would contend that the rights and obligations under the 1924 agreement may have devolved upon the Part B State of Mysore but that would not be considered as an agreement made in exercise of the executive power by the said Part B State of Mysore.

121. Mr. Nariman has referred to Section 7 of the Reorganisation Act to highlight that by reason of the provisions contained under Section 7 of the said Act, the new State of Mysore cannot be treated as the successor State in respect of the obligations of the Ruler of the Indian State of Mysore under the Agreements of 1892 and 1924. To appreciate the said submission in proper perspective, we think it appropriate to reproduce the provisions. It reads as follows:-

> "**Section 7. Formation of a new Mysore State**.—(1) As from the appointed day, there shall be formed a new State to be known as the State of Mysore comprising the following territories, namely:—
>
> (a) the territories of the existing State of Mysore;

(b) Belgaum district except Chandgad taluka and Bijapur, Dharwar and Kanara districts, in the existing State of Bombay;

(c) Gulbarga district except Kodangal and Tandur taluks, Raichur district except Alampur and Gadwal taluks, and Bidar district except Ahmadpur, Nilanga and Udgir taluks and the portions specified in clause (d) of sub- section (1) of section 3, in the existing State of Hyderabad;

(d) South Kanara district except Kasaragod taluk and Amindivi Islands, and Kollegal taluk of Coimbatore district, in the State of Madras; and

(e) the territories of the existing State of Coorg;

and thereupon the said territories shall cease to form part of the said existing States of Mysore, Bombay, Hyderabad, Madras and Coorg, respectively.

(2) The territory comprised in the existing State of Coorg shall form a separate district to be known as Coorg district, and the said Kollegal taluk shall be included in, and become part of, Mysore district, in the new State of Mysore."

122. Learned senior counsel has emphasized on the amalgamation of various areas from various States and exclusion of some areas and, on that foundation, a structured argument has been advanced that the successor State cannot be held liable. Per contra, Mr. Dwivedi, learned senior counsel, would contend that the present case is not one where the territory of a Sovereign State got acceded to another Sovereign State. It is a case for merger where a situation

obtained that the State of Mysore had accepted the 1924 Agreement and it constitutionally remained in continuance a Part B State under Article 295(2) of the Constitution. Formation of new States and alteration of areas, boundaries or names of the existing States under the parliamentary legislation did not alter the rights and liabilities and continued to remain in force and binding upon the successor State so long as they are not modified, changed or repudiated. He has drawn a distinction between a statutory acceptance and the recognition by the new State which can be explicit or implied. For the said purpose, he has pressed into service the decisions in ***M/s. Dalmia Dadri Cement Co. Ltd. v. Commissioner of Income Tax***[18]; ***Amar Chand Butail v. Union of India and others***[19]; and ***Firm Bansidhar Premsukhdas v. State of Rajasthan***[20]. Distinguishing the aforesaid issue, it is urged by him that the case at hand is not one where the Sovereign State has been acceded to or been annexed by another Sovereign State and, therefore, the principles in ***State of Punjab & Ors. v. Balbir***

[18] AIR 1958 SC 816
[19] AIR 1964 SC 1658
[20] AIR 1967 SC 40

Singh & Ors.[21], ***Ranjan Sinha v. Ajay Kumar Vishwakarma***[22], ***State of M.P. v. Bhopal Sugar Industries Ltd.***[23] are applicable.

123. In ***Balbir Singh*** (supra), the erstwhile State of Punjab was reorganized by the Punjab Reorganisation Act, 1966 and on the appointed date, i.e., November 1, 1966, the former State of Punjab ceased to exist. The successor States of Punjab, Haryana and Union Territory of Chandigarh and the transferred territory came into being. The controversy related to the service conditions of the respondents. The Court referred to the dictionary clause and Section 88 of the 1966 Act and came to hold thus:-

> "Law is defined in clause (*g*) of Section 2 of the Act to say:
>
> > "'law' includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the existing State of Punjab;".
>
> We agree with the High Court that the impugned orders in question were not law within the meaning of Section 2(*g*) and hence were, in terms, not saved by Section 88. We think the High Court is right when it says:

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[21] (1976) 3 SCC 242
[22] 2017 (7) SCLAE 234
[23] 1964 (6) SCR 846

> "Section 88 appears to have been introduced as a matter of abundant caution. In my opinion, mere splitting up of the territories of Punjab into four successor States would not ipso facto result in the abrogation or repeal of the laws which were immediately in force before the appointed day in those territories. There is nothing in the 1966 Act, not even in Section 88, which expressly or by necessary intendment repeals the laws which were in force immediately before the appointed day in the territories of the former Punjab. Those laws derived their force de hors the 1966 Act. The first part of Section 88 is merely clarificatory of any doubts which might arise as a result of the reorganisation of Punjab, while the latter part of this section is merely an adaptative provision, to the effect, that the territorial references in any such law to the State of Punjab shall continue to mean the territories within that State immediately before the appointed day. Thus, read as a whole Section 88 merely dispels doubts as to the continuity of the laws which were in force before the appointed day in the former State of Punjab, until the competent legislature or authority of the successor States effects any change in those laws"."

And again:-

> "In our judgment when there is no change of sovereignty and it is merely an adjustment of territories by the reorganization of a particular State, the administrative orders made by the Government of the erstwhile State continue to be in force and effective and binding on the successor States until and unless they are modified, changed or repudiated by the Governments of the successor States. No other view is possible to be taken. The other view will merely bring about chaos in the

> administration of the new States. We find no principle in support of the stand that administrative orders made by the Government of the erstwhile State automatically lapsed and were rendered ineffective on the coming into existence of the new successor States."

124. In ***Ranjan Sinha*** (supra), the controversy revolved around the applicability of laws framed by the undivided State of Bihar with the newly bifurcated State that have come into existence by virtue of the Bihar Reorganisation Act, 2000 (for short, "the 2000 Act"). The controversy also related to the service conditions. The issue arose before the High Court of Jharkhand as to which law was in force and eventually, on scrutiny of the Act, the High Court came to hold that:-

> "6. A division bench of the High Court of Jharkhand on elaborate consideration of applicable provisions of the Act and BROA came to the conclusion that Education Regulations, applicable to the erstwhile Bihar, are law for the new State of Jharkhand in terms of Sections 84 and 85 of the BROA and therefore unless a person is qualified as per Education Regulations, cannot get himself registered. It was observed as under-
>
> > 'What is contended on behalf of the Petitioners is that the Pharmacy Act was extended to the State of Bihar had notified and adopted the Education Regulations issued under Section 10 of the Act which was in Part II of the Act, that both the Act and the Education Regulations hence constitute law

for the purpose of the State of Jharkhand carved out of the modification of either the Education Regulations or the Pharmacy Act by the competent Legislature, namely, the Parliament, that no such attempt was also made by the State of Legislature and in the Jharkhand and unless a person was qualified in terms of the Education Regulations, he could not get his name entered in the Register. We find considerable force in this submission. It is true that the Jharkhand was carved out with effect from 15.11.2000. By virtue of Section 84 of the Bihar Reorganization Act, the Pharmacy Act and the Education Regulations applied. In the absence of any modification, alternation or repeal of either the Act or the Education Regulations by the competent Legislature, it could not be postulated that the law had ceased to be in force merely on the formation of the State of Jharkhand. Section 84 of the Bihar Reorganization Act, in our view, is clear. Moreover, it is not possible for the Court to contemplate a law less State as it were. If the argument of the Respondents were to be accepted, the position would be that there was no law relating to Pharmacy or regarding qualifications for getting recognition as a Pharmacist in the State of Jharkhand and it is yet to be made. In other words, until the same is made there will be a vacuum. Such an argument, unless compelled, can not be acceptable. The territories now forming the State of Jharkhand originally formed part of the State of Bihar, were governed by the Act and the Education regulations promulgated and adopted in terms of Section 85 of the Bihar Reorganization Act. This scheme of the Reorganization Act is consistent with the general principle that a law once made applicable to a territory will continue to apply to that territory unless its application is abrogated or dispensed with by the competent Legislature or authority or its replacement by any other law

> enacted in that behalf. Therefore, it is clear that Education Regulations promulgated under Section 10 and adopted in terms of Section 11 of the Act to the territory in question, continues to apply. There is also the stand adopted by the Indian pharmacy Council in its additional counter affidavit. We find the said stand sustainable in law'."

125. Before this Court, it was contended that every State has to have a First Register of the pharmacists on its own as mandated in Sections 30 and 31 of the Act which is an express provision and if the interpretation given by the Court is accepted, the said provision will become redundant. Adverting to the provisions of the Act and the earlier Regulations, a two-Judge Bench held:-

> "25. The Article 3 of the Constitution inter alia, empowers the Parliament by law to form a new State by separation of territory from any State or by uniting two or more States. Article 4 is to the effect that the law made by the Parliament with reference to Article 3 may contain supplemental, consequential and incidental provisions. When a new State is formed by law made by Parliament, whether the laws made by the existing State out of which a new State is formed continue to apply to the territories included in the new State? When the existing State territory is reorganized by the Parliament there is no change in Sovereignty. It is only adjustment of territories by transferring some territories in the existing State to a newly formed State. Therefore, all the laws which were applicable to the territories of the re-organized State would continue to apply to the territories transferred to the new State until the latter either adapts or, subject to

its competency amends or repeals the existing and applicable laws."

126. Be it noted, the Court placed reliance on ***Balbir Singh*** (supra) and ***Sher Singh and others v. Financial Commissioner of Planning, Punjab and others***[24] and proceeded to rule:-

"35. When a State as forming part of Indian nation is re-organized, in law in so far as application of laws is concerned, the following three things would happen namely; (i) the existing State (Parent State) which made various laws, would continue to exist; (ii) the new State so formed by transferring some territories will be deemed to be the territories of the parent State for the purpose of applicability of the laws; and (iii) those laws made by parent State shall continue to apply to new State until they are modified or amended by a competent legislature in relation to new State and the 'law' as defined in the definition Clause would be the law which was in force in the existing State which would be enforceable in the newly formed State.

36. At the cost of repetition, we may mention that under Article 3 of the Constitution the Parliament can alter, amend, amalgamate, form new States, diminish or increase area of a State. The principle of 'clean slate' as applicable in international law is not applicable when reorganization takes place under Article 3 of the Constitution. 17 The reorganized States do not usually start as tabula rasa, rather they are successors of a pre-existing erstwhile States. Under the BROA, the Jharkhand was carved out of the Bihar and the two separate states came into existence on 15.11.2000. If the laws in force were to lapse on the day the division was effected, a chaotic situation would have emerged

[24] (1987) 2 SCC 439

> inasmuch as the newly created State would be rendered a State without laws. To avoid such situation, provisions like Sections 84 and 85 of BROA have been enacted to maintain continuity, and at the same time authorizing the States to make such modifications and adaptations as are considered necessary by mere issuance of orders within two years, and thereafter by legislation.
>
> 37. As defined earlier 'law' includes 'other instruments having the force of law'. In view of use of the word 'includes', the definition of 'law' under Section 2(f) shall be interpreted exhaustively. In view of the above discussion, we hold that the First Register prepared by the Bihar has the force of law Supra, at 13 under Section 2(f) of the BROA."

127. In the present case, the two provisions, namely, Sections 107 and 119 of the Reorganization Act of 1956 unequivocally spell out the continuance of the assets and liabilities. That apart, the new State of Mysore after 1956 recognised and enforced the agreement and, in any case, did not repudiate it. And in all possibilities, the State could not have done it as it related to inter-State waters and the Parliament in the Reorganisation Act did not make any law in that regard.

128. It may be noted here that the Tribunal has referred to Section 2(m) defining "Principal Successors State", Section 2(o) defining "successor State" and Section 5 to conclude that the State of Kerala had become the principal successor State to the erstwhile State of

Travancore-Cochin excluding the territories transferred to the State of Madras and also a successor State in respect of the territories which were transferred from Madras and, therefore, the agreements would be binding on it, as the Cauvery basin including the portion of rivers Kabini and Bhawani were in the Malabar District, which had been transferred to it. It also referred to Section 87 of the Reorganisation Act, whereunder any contract made by an existing State before the appointed day in the exercise of its executive power was deemed to have been made in the exercise of such power of the successor State or States or the principal successor State, as the case may be. With reference thereto, the Tribunal analyzed that the Agreements of 1892 and 1924 entered into by Madras with the then State of Mysore were, therefore, deemed to have been entered into on behalf of the areas which were within the territories of the State of Madras including the District of Malabar and, consequently, the rights and liabilities which had accrued to Madras as an existing State with regard thereto would be the rights and liabilities of the successor State, i.e., the State of Kerala. The Tribunal also concluded that the State of Kerala would be deemed to be bound by

the terms and conditions of the two Agreements so far as the sharing of the waters of river Cauvery was concerned.

129. The finding of the Tribunal is seriously assailed on behalf of the State of Karnataka on the ground that in a State where different boundaries came into existence, the agreements could not be allowed to remain in continuance. Sections 2(e), 2(j), 2(m) and 2(o), which are relevant in the present context, read thus:-

> "Section 2(e) "corresponding State" means, in relation to the new State of Bombay, Madhya Pradesh, Mysore, Punjab or Rajasthan, the existing State with the same name, and in relation to the new State of Kerala, the existing State of Travancore-Cochin;
>
> (j) "notified order" means an order published in the Official Gazette;
>
> (m) "principal successor State" means—
>
> (i) in relation to the existing State of Bombay, Madhya Pradesh, Madras or Rajasthan, the State with the same name; and
>
> (ii) in relation to the existing States of Hyderabad, Madhya Bharat and Travancore Cochin, the States of Andhra Pradesh, Madhya Pradesh and Kerala, respectively;
>
> (o) "successor State", in relation to an existing State, means any State to which the whole or any part of the territories of that existing State is transferred by the provisions of Part II, and includes in relation to the existing State of Madras, also that State as territorially altered by the said provisions and the Union;"

130. Section 108 which has been relied upon by Mr. Dwivedi, learned senior counsel for the State of Tami Nadu, is as follows:-

> "**Section 108. Continuance of agreements and arrangements relating to certain irrigation, power or multi- purpose projects.—**(1) Any agreement or arrangement entered into between the Central Government and one or more existing States or between two or more existing States relating to—
>
> (a) the administration, maintenance and operation of any project executed before the appointed day, or
>
> (b) the distribution of benefits, such as, the right to receive and utilise water or electric power, to be derived as a result of the execution of such project,
>
> which was subsisting immediately before the appointed day shall continue in force, subject to such adaptations and modifications, if any (being of a character not affecting the general operation of the agreement or arrangement) as may be agreed upon between the Central Government and the successor State concerned or between the successor States concerned, as the case may be, by the Ist day of November, 1957 , or, if no agreement is reached by the said date, as may be made therein by order of the Central Government.
>
> (2) Where a project concerning one or more of the existing States affected by the provisions of Part II has been taken in hand, but not completed, or has been accepted by the Government of India for inclusion in the Second Five Year Plan before the appointed day, neither the scope of the project nor the provisions relating to its administration, maintenance or operation or to the

distribution of benefits to be derived from it shall be varied, —

(a) in the case where a single successor State is concerned with the project after the appointed day, except with the previous approval of the Central Government, and

(b) in the case where two or more successor States are concerned with the project after that day, except by agreement between those successor States, or if no agreement is reached, except in such manner as the Central Government may by order direct,

and the Central Government may from time to time give such directions as may appear to it to be necessary for the due completion of the project and for its administration, maintenance and operation thereafter.

(3) In this section, the expression" project" means a project for the promotion of irrigation, water supply or drainage or for the development of electric power or for the regulation or development of any inter- State river or river valley."

Section 119 of the Reorganisation Act, 1956 reads as under:-

"**Section 119. Territorial extent of laws**.—The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

131. Impressing thereon, it is submitted by Mr. Dwivedi that the aforesaid provisions by operation of law made the 1924 Agreement recognisable and implementable. According to him, the rights and liabilities under the 1924 Agreement are constitutionally continued with and vest in Mysore as Part B State under Article 295(2) of the Constitution. Article 295 reads as under:-

> "**Article 295. Succession to property, assets, rights, liabilities and obligations in other cases**
>
> (1) As from the commencement of this Constitution
>
> (a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and
>
> (b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,
>
> subject to any agreement entered into in that behalf by the Government of India with the Government of that State

> (2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1)."

132. Emphasis has been laid on Article 295(2). According to Mr. Dwivedi, under the Reorganisation Act, the existing rights and liabilities and the existing laws continue to be enforced and continue to be binding upon the successor State so long as they are not modified, changed or repudiated by the successor State. It is his further submission that in the case of Mysore, the territories of Part B Mysore and Coorg alone are in the Cauvery Basin and the laws operating in part B Mysore qua sharing of Cauvery waters secured for Mysore under the 1924 Agreement would continue. If the interest of Coorg was to be secured after the formation of new Mysore State, the provisions of Sections 107 and 119 covered the same. He has propounded that neither the Union Government nor the State of Mysore acted otherwise and the agreement continued to remain in force.

133. We may clearly state here that nothing has been brought on record to show that any dispute was raised after the Reorganisation

Act by the newly formed States to controvert the agreement. As the facts clearly depict, it continued. Mr. Dwivedi, in this regard, would contend that the State of Karnataka had waived its right to question the legal tenability of the agreement and keeping in view the concept of waiver, the Tribunal has also adverted to the same and accepted. We do not think that this aspect needs to be reverted to, for it remains a fact that both the agreements with the Regulations remained in force despite coming into effect of the Reorganisation Act, 1956.

L. Issue relating to expiry of the agreements

134. It is submitted by Mr. Nariman, learned senior counsel, that the 1924 Agreement was not an agreement requiring a positive or affirmative act by either of the states to go ahead with revocation but, on the contrary, to arrive at a common consensus for its continuance and if the clauses of the Agreement are studiedly scrutinized or appreciated as an instrument as a whole, its life span is 50 years and the same could not have continued, by any stretch of imagination, after the expiry of the stipulated period. He would argue that the Constitution Bench in the Presidential Reference has

twice stated that both the agreements have expired and no application for review or modification was filed by the State of Tamil Nadu and rightly so, as anyone connected with the agreement was well aware that the agreements stood expired. The said submission of Mr. Nariman is seriously resisted by Mr. Naphade and Mr. Dwivedi, learned senior counsel, on the foundation of the Presidential Reference answered in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra). It is further urged that the issue did not arise as regards the expiry of the agreements and the Court has not addressed to it and, therefore, it cannot be regarded or treated as a decision on the said issue. Learned senior counsel would contend that merely because the expression has been used that the agreements had expired, that should not be given the status of the ratio of the judgment.

135. The second plank of the argument of Mr. Nariman in this regard is that even assuming that the decision of the Constitution Bench is not treated as binding for the purpose of expiration of the term of the Agreement, the clauses in the Agreement explicitly show that the 1924 Agreement comes to an end after the expiry of 50 years. For the said purpose, emphasis is laid on the language

employed in Clause 10(xi) of the Agreement. We have already reproduced the agreement and, therefore, at this stage, it is apt to reflect on how the Tribunal has understood the Agreement. On a reading of the award, it is noticeable that the Tribunal has analyzed in detail the various clauses of the said Agreement with the mutual rights and obligations as specified therein and focused, in particular, on clause 10 (xi) which contemplated a process of reconsideration on the expiry of 50 years from the date of its execution.

136. The Tribunal, in the context of the rival contentions on the subsistence or otherwise of the Agreement on the expiry of 50 years from its execution, minutely noted that undisputedly there had been no re-consideration by the two States on the question of modification or addition in respect of the different terms and conditions as mentioned therein, after the said period. It referred as well to the plea of the State of Tamil Nadu that as per clause 10(xi), the reconsideration, if any, was limited only to the stipulations in clauses 10(iv) to 10(viii) and not qua clause 10(ii) which enjoined the Mysore Government to regulate the discharge to and from the Krishna Raja Sagara reservoir strictly in accordance

with the Rules of Regulation set for in Annexure I thereto. The Tribunal, however, on a scrutiny of the relevant clauses and on a juxtaposition thereof, negated the said plea and held that clause 10(ii) was inter-linked with clauses 10(iv) to clause 10(viii) and could not be dissociated from each other. In arriving at this determination, the Tribunal noted the areas of irrigation permitted to be undertaken by the two Governments with the liberty to extend the same subject to the ceiling as mentioned and laid emphasis on the enjoinments contained in clause 10(vii) in particular and held that if after 50 years in terms of clause 10(xi), the limitation and arrangements specified in clause 10(iv) to clause 10(viii) were to be considered, then the limitations prescribed by the rules of regulation for Krishna Raja Sagara reservoir forming Annexure 1 of the Agreement and alluded to in clause 10(vii) could not be excluded from the purview of such reconsideration. The Tribunal thought that this is more so as in terms of clause 10(vii), the Mysore Government had agreed that extension of irrigation in its territories as specified in clause (iv) would be carried out only by means of reservoirs constructed on the River Cauvery and in its tributaries mentioned in Schedule A of the 1892 Agreement; such

reservoirs were to be of an effective capacity of 45,000 million cubic ft. in aggregate; impounding therein was to be so regulated as not to make any material diminution in supply recorded by the gauge accepted in the Rules of Regulation for the Krishna Raja Sagara reservoir forming Annexure I to the Agreement and the rules for working such reservoirs were to be so framed as to reduce any loss during the impounding period within 5%, by adoption of suitable proportion factors, impounding formula or such other means as was to be settled. The Tribunal referred to the notes of arguments produced on behalf of the State of Tamil Nadu before it which indicated that the average inflow into Mettur for 38 years from 1934 - 1935 was 377.1 TMC serviced by three sources with the following break ups:

> "(i) From KRS, as per Rules of Regulation of KRS Annexure 1 of 1924 Agreement - 159.780 TMC
>
> (ii) From Kabini - 112.615 TMC
>
> (iii) Contribution for intermediate catchment below KRS and below Hullahalli Anicut in Kabini including 25 TMC from catchment area above Mettur in Tamil Nadu -104.746 TMC
>
> **Total – 377.141 TMC**"

137. It observed that if reconsideration was to be limited only to the

arrangement as set out in clauses 10(iv) to (viii), then the logical consequence would be that in the event of any modification, it would not be possible for the State of Karnataka to comply with the requirement of clause 10(ii) read with Rules 7 and 10 of the Rules of Regulation only on the basis of discharge from Krishna Raja Sagara reservoir. The Tribunal, thus, held that whenever a dispute was raised, it was to be examined in the light of the conditions prescribed not only in clauses 10 (iv) to 10 (viii) but also in the light of the obligation and mandate provided on the part of the State of Mysore/Karnataka to follow the Rules of Regulation for Krishna Raja Sagara reservoir as contained in clause 10(ii).

138. On the plea that the 1924 Agreement, in the absence of reconsideration, as envisaged in clause 10(xi), had expired, an eventuality noticed by this Court in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra) wherein the validity of the Karnataka Cauvery Basin Irrigation Protection Ordinance 1991 had been laid for scrutiny in a reference under Article 143 of the Constitution, the Tribunal apart from observing that the question of subsistence or otherwise of the Agreement was not an issue before this Court in the said reference, also marked that in the complaint

before it under adjudication, the principal grievance of the State of Tamil Nadu was contravention and violation of the terms thereof which, according to it, remained in force even after the expiry of 50 years from the execution thereof. It also referred, the initiatives and endeavours of the two States in this regard with the intervention of the Union Minister for Irrigation and Power and the participation of the Chief Ministers of Tamil Nadu, Mysore and Kerala along with others for an amicable resolution of the lingering differences which, *inter alia,* contemplated a fact finding Committee of Engineers, agricultural experts, retired Judges, etc. to collect data pertaining to Cauvery waters, its utilization and irrigation practices and to examine the adequacy of the supplies or excessive use of water for irrigation purposes to be placed for further discussions to arrive at an agreed allocation of waters for the respective States. The Tribunal underlined that nowhere in the discussions, it had been the stand on behalf of the State of Mysore that after 50 years of the execution of the Agreement, it would expire and as such there would be no question of reviewing the terms thereof.

139. The plea of the State of Mysore that the proviso to clause 10(xiv) per se spelt the automatic termination of the whole of the

Agreement after the expiry of 50 years, was negatived in view of the interplay of clauses 10 (xiv) and (xi).

140. The Tribunal, as we find, has accepted the plea and stand of the State of Tamil Nadu that the 1924 Agreement did not expire in 1974.

141. It is necessary to reflect on the finding of the Tribunal on this score. The Tribunal noticed the rival orientations of the two States with regard to the status of the Agreement on the expiry of 50 years from the date of its execution. It recorded the stand of the State of Karnataka that the agreement expired after the expiry of the period of 50 years from the date of its execution so much so that none of the clauses therein were enforceable in respect of discharges to be made from Krishna Raja Sagara and other reservoirs of the tributaries of Cauvery which were under construction in Karnataka. It took note of the contrary plea of Tamil Nadu that the agreement was permanent in nature and that all the terms therein were binding on Mysore, that is on the State of Karnataka in respect of the operation of Krishna Raja Sagara and other reservoirs constructed on the tributaries of river Cauvery. The Tribunal recorded the plea of the State of Karnataka that not only the

Agreement of 1924 expired in the year 1974 but also the terms of the Agreement dated 1892 as well as of 1924 were arbitrary in nature and inequitable between the State of Madras which was then a Presidency State and as such part of the British Territory and the State of Mysore which was then under the Ruler. Tracing the history of the two agreements and that of 1924 in particular, the Tribunal was of the view that the latter agreement was entered into only after the terms thereof had been fully examined by the two States with special attention to the aspect as to whether the new irrigation reservoir was likely to diminish the flow of river Cauvery to the territory of Madras State in any manner. In the context of the cavil of the State of Karnataka that the then State of Mysore had to enter into both the agreements under some compulsions and that the stringent stipulations contained therein, amongst others, defining the limits under which no irrigation works were to be constructed by Mysore without the previous consent of Madras and that the rigorous restrictions in respect of impounding of water of Krishna Raja Sagara as well as other reservoirs to be constructed on the tributaries of river Cauvery with the rider of maintaining a minimum flow of Cauvery at the Upper Anicut so as to maintain a

height of water level ranging between 3 ft. to 7 ½ ft. during January to June did spell great hardship, the Tribunal delved into the time phase chapter pertaining to the Treaty of 1799 entered into between the then East India Company and the Maharaja of Mysore whereupon the possession of the Mysore State was handed over to the then Maharaja. It marked, *inter alia,* the undertaking of the then Maharaja of Mysore that he would abstain from any interference in the affairs of any state in alliance with the English Company Bahadur and would not enter into any communication or correspondence with any foreign State without the previous knowledge or sanction of any English Company Bahadur. The Tribunal noted as well the similar restrictions in the Instrument of Transfer of 1881, apart from preserving in the Governor General in Council, several powers including the one to resume possession of the said territories and to assume direct administration thereof.

142. While noticing the plea of Karnataka that after the Treaty of 1799, with the advent of East India Company as well, the administration of Mysore had been taken away by it, and the possession of the State was eventually handed over to the then Maharaja on 25.03.1881, and that thus the British Crown was

apparently exercising its paramount power over the ruling State of Mysore for which, as a feudatory State, it was really under a compulsion to subject itself to the constraints prescribed under the Agreement, the Tribunal observed that International Agreements as well as Inter-state Agreements cannot be examined at a later stage on the touchstone of whether the terms were just and proper, keeping the interest of both the Nations or the States at the time of execution thereof. While acknowledging that sometimes, compulsions existing at the time of execution of the Agreements may be factors for adopting the spirit of give and take on the part of one Nation or the State, it concluded qua the Agreements of 1892 and 1924 that those could not be challenged as being done after a lapse of more than 100 years so far as the Agreement of the year 1892 is concerned and 80 years qua the Agreement of 1924 by the State of Karnataka being the successor of the interest of the State of Mysore. The Tribunal recorded that this was more so as the State of Mysore/Karnataka had complied with the terms of the Agreements scrupulously and religiously up to 1974 and the dispute surfaced only after the expiry of the period of 50 years as contemplated in Clause 10(xi) of the Agreement of 1924. It remarked as well that on

the basis of the Agreement of 1924, the State of Mysore/Karnataka not only constructed the Krishna Raja Sagara Project but also other reservoirs on the tributaries of Cauvery within its territories for a total capacity of 45,000 million cubic ft. (45 TMC) and thereby derived the benefit of construction of those reservoirs on the river Cauvery and its tributaries and, thus, it cannot be allowed to repudiate the agreements on the principle of "q*ui approbat non reprobat*" (one who approbates cannot reprobate). The Tribunal construed that though an agreement can be challenged in terms of Section 19A of the Indian Contract Act, yet the party concerned had to satisfy the Court at the appropriate stage that its consent was obtained by coercion, fraud, misrepresentation or undue influence and that noticeably, during the period of more than 50 years since 18.02.1924, after which according to the State of Karnataka, the said Agreement had come to an end, it did never allege before any court of law that the said Agreement was either voidable or that it was not bound by it for any of the infirmities as envisaged in Sections 19 and 19A of the Indian Contract Act. It recalled in reinforcement of this view the backdrop of the Agreement which evinced that the competent authorities on behalf of both the States,

after proper application of mind and discussion, had endorsed and executed both these documents and, thus, these could not be ignored and discarded being not void in the eye of law.

143. The aforesaid finding of the Tribunal is seriously found fault with by Mr. Nariman on the ground that the Tribunal should have proceeded on the basis of the language employed in the instrument. Regard being had to the said submission, we think it appropriate to reproduce Clause 10(xi), though it has already been extracted hereinbefore:-

> "10 (xi) The Mysore Government and the Madras Government further agree that the limitations and arrangements embodied in clauses (iv) to (viii) supra shall at the expiry of fifty years from the date of the execution of these presents, be open to reconsideration in the light of the experience gained and of an examination of the possibilities of the further extension of irrigation within the territories of the respective Governments and to such modifications and additions as may be mutually agreed upon as the result of such reconsideration."
>
> [Underlining is ours]

144. The said clause requires studied scrutiny. It stipulates that both the States agreed that the limitations and arrangements embodied in Clauses (iv) to (viii) shall, at the expiry of 50 years from the date of execution, be open to reconsideration in the light of the

experience gained and upon examination of the possibilities of further extension of irrigation within the territories of the respective States be subject to such modification and additions as may be mutually agreed upon as the result of such reconsideration. The submission of Mr. Nariman and Mr. Katarki appearing for the State of Karnataka is that the postulates in the clause have to be read as a whole and not in a truncated sense. According to them, the stipulations in Clauses (iv) to (viii) would be open for reconsideration taking into stock certain facts and circumstances and only thereafter, the modification and additions can be mutually agreed to. Emphasis is laid on the word 'reconsideration'. It is also argued by them that the stipulation in Clause (xi) cannot be restricted to Clauses (iv) to (viii) as those clauses constitute the spine of the Agreement. It is their argument that the other clauses in the Agreement are so interdependent with the mentioned clauses that the others cannot be excluded or eschewed. The intention of the parties is quite clear that the experience has to be seen in 50 years and thereafter, the whole thing is to be called for reconsideration and reconsideration cannot be unilateral or, for that matter, automatic.

145. Controverting the same, it is urged by Mr. Naphade and Mr. Dwivedi, learned senior counsel for the State of Tamil Nadu, that the clause applies in part essentially what has been mentioned therein and cannot cover the whole agreement. They emphasized on the words that the life of the Agreement is not limited to 50 years but only meant for reconsideration for the purpose of reexamination and that does not put an end to the Agreement.

146. Having perused the clause in entirety and considering the words, namely, 'reconsideration', mutually agreed upon' and 'be open to', it is clear that certain clauses in the Agreement had a restricted life span.

147. We are inclined to think so inasmuch as the relevant clauses which are open to reconsideration are absolutely essential parts of the contract and it is extremely difficult to place appropriate construction on the contract without them. The clauses in the contract do not indicate permanency but, on the contrary, indicate fixed term and that is how we intend to construe the same. The continuance of contract, as we find, was further a subjective consideration and merely agreed upon and, therefore, to hold that it

continued solely because of the experience gathered would not be appropriate and it would be contrary to the concept of understanding the clauses in a contract to give effect to its continuance. The continuance after 50 years was dependent on certain aspects and, therefore, we have no hesitation in holding that the agreement expired after 50 years. The submission on behalf of the State of Tamil Nadu is that the obligations of the contract continued but, in this context, it is worth noting that the parties to the agreement had entered into correspondence with the Central Government agitating their grievances and they met at the various levels to discuss and to arrive at an acceptable arrangement. That not having been accepted, the complaint was lodged. Taking into consideration the entire conspectus of facts and circumstances, we hold that the agreement expired after 50 years in the year 1974.

M. <u>Did the complaint not require any adjudication?</u>

148. It is submitted by Mr. Nariman that the manner in which the complaint had been lodged and a request had been made for referring the dispute that had arisen between the States of Karnataka and Tamil Nadu was not statutorily entertainable.

According to him, the foundation of the complaint is the 1892 and 1924 Agreements and once they are treated to have expired, in the absence of any other aspect being stated in the complaint, it does not call for an adjudication by the Tribunal despite the matter having been referred to the Tribunal for adjudication. To bolster the said stand, he has relied upon the language employed in Section 3 of the 1956 Act. Section 3 of the 1956 Act reads as follows:-

> "3. Complaints by State Governments as to water disputes.—If it appears to the Government of any State that a water dispute with the Government of another State has arisen or is likely to arise by reason of the fact that the interests of the State, or of any of the inhabitants thereof, in the waters of an inter-State river or river valley have been, or are likely to be, affected prejudicially by—
>
> (a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other State; or
>
> (b) the failure of the other State or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; or
>
> (c) the failure of the other State to implement the terms of any agreement relating to the use, distribution or control of such waters,
> the State Government may, in such form and manner as may be prescribed, request the Central Government to refer the water dispute to a Tribunal for adjudication."

149. Relying on the said provision, it is urged by Mr. Nariman that there is no assertion with regard to either the State of Tamil Nadu or its inhabitants being prejudicially affected in any other manner except the agreement and, then, the conditions precedent as postulated in clauses (a), (b) and (c) of Section 3 are not met with. He has referred to issues 8, 10, 40 and 43 by the Tribunal on prejudicial affectation and stated that the Tribunal has not recorded any finding that the State of Tamil Nadu has been prejudicially affected within the sphere of Section 3. On the contrary, it has held that the issue regarding prescriptive right of Madras has become academic and the injury caused to each State at one stage or the other by the conduct of the other State has become a matter of history and it is not easy to assess any injury in an irrigation dispute. Learned senior counsel would further submit that the State of Tamil Nadu did not plead for a claim to any right which is conferred on it by the two agreements either in its complaint or on the statement of case before the Tribunal. The complaint deserves to be dismissed in the absence of proven injury. Mr. Naphade and Mr. Dwivedi, learned senior counsel being assisted by Mr. G.

Umapathy, learned counsel, in their turn, would contend with vehemence that such a contention at this stage is absolutely specious and should not engage the attention of this Court even for a moment. They would submit that the series of meetings and the correspondence that had commenced in the beginning of the 70s of the last century would speak eloquently about the inhabitants being prejudicially affected and further the various issues raised clearly exposit the grievances of the inhabitants of the State of Tamil Nadu. Additionally, it is contended by them that even if a finding is returned that the agreements have expired, rights had been created under the agreements and till they remain in force and also thereafter till the date of reference and more so when such a plea was not raised when reference was made to this Court under Article 143 of the Constitution, the said plea should be negatived.

150. The aforesaid submission advanced by the State of Karnataka should not detain us for long. On a perusal of the complaint, it does not contain the words "prejudicially affected' but the antecedents of the complaint, the view of the Central Government while referring water dispute and the expression of opinion of this Court ***In Re: Presidential Reference (Cauvery Water Disputes***

Tribunal) (supra). In the backdrop of the language of the 1956 Act, the expiration by the efflux of time and the role of this Court, we are not inclined to entertain such a plea. We must say without any hesitation that it may, in the first blush, have the potentiality to invite the intellectual interaction but the same fails to gain significance when one perceives the controversy from a broader perspective and the various orders passed from time to time by the Tribunal and by this Court. Therefore, the matter deserves to be adjudicated on merits.

N. <u>The approach adopted by the Tribunal post 1974 and correctness of the same</u>

151. On a perusal of the award, it appears that the Tribunal, after coming to hold that the 1974 agreement is valid which we have not accepted, noted the submissions of the State of Karnataka, Tamil Nadu and Kerala and Union Territory of Puducherry. The State of Karnataka, on 10.07.2002, has made the following submissions before the Tribunal which is to the following effect:-

> "60. The State of Karnataka in its Note KAR 3, page 10, filed on 10.07.2002, has taken the stand that "any future determination post-1974 would have to be made on the following basis:-

> (a) how much water is needed to irrigate the areas to which Tamil Nadu and Karnataka are entitled, under the Agreement; and
>
> (b) how should the surplus be divided and distributed for the planned areas of Karnataka and for the areas cultivated by Tamil Nadu (outside the Agreement of 1924). It is respectfully submitted that all areas contemplated to be irrigated under the Agreement of 1924 are concerned – whether by Tamil Nadu or by Karnataka, they have first to be taken into account as committed uses or existing uses. The remaining areas should be considered on the principles of equitable apportionment that are well settled and on the evidence led before this Hon'ble Tribunal."

152. The Tribunal, which had taken the view that the Agreements of 1892 and 1924 are valid and enforceable, alternatively suggested the apportionment of Cauvery waters on the following basis:-

> "(i) Protection of irrigated areas as existing prior to 1924 both in Karnataka as well as Tamil Nadu.
> (ii) The development of irrigation as contemplated in the 1924 agreement but actually developed before 1974.
> (iii) All other development to be considered as per different priorities suggested by them, indicated later on in the report."

153. After so noting, the Tribunal opined that before the requirement of water is examined, the two States have to determine the areas which have been adopted by the two States. The areas where the States of Karnataka, Tamil Nadu and Kerala and Union Territory of Puducherry have to be served by the Cauvery System

for irrigation are required to be considered. The principles for consideration were formulated by the Tribunal which are as follows:-

> "(i) Areas which were developed before the agreement of the year 1924
>
> (ii) Areas which have been contemplated for development in terms of the agreement of the year 1924.
>
> (iii) Areas which have been developed outside the agreement from 1924 upto 2.6.1990, the date of the constitution of the Tribunal. (i.e. from 1924 to 1990)
>
> (iv) Areas which may be allowed to be irrigated on the principle of equitable apportionment."

154. On a perusal of the aforesaid, it is noticed that the Tribunal has taken the cut-off date as 02.06.1990, the date on which the reference/complaint was made. In the course of the hearing, learned counsel for all the parties accepted that they do not have any kind of quarrel over the determination by the said date.

155. Having stated thus, we have to analyze the approach adopted by the Tribunal on the basis of the same. Prior to that it is necessary to reflect on what the Court has said in the Presidential Reference. At this stage, we must note with profit that the Court had noted that the 1924 Agreement had expired. After the Court

held that the agreement had expired and further that the legislation passed by the State of Karnataka was *ultra vires*, it proceeded to state thus:-

> "71. It will be pertinent at this stage also to note the true legal position about the inter-State river water and the rights of the riparian States to the same. In State of Kansas v. State of Colorado the Supreme Court of the United States has in this connection observed as follows:
>
> "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none … the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them and this Court is called upon to settle that dispute in such a way as will recognise the equal rights of both and at the same time establish justice between them.
>
> The dispute is of a justiciable nature to be adjudicated by the Tribunal and is not a matter for legislative jurisdiction of one State ….
>
> 'The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land, and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is

made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down ….'

The right to the use of flowing water is publici juris, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorised use of it that an action will lie."

72. Though the waters of an inter-State river pass through the territories of the riparian States such waters cannot be said to be located in any one State. They are in a state of flow and no State can claim exclusive ownership of such waters so as to deprive the other States of their equitable share. Hence in respect of such waters, no state can effectively legislate for the use of such waters since its legislative power does not extend beyond its territories. It is further an acknowledged principle of distribution and allocation of waters between the riparian States that the same has to be done on the basis of the equitable share of each State. What the equitable share will be will depend upon the facts of each case. It is against the background of these principles and the provisions of law we have already discussed that we have to examine the respective contentions of the parties."

156. Though the aforesaid paragraphs were said in the context of the legislative power, yet it meaningfully stated the legal position about the Inter-State River Water and rights of the riparian States

in the same and further that the distribution and allocation of waters between the riparian States has to be done on the basis of equitable share of each State which will depend upon how the quantum of equitable share is determined as per the facts of the case.

157. The Tribunal referred to the decisions in ***State of Wyoming v. State of Colorado***[25], ***State of Nebraska v. State of Wyoming***[26], the report of the Krishna Water Disputes Tribunal, Chapter XII, page 98 under the heading of "Protection of Existing Uses", the report of Narmada Water Disputes Tribunal, the Report of Godavari Water Disputes Tribunal, the Report of the Ravi and Beas Waters Tribunal and noted thus:-

> "16. There are three different views in respect of the claims by different riparian States regarding sharing of the water of an inter-State river or a river passing from one nation to another:
>
> (i) The first view proceeds on what is called the doctrine of absolute territorial sovereignty commonly referred to as 'Harmon doctrine'. According to this doctrine every State is sovereign and has right to do whatever it likes with the waters within its territorial jurisdiction irrespective of injury that it might cause to the neighbouring State by such appropriation and diversion.

[25] 259 US 419 (1922)
[26] 325 US 589 (1945)

(ii) The second view is based on the stand that lower riparian State is entitled to water in its natural flow without any diminution or interference or alteration in its character.

During the last century both views had been propounded – the first one by the upper riparian State and the second by the lower riparian State. If it is examined by an example, a State which is at the head of the river from which the river initially passes then such State can utilize and divert the water from the said river making the lower riparian State starve, leading to the break-down of the economy of such lower riparian State. Similarly, if the second view is pushed to its logical end, then the upper riparian State although may be in dire need of the water of such inter-State river for agriculture and other use shall be a mute spectator of the 14 water of such inter-State river flowing from its territory to the lower riparian State.

(iv) The third view is based on the principle of "equitable apportionment", that is to say that every riparian State is entitled to a fair share of the water of an inter-State river according to its need. Such a river has been provided by nature for common benefit of the community as a whole through whose territories it flows, even though those territories may be divided by political frontiers."

158. Thereafter, the Tribunal referred to the decisions in ***Kansas v. Colorado***[27], ***Colorado v. Kansas***[28], ***State of New Jersey v. State of New York***[29], ***State of Connecticut v. Commonwealth of***

[27] 206 US 46 (1906)
[28] 320 US 383 (1943)
[29] 283 US 336 (1931)

Massachusetts[30], ***State of Colorado v. State of New Mexico***[31]

and came to hold as follows:-

> "24. It may be pointed out that in the Colorado v New Mexico 459 US 176 (1982) known as Colorado I as well as in Colorado v New Mexico 467 US at 310 (1984) known as Colorado II there are explicit indications, to consider future developments in equitably apportioning a fully appropriated river. But it has been pointed out in those opinions that any future developments must not be inherently speculative in nature and assessment is required to be made on the benefits and harms of a future use.
>
> 25. It also appears that recent treaty between Canada and the United States with regard to the Columbia basin has discredited Harmon doctrine. Also in other international disputes in respect of sharing of waters of rivers flowing from the territory of one nation to another, treaties have been entered which show that different nations have adjusted their differences. The Indus Treaty 1960, between India and Pakistan is an example.
>
> 26. In Halsbury's Laws of England, Fourth Edition, Volume 49(2) in paragraph 121 it has been said:
> "121. Rights and duties as to quantity of water. The right of a riparian owner to the flow of water is subject to certain qualifications with respect to the quantity of water which he is entitled to receive. The right is subject to the similar rights of other riparian owners on the same stream to the reasonable enjoyment of it, and each riparian owner has a right of action in respect of any unreasonable use of the water by another riparian owner. A riparian owner must not use

[30] 282 US 660 (1931)
[31] 459 US 176 (1982)

> and apply the water so as to cause any material injury or annoyance to his neighbours opposite, above or below him, who have equal rights to the use of the water and an equal duty towards him."

159. At this juncture, it is worth noting the submissions advanced by Mr. Katarki, learned senior counsel appearing for the State of Karnataka and Mr. Naphade, learned senior counsel appearing for the State of Tamil Nadu. It is submitted by Mr. Katarki that the equitable share of water to be allocated to the party States had to be based on needs rather than on the flow of the river. No State had any right to the natural flow of an inter-state river and several factors had to be considered while assessing the needs like basin factors, drought area and population. He emphasized on the basic aspects, namely, Natural Flow Theory and Helsinki Rules, 1966 and placed reliance on the decision in ***New Jersey*** (supra) and other authorities. Mr. Naphade, per contra, would contend that the contention that there has to be an equal apportionment of water between the two States is untenable. According to him, the parameter of equality has to be understood from a different perspective in a controversy giving rise to water dispute. He relied upon the observation made by the Narmada and Krishna Water

Disputes Tribunals that the principle of equality did not imply that there must be an equal division of water between the States but instead meant that the States must have equal consideration and equal economic opportunity. Such equality would not necessarily result in the same quantity of water being provided to the parties.

160. The Tribunal has referred to the Helsinki Rules of 1966 that has rejected the Harmon Doctrine and laid stress on the need of equitable utilization of international rivers. The said Rules relate to the use of waters of international rivers. Articles V, VI and VIII read as follows:-

> "Article V
>
> (1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.
>
> (2) Relevant factors which are to be considered include, but are not limited to:
>
> (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State ;
>
> (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
>
> (c) the climate affecting the basin
>
> (d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin State ;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying file economic and social needs of each basin State;

(h) the availability of other resource!;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin ;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State;

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Article VI: A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

Article VIII: 1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.

2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the useor, where such

> construction is not required, the undertaking of comparable acts of actual implementation
>
> (b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandonded.
> 3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use."

161. On a perusal of the said Rules, it is clear as crystal that the said Rules have not accepted the Harmon doctrine. It has, on the contrary, laid emphasis on the need of equitable utilization of such international rivers. It is noticeable from Articles IV and V of the said Rules that they recognize equitable use of water by each basin State, setting out the factors, not exhaustive though, to be collectively taken into consideration for working out the reasonable and equitable share of the riparian states. The indicated factors, inter alia, include the geography of the basin, the hydrology of the basin, the climate, past utilization of waters, economic and social needs of each basin State, population dependent on the waters of the basin in each basin State, availability of other resources and the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State. The emphasis clearly is that in determining the reasonable and equitable share, all

relevant factors are to be considered together and a conclusion is to be reached on the whole.

162. In this regard, it is submitted by Mr. Nariman that the allocation of water could be done equitably and in accordance with justice by restoring equal rights to the party states. He submitted that Karnataka and Tamil Nadu were co-equal States and that justice had to be done to both while allocating water, a fact which the Tribunal had failed to recognize. The Tribunal intertwined a decision based on a void agreement with the doctrine of equitable apportionment contrary to the law laid down in ***In Re: Presidential Reference*** (supra). He submitted that the various applicable factors set out in the Helsinki Rules, 1966 were more or less evenly balanced between the two States. Further, based on the maxim that equality was equity, the balance water available after subtracting the share of the smaller States, i.e., Kerala and Puducherry and after accounting for wastage ought to be divided equally between Karnataka and Tamil Nadu.

163. In this context, we may refer to the dictionary clause of the 1956 Act. Section 2(c) defines 'water dispute'. It reads as under:-

> "2(c) "water dispute" means any dispute or difference between two or more State Governments with respect to—
>
> (i) the use, distribution or control of the waters of, or in, any inter-State river or river valley; or
>
> (ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or
> (iii) the levy of any water rate in contravention of the prohibition contained in section 7."

164. Section 3 deals with complaint by the State Government as to water disputes. The said provision is extracted below:-

> "3. Complaints by State Governments as to water disputes.—If it appears to the Government of any State that a water dispute with the Government of another State has arisen or is likely to arise by reason of the fact that the interests of the State, or of any of the inhabitants thereof, in the waters of an inter-State river or river valley have been, or are likely to be, affected prejudicially by—
>
> (a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other State; or
>
> (b) the failure of the other State or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; or
>
> (c) the failure of the other State to implement the terms of any agreement relating to the use, distribution or control of such waters,
>
> the State Government may, in such form and manner as may be prescribed, request the Central Government to refer the water dispute to a Tribunal for adjudication."

165. The definition of 'water disputes' and the provisions contained in Section 3 have to be given due significance. Section 3 protects the right of inhabitants of a State. When the States make a request under the 1956 Act for adjudication of the disputes, the interest of the inhabitants of the State is involved. That is why, submits Mr. Nariman, both the States are governed by the *parens patriae* principle. Keeping in view the principles of law stated, we are disposed to think that the controversy is to be adjudged on the bedrock of equal status of the States and the doctrine of equitability.

O. The quintessence of pleadings before the Tribunal

166. Having stated thus, we think it seemly to refer to the findings on material aspects that pertain to the pleadings as regards the allocation of quantity of water and the foundation to sustain such claims. In that arena, we shall first advert to the outline of the pleadings.

167. The plea of the State of Karnataka was that till the end of the 19th century, utilization of the waters of the Cauvery in the States of Coorg and Mysore was primarily from channels drawn from the

river bed and from tanks in small quantities not exceeding 73 TMC in aggregate. There was no facility of storage and, thus, the agricultural operations were dependent on rainfall. It alleged that the efforts made by the State of Mysore to utilize the waters of this river for the purposes of irrigation were continually frustrated by the protests of the British Government of Madras and though the State of Mysore was the upper riparian State and contributed the highest flow to the river, yet it was not permitted to exercise its powers to utilize the waters for irrigation due to the remonstrances of the lower riparian province of Madras. It pleaded that eventually, after a series of correspondence in the last part of the 19th century and early part of the 20th century and on the culmination of the arbitration proceedings on the issue, a scheme for storage of the water of Cauvery was formulated in 1931 after the construction of the Krishna Raja Sagara Dam (also referred to as "KRS") for the storage of 44.8 TMC of water. It stated that by 1934, Madras too had completed the work of Mettur Dam for storage of 93.5 TMC of water of Cauvery thereby enabling cultivation of over 1,21,457 hec. (3,00,000 acres) of new area. It mentioned that after the reorganization of the States and formation of the State of Karnataka

covering the areas of the new State of Mysore and others, the drainage area of Cauvery basin in Karnataka rose to 42.2%. Apart from referring to the principal tributaries of Cauvery in Karnataka like Harangi, Hemavathi, Kabini, it was underlined that the Cauvery river valley did receive varying degrees of rainfall. In elaboration, it was stated that while the western and central parts of the basin received rainfall in South-West monsoon commencing from the last week of May and ending in September, the eastern part was largely attended by the North-East monsoon starting in September and ending in December. It averred that the rainfall pattern per se evinced that large cultivable areas of the State suffered from inadequate rainfall. Though the hilly regions forming part of the Western Ghat in Karnataka received very heavy rainfall, yet other parts of the Districts of Mysore, Mandya, Hassan, Tumkur, Bengaluru and Kollar encountered severe and successive droughts.

168. According to Karnataka, in sharp contrast, the eastern part of the basin in Tamil Nadu received heavy rainfall in North-East monsoon beginning from the end of September and ending in December and further the central part of the basin in Tamil Nadu received both South-West monsoon and North-East monsoon.

Referring to the report of the Irrigation Commission, it maintained that though Karnataka had very large areas of cultivable and cultivated lands in the Cauvery basin, yet it has the largest extent of drought prone areas in the basin as well and that there was an imperative need to extend relief to these areas by providing proper irrigation facilities. It emphasized as well that due to uncertain ground water resources resulting from reduced recharge, general deep water table and low storage in the aquifer, the State has to depend on surface water allocation in the Cauvery basin. Elaborating its crop pattern, it was canvassed that Ragi, Jowar, Sessamum, Groundnut, Redgram and short duration pulses were the common Kharif crops under rain fed conditions. In some areas where there were pockets of retentive soils or were visited by late rains, some Rabi crops like Jowar, Bengalgram and cotton are also cultivated. It emphasized that to ensure crops during the entire period from June to February, i.e., the irrigation season, water from Cauvery was an indispensable necessity, more particularly in view of the precarious drought conditions suffered by the State.

169. Referring to the backdrop of the dispute and the reference for the adjudication thereof before the Tribunal, the State of Tamil

Nadu reiterated its demurral that the State of Karnataka did construct four reservoirs over Kabini, Hemavathi, Harangi and Suvarnavathi tributaries of Cauvery and set up other projects for storing water of the river much beyond the limits stipulated in the agreement of the year 1924 which decisively resulted in material diminution of the supply of waters of Cauvery to its territories. According to it, such indulgences adversely affected the Ayacutdars in Tamil Nadu who had been dependent on the water of river Cauvery for centuries. While reiterating that the Agreements of 1892 and 1924 did factually recognize and protect the prescriptive rights of Tamil Nadu, a lower riparian State, over the water of Cauvery and that these agreements were the yields of deliberations over the disputes between the erstwhile Governments of Madras and Mysore, whose successors- in-interest are the present States of Tamil Nadu and Karnataka, it was averred that though the State of Karnataka was at liberty to use the water of Cauvery, yet it could not do so to the prejudice of the interest of the people of Tamil Nadu. It underlined that the apportionment of the water of an inter-State river has to be adjudged on the principle of equitable apportionment as well as by the common law of prescriptive rights.

According to Tamil Nadu, wherever there is an agreement between the parties regarding the use, development and control of waters of an inter-State river and the river valley thereof, the stipulations in the agreement would govern the claim of the parties. It alleged that the construction of Kabini, Hemavathi, Harangi and Suvarnavathi projects by Karnataka was without the consent of Tamil Nadu and thus in violation of the Agreement of 1924 and by taking advantage of the fact that Tamil Nadu was a lower riparian state. It dilated that Karnataka proceeded with the construction of Kabini reservoir from 1958 and completed the same in 1975 and the irrigation from the said reservoir commenced from 1975/1976 onwards. Tamil Nadu contended that because of the construction of these reservoirs, the inflows into Mettur reservoir were substantially and materially diminished to its immense prejudice. Apart from reiterating that the construction of these projects was without the consent of Tamil Nadu and also the clearance required therefor, it asserted that as per the settled principles, the upper riparian state did not have an absolute right to impound or utilize the water of an interstate river to the detriment of the lower riparian States. It strongly put forth that the pre-existing right of the lower riparian

State has to be preserved more particularly when river Cauvery is the only major river in Tamil Nadu which had been contributing nearly 50% of the State's surface water use. Referring to the two monsoons experienced by the State, Tamil Nadu elaborated that the upper part of the Cauvery basin, which is above Mettur, is influenced by South-West monsoon and the lower part by the North-East monsoon and that the flow of river during the South-West monsoon is to a great extent dependent on the run off from the hilly catchment above the Sivasamudram falls. It was stated that while the South-West monsoon is more intensive, unfailing and dependable and spread over a long period, the North-East monsoon, which visits the State after the South-West monsoon, is erratic and undependable so much so that the coastal areas and the Delta occasionally receive heavy intense rains of very short duration, most of which can neither be conserved nor utilized in the Delta. According to the State, during the South-West monsoon, most of the catchment lying below the Mettur reservoir is not benefitted, except a small portion of the high ranges of Bhawani and Amaravathi tributaries, as the catchment lies on the rain shadow areas of the Western Ghats. It was reiterated that due to the unique

geographical and hydrological characteristics of the Cauvery basin, Tamil Nadu is not in a position to avail the benefit of the South-West monsoon fully and has to suffer the damage wrecked by the North-East monsoon. To emphasize that it had to depend on the flows of river Cauvery since June onwards during the South-West monsoon and on local rainfall during the North-East monsoon, it explained that after the commissioning of the Mettur reservoir in 1934, it had been possible to impound the excess flows and dispatch regulated discharges to meet the needs of the river channels enroute the Delta and that contingent on the availability of supplies, a number of regulatory controls have been devised to regulate the same. Referring to its crop pattern, Tamil Nadu disclosed that in the Delta, a short duration crop called “Kuruvai” is raised between the months of June and September followed by a medium crop named “Thaladi” between October and February. It also mentioned about a long term crop named “Samba” raised between July and January in single crop lands which are large in extent. Tamil Nadu underlined that rice was the dominant crop in the Delta especially in the Thanjavur district and that the whole State largely depended on this district for rice which was the staple

food of the people. It asserted that the alluvial soil of the Delta was ideal for growing rice subject to the availability of water and only in isolated pockets, sugarcane, banana and other crops are grown.

170. Kerala averred that the river Cauvery originates in the eastern slopes of the Western Ghats and has its huge catchment spread over the States of Kerala, Karnataka and Tamil Nadu and that three tributaries of the river, namely, Kabini, Bhavani and Pamber, have portions of their catchments in the State of Kerala. It was further asserted that its total contribution in the flow is to the extent of 20% but it lags behind others in utilization of waters of the Cauvery. As a reason therefor, it cited the fact that before the reorganization of the States in the year 1956, neither Travancore nor Travancore-Cochin State was recognized as an interested party in the dispute of sharing of the water of Cauvery, but after the reorganization, determined efforts were made for improvement of the Basin and diversion of the water in Cauvery Basin for utilization by the State. It, however, underlined that the efforts of the State stood frustrated because of the objection of the other riparian states and though several claims had been brought up and were otherwise found to be technically feasible and economically viable, yet those

could not be executed because of the adamant attitude of the other lower riparian states. It highlighted that the State of Kerala, for all these factors, had to be dependent on the single crop of paddy though there is much scope for raising second or even third crop with the availability of irrigation facilities from the water available in the Cauvery Basin. It emphasized that its ground water potential was negligible but because of the special topographical feature of the Cauvery Basin in the State of Kerala, diversion of water from the Cauvery Basin did promise the scope of development of cheap hydro electric power in addition to meeting the need for consumption of water for irrigation purposes. It stated that while it was stifled from taking up any scheme in the Basin, Tamil Nadu proceeded with the construction in utilizing water for extending irrigation and for that purpose, the Government of India cleared projects like Mettur Canal Project, Kattalai High Level Canal and Pullambadi Canal Schemes. The State of Karnataka also embarked upon new irrigation projects for utilizing Cauvery water even without the clearance of the Government of India in order to underscore the discrimination meted out to the State of Kerala in the matter of proportionate utilization of the waters in the Cauvery

Basin to which it was entitled.

171. The Union Territory of Puducherry pleaded that its Karaikal region is situated on the South Coromandel Coast and that the three sides thereof are bound by Thanjavur District of Tamil Nadu and on the East lay the Bay of Bengal. It disclosed that the total area of Karaikal region is 14,920/- hectares out of which 10,990 hectares is under cultivation. While stating that the sub-soil water in the region is unsuitable for cultivation, it mentioned that the water supplied to Karaikal region from river Cauvery flows from the branches of the river below Grand Anicut where the river Cauvery divides and sub-divides itself and serves both the irrigation and training channels in the Karaikal area. The water requirement for the Karaikal region for the three crops, namely, Samba (single crop), Kuruvai (Kharif) (Double crop) and Thaladi (Rabi) (Double crop) was mentioned to be 9240 Mc.ft, i.e., 9.24 TMC for 17220 ha. of irrigation. It claimed that the interest of its territory was taken note of when the Agreements of 1892 and 1924 were entered into between the then Government of Madras and Government of Mysore in connection with the construction of Krishna Raja Sagara Dam and that at the time of construction of Mettur Dam, the

French Administration, then in-charge, passed on its claim to the then Government of Madras for regulation of supply of Cauvery Water to Karaikal region. It, however, alleged that after 1972, there has been a shortfall in the actual release of water ranging from 2 TMC to 6 TMC.

172. After recording the evidence to which we shall refer to hereinafter under different headings, to reiterate, the issues for the purpose of convenience were regrouped finally which we have already reproduced hereinbefore.

173. The Tribunal in seriatim dealt with the regrouped issues and, accordingly, proceeded to examine the validity or otherwise of the Agreements of 1892 and 1924. It set out the background and the circumstances under which the agreements were entered into. We need not advert to the same in detail as we have referred and dealt with while dealing with the issues pertaining to the status of the Agreements. However, it is necessary to state that after a spate of correspondence and series of discussions, an agreement between the Mysore Government and Madras Government was entered into in 1892 in the form of rules captioned as “Rules defining the limits within which no new irrigation works are to be constructed by the

Mysore State without previous reference to the Madras Government". The Tribunal set down the relevant clauses of the Rules and the extracts therefrom having a formidable bearing on the issue under scrutiny are quoted hereinbelow:-

> "The Mysore Government shall not, without the previous consent of the Madras Government, or before a decision under rule IV below, build (a) any "New Irrigation Reservoirs" across any part of the fifteen main rivers named in the appended Schedule A, or across any stream named in Schedule B below the point specified in column (5) of the said Schedule B, or in any drainage area specified in the said Schedule B, or (b) any "New anicut" across the streams of Schedule A, Nos. 4 to 9 and 14 and 15, or across any of the streams of Schedule B, or across the following streams of Schedule A, lower than the points specified hereunder:
>
> Across 1. Tungabhadra – lower than the road crossing at Honhalli,
>
> Across 10 Cauvery – lower than the Ramaswami Anicut and,
>
> Across 13 Kabani – lower than the Rampur anicut.
>
> III. When the Mysore Government desires to construct any "New Irrigation Reservoir" or any new anicut requiring the previous consent of the Madras Government under the last preceding rule, then full information regarding the proposed work shall be forwarded to the Madras Government and the consent of that Government shall be obtained previous to the actual commencement of work. The Madras Government shall be bound not to refuse such consent except for the protection of prescriptive right already acquired and actually existing, the existence, extent and

> nature of such right and the mode of exercising it being in every case determined in accordance with the law on the subject of prescriptive right to use of water and in accordance with what is fair and reasonable under all the circumstances of each individual case."

174. Schedule A that was annexed to the Rules provided the details of the rivers and their tributaries passing through the territory of Government of Mysore including Cauvery and its tributaries Hemavathi, Laxmanthirtha, Kabini, Honhole (or Suvarnavathi) and Yagachi (tributary of Hemavathi) upto Belur Bridge. It was clarified that at that point of time, there was no mention of the tributary Harangi in the Schedule as it was outside the territory of Mysore and was located in Coorg State.

175. In the above premise, the Tribunal noted that in terms of the Agreement of 1892, the Mysore Government was required to obtain the previous consent from the Madras Government in respect of any construction proposed to be made including any new irrigation reservoir across the 15 main rivers named in Schedule A to the agreement or across any stream named in Schedule B below the point specified therein. It was stipulated as well that before any such project was executed, full information with regard to the same was required to be furnished to the State of Madras for the purpose

of consent. In its turn, the Madras Government was not to refuse such consent except on the failure of the Mysore Government to furnish full information regarding the proposed work to the Madras Government and if the grant of any such consent by the Madras Government would deprive its inhabitants of their protection of prescriptive rights already acquired and existent in accordance with law on the use of an inter-state river.

176. The Tribunal thereafter took note of the events subsequent thereto which, with time, gave rise to a fresh dispute between the two States following the formulation of proposals by them for construction of reservoirs on the river Cauvery. The dissension, as the Tribunal has noted, gave rise to disputes, the Griffin Award and eventually coming into force of the 1924 Agreement. The Tribunal generally traversed the agreement as a whole with particular reference to clause 10(i), (ii), (iii), (iv), (v), (vi), (vii), (xi), (xiv) and (xv) dealing with the construction and operation of the Krishna Raja Sagara reservoir; obligation of the Mysore Government to regulate the discharge through and from the said reservoir strictly in accordance with the rules of regulation set forth in Annexure (I) to the Agreement; future extensions of irrigation in Mysore and

Madras as well as future constructions of reservoirs on Cauvery and its tributaries mentioned in Schedule A of the 1892 Agreement; the mode and manner of operation of the reservoirs so as not to make any material diminution in supplies connoted by the gauges accepted in the rules of regulations for the Krishna Raja Sagara reservoir; reconsideration of the limitations and arrangements embodied in Clauses (iv) to (viii) on the expiry of 50 years from the date of the execution of the agreement for the purpose of modifications and additions, as may be mutually agreed upon; liberty of the Mysore Government to construct, as an offset, a storage reservoir on one of the Tributaries of the Cauvery in Mysore of a capacity not exceeding 60% of the new reservoirs in Madras, should the Madras Government construct irrigation works in Bhawani, Amravathi or Noyyal rivers as new storage reservoirs and the provision for reference to arbitration of any dispute between the two Governments touching upon the interpretation or operation or carrying out of the agreement.

177. The Tribunal also set out the extract of Rule 7 of the rules of regulation of the Krishna Raja Sagara prescribing the minimum flow of Cauvery that was to be ensured at the Upper Anicut before

any impounding was made in the Krishna Raja Sagara reservoir. Be it stated, we have already reproduced the same earlier.

178. The Tribunal next scanned the Agreements of 1892 and 1924 and to discern the clarificatory Agreement dated 17.06.1929 noted that the fixed level or discharge was to be maintained on the basis of (a) the waters released from Krishna Raja Sagara reservoir, (b) from Kabini, Suvarnavathy, Shimsha and Arkavathi Tributaries which join Cauvery within the State of Mysore/Karnataka below Krishna Raja Sagara reservoir and (c) Four Tributaries of Cauvery in Madras/Tamil Nadu; (i) Chinnar, (ii) Noyyal, (iii) Bhavani and (iv) Amaravathi.

179. The Tribunal further observed that the Agreement only contemplated and provided for future extension of irrigation in new areas on the terms and conditions mentioned therein and concluded that after the execution of the said Agreement, there was no nexus or link between the discharge of water of river Cauvery to the State of Madras and the areas over which any prescriptive right had already been acquired or was actually existing and the formula was worked out by taking the total area which was under irrigation

by the Cauvery system before the execution of the said Agreement.

180. It analyzed in detail the various clauses of the said Agreement with the mutual rights and obligations as specified therein and in that context, it opined that whenever a dispute was raised, it was to be examined in the light of the conditions prescribed not only in clauses 10 (iv) to 10 (viii) but also in the light of the obligation and mandate provided on the part of State of Mysore/Karnataka to follow the rules of regulation for Krishna Raja Sagara reservoir as contained in clause 10(ii).

181. It adverted to the observations of this Court that though the water from inter-state river pass through the territories of riparian States, yet such waters cannot be located in any one State, being in a state of flow, and, thus, no State can claim exclusive ownership of such water so as to deprive the other States of their equitable share. Keeping in view of the judgment of this Court, the Tribunal negatived the contention of the State of Tamil Nadu that the allocation and apportionment of the waters of river Cauvery should be made strictly in accordance with Agreements dated 1892 and 1924 but parted with the observation that the terms thereof would, however, have to be kept in view, while considering the

developments made in the different State vis-a-vis the share of each riparian State.

P. The findings of the Tribunal on various issues

P.1 Prescriptive rights and other claims

182. Vis-a-vis the prescriptive rights and other claims projected by the States, the Tribunal reiterated that the Agreement of 1924 along with the rules of regulation of Krishna Raja Sagara reservoir, as appended thereto, did not indicate anything to that effect and neither any reference had been made to the areas over which any prescriptive right had been acquired prior thereto or existing nor any provision had been made with regard thereto. It differentiated in this respect the Agreement of 1892 which laid stress in respect of prescriptive rights already acquired and then existing from the Agreement of 1924 which did not contain a reference to any existing prescriptive right of the State of Madras or its cultivators in respect of the water to be released to it. The Tribunal perceived that the Government of Mysore and the State of Madras while entering into the Agreement of 1924 seemed to have recognized the total areas under irrigation of the Cauvery System within the State of Mysore

as well as the State of Madras irrespective of any prescriptive right having been acquired by the State of Madras on any part or whole of the areas under irrigation and it rather provided for future extension of irrigation in new areas on the terms and conditions as set out. Referring to a letter dated 06.07.1915 addressed by the then Dewan of Mysore to the Resident of Mysore which carried, according to the Tribunal, an admission on behalf of the State of Mysore to the effect that at that point of time, the area irrigated under the Cauvery System in Madras was 12,25,500/- acres, it upheld the claim of State of Tamil Nadu that prior to the execution of the Agreement of 1924, its area of irrigation was 13,26,233 acres. The Tribunal, thus, concluded that in the overall background, it would be futile to examine as to what was the total area in the then State of Madras over which prescriptive rights had been acquired or were in existence for the purpose of allocating the quantity of water to the State of Tamil Nadu and that for all intents and purposes, the issue regarding prescriptive right of Madras had been rendered academic.

P.2 Breach of agreements of 1892 and 1924 and consequences thereof

183. Dealing with the highly contentious issue of breach of the agreements and the consequences thereof, the Tribunal outlined the summary of the rival orientations. While the State of Karnataka urged that all its projects with regard to which grievances had been made by the State of Tamil Nadu had been contemplated under the Agreement of 1924 and that no separate consent therefor was required from the State of Tamil Nadu and that in view of clauses 10(iv) and 10(vii), the Mysore Government was at liberty to carry out future extension of irrigation within its territories under the Cauvery and its tributaries to the extent as permissible thereunder and in the manner as prescribed, the remonstrance of the State of Tamil Nadu was that the Mysore Government did not furnish the full particulars and details of the reservoir schemes and of the impounding of water thereby, as required thereunder in clause 10(viii). It contended as well that the Rules of Regulation in respect of such reservoirs had to be settled first before the construction was to start as the apprehension of the then State of Madras was that impounding in such reservoirs was bound to affect the flow at

Upper Anicut as stipulated in clauses 7 and 10 of the rules of regulation of Krishna Raja Sagara reservoir.

184. To address these areas of dissension, in essence, the Tribunal primarily referred to the official exchanges/correspondence between the two States after the execution of the Agreement on various aspects bearing thereon, during which both the States did initiate and pursue their projects, levelling at the same time, against each other, the imputation of deviations from the Agreement. The Tribunal noted as well that after 1974, when according to the State of Karnataka, the Agreement of 1924 came to an end, it started impounding waters in different reservoirs constructed over the tributaries of Cauvery within its territories without following any Rules or any of the terms of the Agreement of 1924 and that the areas which were to be put under irrigation from such reservoirs and other diversion of works, like Anicuts increased every year. Referring to the charts laid before it, the Tribunal also marked that the impounding of water in different reservoirs on Hemavathi, Kabini, Suvarnavathy and Harangi tributaries in the State of Karnataka increased, which precisely was one of the inducing factors for the dispute to be referred to the Tribunal for

adjudication. The Tribunal, on an overall view of the intervening developments, concluded that the issue as to who was at fault and responsible for such alleged breaches or violations had been rendered academic with time and was of no practical relevance. It, however, set down that Mysore had observed the rules of regulation of Krishna Raja Sagara reservoir till the expiry of the period of 50 years from the date of the execution of the Agreement of 1924, but thereafter had started asserting its territorial rights over the water flowing from Cauvery within its boundaries. Noting, amongst others, that even the State of Tamil Nadu had increased its acreage under the Cauvery irrigation system over the years from 16 lakhs to 28 lakhs, the Tribunal was of the view that the violations or the injuries caused by the States allegedly to each other was really a matter of history and defied any manageable parameter for assessment thereof after the lapse of considerable period of time.

P.3 Peripheral issues qua claims of Kerala and Union Territory of Pondicherry (presently named as "Puducherry")

185. The Tribunal, at this juncture, before embarking upon the scrutiny of the factors to ascertain the aggregate yield of water available for the purpose of apportionment amongst the riparian

States, addressed a few peripheral issues pertaining to the claims of Kerala and the Union Territory of Puducherry. Qua Kerala, it recorded that its claim of share of waters of the river Cauvery had been made primarily because of the areas transferred to it from the State of Madras. The Malabar District which before the reorganization of the States, was an integral part of the State of Madras, it was noticed, not only included a part of the Cauvery Basin but also a part of two important tributaries, namely, Kabini and Bhawani, apart from another tributary, namely, Pambar which was within the erstwhile State of Travancore Cochin, territories whereof also were integrated with the new State of Kerala on such reorganization. The erstwhile State of Travancore Cochin was not a party to the Agreement of 1924, but after its formation in the year 1956, the State of Kerala started claiming apportionment of the waters contending that the said Agreement was not binding on it and ought to be ignored to determine its share. The Tribunal exhaustively referred to the series of communications projecting the grievances and demands of the State of Kerala, the demurral in substance being that the co-riparian States, Mysore and Madras, were prosecuting their projects in total disregard of its share of

water in the Kabini, Bhawani and Pambar tributaries. In the discussions held, it asserted that there was no valid or legal agreement which did bind it with regard to the allocation of waters in Cauvery and its tributaries as it was never a party thereto. It claimed that the three tributaries, namely, Kabini, Bhawani and Amaravathi, which had become part of Kerala State, did contribute about 220 TMC against the total flow of 680 TMC in the entire Cauvery basin and that there had been practically no utilization of this water by it. It registered its claim for irrigation and power generation at 86 TMC.

186. The claim of Union Territory of Puducherry on the basis of its total area of cultivation to be 43,000 acres was taken cognizance of. This was based on the fact that the Karaikal region of the Union Territory of Puducherry was located within the Cauvery basin and that seven branches of Cauvery did flow through the said region. The Tribunal parted with the observation that the Union of Territory of Puducherry was, thus, interested only in the allotment of its share of water in the Cauvery basin being at the tail end among the riparian States. It felt it apt to direct that 6 TMC out of the total volume to be released to Mettur Dam would have to be made

available for utilization by Puducherry for its irrigation in the Karaikal region.

P.4 Gross water available for apportionment

P.4(i) Surface flow of water:

187. Having thus laid the factual preface comprehending the relevant facets of the discord, the Tribunal next turned to determine the surface flow of Cauvery river to ascertain the volume of water dependably available for eventual allocation amongst the claimants-States. For the said purpose, it initiated the scrutiny from the yield of the river. It noticed that the yield or the total available quantum of water in a river system was dependant on rainfall pattern, catchment area characteristics including soil and vegetal cover and various climatic parameters affecting evaporation and evapo-transpiration in the basin. It also took note of the fact that the annual yield of a given basin varies from year to year depending upon the occurrence of rainfall and its intensity and distribution in time and space. It observed that in the assessment of total yield, the withdrawals of water, if any, for different uses had a bearing and that the total annual flow including upstream withdrawals at the terminal site out of the yield of a river system was required to be

noted. It recorded that due to variability of the annual yield of a river from year to year, depending upon the rainfall distribution, consequent run off and withdrawals, etc., such data is collected for a number of years to assess the reliable yield. At this stage, passing reference was also made to the doctrine put forward by the Attorney General Harmon of the United States that Riparian States have exclusive or sovereign rights over the water flowing through their territories and the anomaly in this doctrine in the implementation thereof, especially in cases where the water of the river concerned was not sufficient for all the States through which it passed. This was so, as on the upper riparian State claiming its exclusive right to utilize the waters on the basis of the aforesaid doctrine, the right of use of water of such inter-state river by the lower riparian State would stand jeopardised. The other extreme assertion of the lower riparian States that they were entitled to water of such inter-State or international rivers in their natural flow without any interference and alteration in their character did have the potential of creating disharmony and anomaly. To strike a balance for resolving such conflicting claims of the upper and lower riparian States, the principle of equitable apportionment as propounded by the

Supreme Court of United States in ***Kansas v. Colorado*** (supra) was taken note of. The Tribunal while accepting this principle however posed a question to itself, as to what would be the equitable apportionment, more particularly where the water available was not enough to cater to the needs of different riparian States.

188. The Tribunal noted in this context that the total amount of water available in river Cauvery through surface flows and alternative sources was much less than what the different States claimed and required for their irrigation, electricity, drinking water and to run different projects. It recounted again the formation of the Cauvery Fact Finding Committee in the year 1972 and its report which, on the issue, after having regard to the particulars and data of the total yield forwarded by the States involved, cross-checked it spanning over a period between 1933-34 to 1970-71 and also on the basis of its investigation and further taking into consideration the gauge and discharge readings at different places in different States, worked out the dependable yield at 50%, 75% and 90% to be 740 TMC, 670 TMC and 623 TMC respectively. In arriving at these figures, the Committee noted the utilization of Cauvery water in the years 1901, 1928, 1956 and 1971 by different States. The

Committee also reflected over the different projects in different States, land use, cultivated areas and agricultural practices, geology and minerals as well as the climate, rainfall and water resources vis-a-vis the competing States. Gauge and discharge observations at the recorded sites in Tamil Nadu and Mysore in particular were noted too. In view of the long term record available for the main Cauvery at Krishna Raja Sagara, Mettur and Grand Anicut/Lower Anicut, the Committee estimated the yield at 50%, 75% and 90% dependabilities. The Committee, thus assigned sufficient weightage to the existence of Krishna Raja Sagara and Mettur reservoirs and, accordingly, relied upon the data from 1933-34 when both these reservoirs were in position. The yield at the terminal point of the basin, namely, Lower Coleroon Anicut, was, thus, assessed by the Committee at 740 TMC at 50% dependability, 670 TMC at 75% dependability and 623 TMC at 90% dependability. The Tribunal observed that the report of the Committee had been considered by the Chief Ministers of the States whereupon they concurred with the finding of the total yield within the Cauvery basin.

189. In the same year, i.e., 1973, the Chief Ministers of the three riparian States and the Minister for Irrigation of Government of India in a meeting did also agree that it was necessary for all the concerned States to effect economy in the use of water so as to make it possible to meet the legitimate needs of other projects which were feasible in the Cauvery basin. Having said that, in the end, Mr. C.C. Patel, Additional Secretary in the Ministry of Irrigation and Power was asked to carry out detailed studies on the scope for economy in the use of Cauvery waters. Accordingly, Mr. Patel, on the completion of his studies, suggested some concrete proposals in his report qua the States. The Tribunal recorded that the State of Tamil Nadu did not dispute at any stage the assessment made by the Cauvery Fact Finding Committee in respect of the river flow and total yield of river Cauvery to be at 740 TMC at 50% dependability, 670 TMC at 75% dependability and 623 TMC at 90% dependability and had also accepted about the utilization by the three riparian States, Tamil Nadu, Karnataka and Kerala, as found by the Committee in its additional report to be 566.60, 176.82 and 5.00 TMC respectively.

190. The Tribunal, however, at the hearing of the arguments, required the States of Karnataka and Tamil Nadu to furnish the flow series for 38 years, i.e., from 1934-35 to 1971-72 and from the data so furnished, it transpired that according to the State of Karnataka, the average yield for the period 1900-01 to 1971-72 was 792.3 TMC which, at 50% dependability, figured 752 TMC. Tamil Nadu noticeably, on the basis of flow series from the year 1934-35 upto 1971-72, claimed the total yield at 50% dependability to be 740 TMC. The Tribunal, on a comparison of the flow series for the two States for the same period, i.e., 1934-35 to 1971-72, quantified the dependable yield at 50% at 734 TMC qua Karnataka and 740 TMC for Tamil Nadu. Responding to the plea of Karnataka that the Tribunal should take into consideration the flow series for the period after 1972, it noted that none of the party-States had filed annual flow series for the period subsequent to 1972 for important nodal points, namely, Krishna Raja Sagara, Mettur and Lower Coleroon Anicut and that in the absence of such information, it was not possible to come to the conclusion that there has been a material change in the total yield within the basin. It remarked as well that after 1974, none of the States appeared to be interested in

disclosing the correct information in respect of withdrawals because of which the details furnished in respect of flows and withdrawals by the party-States in the common format after 1972 were disputed by both the States. The Tribunal took note of the fact that Kerala, since the initial stage, had supported the finding of the Cauvery Fact Finding Committee that 740 TMC of water was available in the Cauvery system in an average year. The stand of the Union Territory of Puducherry was similar. In view of such preponderant and convincing empirical inputs, the Tribunal accepted the total yield of the Cauvery basin at 50% dependability to be 740 TMC and at 75% dependability as 670 TMC.

P.4(ii) <u>Identification of dependable yield</u>:

191. The Tribunal next turned to identify which of the two dependable yields, i.e., 50% or 75% was to be adopted for the purpose of eventual apportionment. In this context, it premised that the variability of annual yield from year to year warranted ascertainment of the sustainable utilizable flow which could be accepted for final allocation for which dependability of the available flow (yield) was of formidable significance. In this regard, it noticed

that the utilizable quantities of water from surface run off had been assessed by different authorities including the Irrigation Commission, 1972 and the National Commission on Agriculture, 1976 based on physiographic conditions, hydro-meteorological parameters and socio-political environment, legal and constitutional constraints and available technology of development. The dependability factor, the Tribunal observed, did indicate the degree of assured supply available on the basis of which a project/scheme for any particular use had been designed. It also recorded that from the information furnished by the States of Karnataka and Kerala in the common format, it transpired that most of the projects had been designed on 50% dependability. The Tribunal felt advised as well by the observations of the Supreme Court of United States in ***State of Wyoming v. State of Colorado*** (supra) that the lowest natural flow of the years is not the test and the reasonable view is that a fairly constant and dependable flow materially in excess of the lowest may generally be obtained by means of reservoirs adopted to conserve and equalize the natural flow. The Tribunal mentioned that from the yield series furnished by the States of Tamil Nadu and Karnataka during the period of 38 years from

1934-35 to 1971-72, the lowest recorded yield was during the period 1952-53 at 523 TMC according to Tamil Nadu and 516 TMC according to Karnataka. It noted that in the Cauvery basin, the fluctuation of the flows was not as high as in the Krishna or Narmada basin, such fluctuation between the lowest yield and the dependable yield being within 30% in comparison to 56% and 70% in case of Krishna or Narmada. The Tribunal took note of the storage capacities of various reservoirs built by the States of Tamil Nadu and Karnataka before and after 1972 in the Cauvery basin. It also took into account the projects proposed by the State of Kerala having live storage of more than 1 TMC each totaling 19 TMC of live storage capacity in the basin. The fact that in addition, about 12 TMC of storage capacity was available from other small reservoirs with capacity of less than 1 TMC was taken cognizance of. The Tribunal, thus, concluded that the total storage capacity in the Cauvery basin was 330 TMC (gross) and 310 TMC (live). It was of the view that about 42% of 740 TMC (i.e., 50% dependable yield) could be stored in all the storage reservoirs in the Cauvery basin which was a very significant aspect for consideration in the development and utilization of water resources of a river basin. It

concluded that in view of the facets examined on the basis of the materials available, adoption of 50% dependable flow for apportionment amongst the party-States, bearing in mind the reinforcement in the two monsoon seasons and the availability of ample storage facilities, would be fair and the system could be further strengthened by integrated operation of the important reservoirs.

P.4(iii) <u>Additional source of water</u>:

192. The Tribunal, in its quest for an additional/alternative source of water, dwelt upon sub-surface water or groundwater which is a portion of the earth's hydrological cycle. It started with the premise that the groundwater originates for all practical purposes as surface water which infiltrates into the ground from natural re-charge of precipitation, stream flow, lakes and reservoirs. It noted the recorded fact that recharge of the groundwater takes place from natural resources like rainfall and artificial modes, i.e., application of water to irrigate crops, flooding of areas caused by over-flowing of streams to their sides and seepage from unlined canals, tanks and other sources of re-charge in any particular area. It took

cognizance of the empirical data prepared by the Central Ground Water Board, Ministry of Water Resources, Government of India, that groundwater caters to more than 45% of the total irrigation in the country. On this issue, whereas the State of Karnataka contended that while making apportionment of the waters available within the Cauvery basin, groundwater available within the delta areas should also be taken into consideration, per contra, Tamil Nadu asserted to the contrary. According to it, so far as the delta was concerned, the groundwater was mainly derived from re-charge by the supplies from Mettur, i.e., it is the water of river Cauvery and its tributaries which by process of re-charge becomes groundwater within the delta area in the State of Tamil Nadu and the same is utilized by the farmers for raising of early nurseries ahead of releases from Mettur and for irrigating belated crop after stoppage of Mettur releases. It, thus, asserted that as the groundwater in the delta area is replenished by the releases from Mettur, it cannot be considered to be an independent source of irrigation or an alternative means of irrigation. The Tribunal, in order to address this issue, traversed the studies undertaken, amongst others, by the Central Ground Water Board, Ministry of

Water Resources, Government of India which, to reiterate, attested that groundwater is an important source of irrigation and caters to more than 45% of the total irrigation in the country and that the contribution of groundwater irrigation to achieve self-sufficiency in food grains production in the past three decades had been phenomenal. It mentioned in its report that although the groundwater is an annually replenishable resource, yet its availability is non-uniform in space and time and though for planning its development, a precise estimation of groundwater resource and irrigation potential is a necessary pre-requisite, yet such an exercise is rather difficult as techniques are currently not available for direct measurement. The report further enumerated the items of supply to and disposal from groundwater reservoirs. The Tribunal noted that for irrigation, there are three sources of water supply, namely, rainfall, surface flow of any river which can be taken to different areas through canal system and groundwater which can be taken out through open wells or tube-wells. Reverting to the Cauvery basin, the Tribunal marked that it was an admitted position that the variability in time and quantity of rainfall from the South-West monsoon and the North-East monsoon in some years

do create problems thereby affecting the surface flow of river Cauvery and its tributaries which in its own turn affect the storage in different reservoirs like Krishna Raja Sagara, Mettur, etc. The Tribunal underlined that it is in this background that availability of groundwater assumed importance. It also referred to the disclosures in research undertaken in the field that the availability of groundwater for use was limited to the annual re-charge which could be withdrawn and again replenished by natural rainfall/artificial modes of re-charge so much so that the annual withdrawals of groundwater in any region need to be in equilibrium with the annual replenishment of groundwater in that region. It indicated on the basis of the materials available that over-withdrawals made from an aquifer (i.e., water bearing rock formation) at rates in excess of the net re-charge are described as "mining" of groundwater as it lowers the groundwater level permanently to the extent these over-withdrawals are made thereby leading to serious problems. It noted that if such practice of over-withdrawals would continue resulting in decline of groundwater table, the pumping of water would become more and more expensive from the greater depth thus compounding the situation.

The Tribunal, adverting to the Central Ground Water Board Publication "Ground Water Resources of India -1995" observed that whereas in Karnataka, dug-wells, dug-cum-bore wells and bore wells were the main groundwater structures feasible, the ground water development for irrigation had commenced recently in the State. As regards the State of Tamil Nadu, it was observed that groundwater development in most of the parts of the State was high resulting in lowering of water level in many areas. The caveat in the report that in the coastal areas of Tamil Nadu, a cautious approach has to be adopted for groundwater development due to salinity hazards, was noted. The fact that the research study and experiments indicated towards the encouraging conjunctive use of groundwater with the available surface waters was taken note of by the Tribunal as well. This was clearly suggestive of the comprehension that groundwater could be used to supplement surface water supplies in order to reduce peak demands for irrigation and other uses or to meet the deficit in the years of low rainfall. Reports, inter alia, of the Irrigation Commission, 1972 disclosing the role played by groundwater in mitigation of the requirements of the party-States, namely, Karnataka (35%), Kerala

(21%), Tamil Nadu (47.2.%) and Union Territory of Puducherry (61%) were noticed by the Tribunal. The Tribunal also took note of the fact that the development of groundwater had taken place mostly in the private sector where the owners have many a time over-exploited the available groundwater resources resulting in gradual lowering of the water level with the hazard of intrusion of sea water in the coastal areas thereby polluting the quality of groundwater in the vicinity of the coastline and, thus, rendering the groundwater in the affected area not only unfit for human consumption but also for use in agriculture. The Tribunal marked the limit of groundwater development proportionate to the annual replenishable groundwater resources as prescribed by the National Water Policy. The aspect that though underground water resources of a State had been acknowledged to be a relevant factor by the Krishna Water Disputes Tribunal, Narmada Water Disputes Tribunal as well as Godavari Water Disputes Tribunal for equitable apportionment of the waters of an inter-State river system, yet they declined to investigate the question regarding availability of groundwater and quantity thereof on the ground that groundwater flow cannot be accurately estimated from the technical point of view

and, thus not fully cognizable from the legal point of view, was underlined.

193. The Tribunal referred to the investigation undertaken by a team of experts under the United Nations Development Programme with its report stating that the total yearly quantity of replenishable groundwater that can be extracted from the shallow aquifer in the delta through high yielding medium-depth tube-wells equipped with turbine pumps is 129 TMC. It elaborated that the yearly quantity of groundwater that can be extracted by using centrifugal pumps in the Cauvery sub-basin, Vennar sub-basin and in the new delta was 33.7 TMC, 5.4 TMC and 32.5 TMC respectively. Additionally, a quantity of 56.5 TMC of groundwater per year can also be made available in the Cauvery sub-basin by lowering seasonally groundwater level to 10 meters depth below the regional groundwater level and substituting high yielding medium-depth tube-wells equipped with turbines for the low yield filter points with centrifugal pumps. This finding, however, was criticized by Tamil Nadu as impracticable and unworkable, more particularly in view of the high cost involved in purchasing the equipments suggested and in lowering the depth upto 10 meters by different cultivators in the

Delta. The State of Karnataka, however, supported the recommendation of the UNDP with the observation that if the same would have been implemented timely, the aquifers in the Delta would have been re-charged by North-East monsoon rainfall which could be utilized during the period from June to October next year.

194. The Tribunal took note of the study conducted by a team of the Central Ground Water Board of the utilization of groundwater with special reference to the Delta area in Tamil Nadu which indicated that the groundwater potential available from the Delta was to the extent of 64 TMC which included 5 TMC from deep acquifer (upto 100 meters deep). The Tribunal also took note of the report by Mr. W. Barber, Consultant, World Bank on the Groundwater Resources of the Cauvery Delta which not only indicated the Gross Ground Water Abstractions from Cauvery Delta from 1971 to 1983 but also estimated the available groundwater to be 51.56 TMC. The Tribunal, on the basis of the reports submitted by the UNDP, Central Ground Water Board and Mr. Barber of World Bank, observed that the same, to a great extent, supported the stand of Tamil Nadu that the re-charge of groundwater in the Delta area was mainly due to releases from Mettur reservoir. It, however,

marked the admission of the State in its pleadings that the total groundwater extraction during the year 1989 was approximately 28.4 TMC in the Cauvery sub-basin, 7.3 TMC in the Vennar sub-basin and 11.3 TMC in the Grand Anicut Canal area (new Delta area) totaling 47 TMC. The statement of Tamil Nadu in its pleadings that in the old Delta there was scope for conjunctive use of groundwater to the extent of 30 TMC was recorded. Tamil Nadu, however, belatedly questioned the findings of the UNDP to be not fully representative of the area surveyed and in view of better parameters for revaluation of the aquifers, as suggested by the Ground Water Resource Estimation Committee. But the Tribunal in absence of any evidence adduced by Tamil Nadu to this effect, preferred not to discard the reports of the UNDP. The issue was tested by the Tribunal in the context of the variety of crops grown and the rainfall received through the South-West monsoon and North-East monsoon. It concluded from the reports of the Irrigation Commission as well as of the Cauvery Fact Finding Committee that the North-East monsoon was irregular and subject to frequent failures often accompanied with cyclonic formations in the Bay of Bengal resulting in high floods as well as large surface runoff with

many a times even causing damage to the standing paddy crop. On a scrutiny of the report of the UNDP and the Central Ground Water Board, the Tribunal concluded that as per the former, 39.2 TMC of the groundwater was available in the old Delta, whereas as per the latter, the stock was limited to 30 TMC. The Tribunal noted that this was in comparison to 28.79 TMC as estimated by Mr. Barber. It noted as well that qua the new Delta, UNDP had estimated at 32.6 TMC and Mr. Barber had estimated at 22.77 TMC. In the background of such exhaustive studies by various agencies, the Tribunal observed that in a normal year when there would be regular releases of water from Mettur, the bulk of contribution to the groundwater in the Cauvery sub-basin would be from such releases, but in any case, the contribution from surface irrigation and rainfall could not be overlooked. All these notwithstanding, the Tribunal, considering the severe limitation in the assessment of groundwater resource, made a safe estimate of 20 TMC which could be used by Tamil Nadu conjunctively with surface water. The Tribunal clarified that this quantum was arrived at after excluding the component of groundwater re-charge from river water by lateral infiltration.

P.5 The principles of apportionment

195. The principles of apportionment of the waters of Cauvery, the gravamen of the dispute, next engaged the attention of the Tribunal. The fact that such principles for distribution of inter-state or international rivers like the principles of natural justice had been evolved and developed by the Courts from time to time over centuries, while adjudicating water disputes between different States or Nations were noted as the starting premise. The Tribunal acknowledged that such disputes were directly linked with the development in different spheres and demands for water from such inter-state or international rivers could be traced to the rise in population. It reminisced to record that most of the ancient cities and civilizations had grown on the banks of such rivers because of the fertile land and easy communication but during the middle of the 19th century the industrial revolution and allied development, which brought prosperity to mankind, also bred conflict and dispute in respect of sharing of waters of such inter-State and international rivers. The perennial dissension between the upper riparian States claiming an absolute right on the flow of water

passing through their territories and the lower riparian States claiming on the principle of right of easement was taken note of.

196. The Tribunal ruminated that the resultant dispute and disharmony called for a balanced approach keeping in mind the interest of all the riparian states, the inherent question to be answered being which State should get what proportion of water out of the total yield of the river concerned. Noticing that the demands of different States when much higher than the total available water in the basin in question posed formidable challenges, the Tribunal recalled that the dispute about sharing of water of deficit river like Cauvery was more than one and a half century old as attested by the recorded facts. It took into account the assertion of the State of Tamil Nadu based on prescriptive right over the flows of river Cauvery as well as its right of prior appropriation being a lower riparian State. In endorsement of this plea, the State had relied on the relevant observations with regard to the doctrine of appropriation made in the report of the Indus Commission of the year 1942 to the effect that "priority of appropriation gives superiority of right". The Commission had remarked that the common law rule of riparian rights was

completely destructive of equitable apportionment for under that rule, the upper owner could hardly take any share, far less than his fair share of water of the river for the purposes of irrigation. In comparison, the doctrine of appropriation was consistent with equitable apportionment provided that the prior appropriator was not allowed to exceed reasonable requirements. The fact that this doctrine was dictated by considerations of public interest was noticed as well. The view of the U.S. Supreme Court in ***State of Wyoming v. State of Colorado*** (supra) to the effect that the cardinal rule of the doctrine that priority of appropriation gives superiority of right was underlined. The Tribunal construed that the priority of appropriation was a concept different from past utilization of waters of the basin by one State or the other. It noted as well the reservation of the Supreme Court of United States in ***State of Nebraska v. State of Wyoming*** (supra) that for an allocation between the appropriating States to be just and equitable, strict adherence to the priority rule might not be possible though it may pose as the guiding principle. The Tribunal recorded that past utilization or existing utilization had also been recognized as a relevant factor in a proceeding for apportionment of waters of

an inter-state or international river and conceptually was a part of the evolution and development of river basin linked with the history thereof. It mentioned as well that though past utilization and existing utilization was a relevant factor in the matter of apportionment, yet there could be prevalent circumstances in other riparian States outweighing the prevailing practice so much so that in such an eventuality, such practice or use would be required to be restricted or modified in a reasonable manner.

197. The Tribunal also took note of the observations of the Krishna Water Disputes Tribunal in its report under the heading "Protection of Existing Uses" to the effect that in fixing the equitable share of the States, the claims of such existing uses should be allowed before claims for future uses are taken up for consideration. It was, however, reiterated that priority of appropriation, though the guiding rule, was not conclusive in equitable allocation. It recalled the observations of the U.S. Supreme Court in ***State of Nebraska v. State of Wyoming*** (supra) where junior uses of Colorado were allowed to prevail over the senior uses of Nebraska having regard to Colorado's counter-veiling equities and established economy based on existing uses of water. The Krishna Water Disputes Tribunal's

remark that equitable apportionment can take into account only such requirements for prospective uses as are reasonable, having regard to the available supply and the needs of the other States, was referred to.

198. The Tribunal also adverted to the discussion recorded by the Narmada Water Disputes Tribunal in its report where it dwelt upon the ***"Relevant Factors in the Balancing Process"***, where, amongst others, various determinants like extent of dependence of the riverine dwellers on the river flow, the size of the river's watershed or drainage area and the possibility of maintaining a sustained flow through the controlled use of flood waters, seasonal variations in diversions, availability of storage facilities or ability to construct them, availability of other resources, etc. had been enumerated. The Tribunal noticed the remark in the report that the doctrine of equitable apportionment cannot be put in the narrow strait-jacket of a fixed formula and that in determining the just and reasonable share of the interested States, regard must be had to these factors and beyond so that the allocation will be made according to their relative economic and social needs. In this regard, the volume of the stream, the water uses already been made

by the State concerned, the respective areas of land yet to be watered, the physical and climatic characteristics of the States, the relative productivity of land in the States, the State-wise drainage, the population dependent on the water supply and degree of their dependence, extent of evaporation in each State and the avoidance of unnecessary waste in the utilization of water were also factors to be applied.

199. The Tribunal also referred to the reports of the Godavari Water Disputes Tribunal and Ravi and Bias Water Tribunal to underline the primacy of the recognition of equal rights of the contending States to establish justice between them over the claim of absolute proprietary rights in river waters. The reports explained that equal right, however, did not mean an equal division of water but implied an equitable apportionment of the benefits of the river, each unit getting a fair share.

200. With the third view gaining increased recognition and application in the resolution of water disputes involving the issue of allocation and distribution of waters of an inter-state river, the Tribunal in reiteration noted the observations of the U.S. Supreme

Court in ***Kansas v. Colorado*** (supra) that the right of flowing water is well-settled to be a right incident to property in the land and it is a right *publici juris* and is of such character that whilst it is common and equal to all through whose land it runs and that no one can obstruct or divert it, yet it is one of the beneficial gifts of providence so that each proprietor has a right to a just and reasonable use of it as it passes through his land as long as it is not wholly obstructed or diverted or no larger appropriation of the water running through it is made than a just and reasonable use. The Tribunal further held that it cannot be said to be wrongful or injurious to a proprietor lower down if there is *jus* case. The theme was further elaborated in ***Colorado v. Kansas*** (supra) with the elaboration that the lower State is not entitled to have the stream flow as it would in nature regardless of the need or use and if then the upper State is devoting the water to a beneficial use, the question would be, in the light of existing conditions in both the States, whether and to what extent her action, injures the lower State and her citizens by depriving them of a like or an actually valuable, beneficial use. The observation of the U.S. Supreme Court in ***State of New Jersey*** (supra) that a river is more than an

amenity being a treasure and that the competing riparian states have real and substantial interests in it requiring best reconciliation thereof was highlighted. It noted the exposition of the U.S. Supreme Court in ***State of Connecticut*** (supra) that "equality of right" applied to settle disputes with regard to allocation of water would not connote equal division of waters of an inter-State stream but would mean that the principles of right and equality should be invoked having regard to the "equal level or plane" on which all the States stand, in point of power and right under the Constitutional system.

201. The determination of the U.S. Supreme Court in ***State of Colorado v. State of New Mexico*** (supra) that the rule of priority should not be strictly applied where it would work more hardship on the junior user than it would bestow benefits on the senior user, was recorded. The opinion of Chief Justice Burger in the said decision to the effect that each State through which the river passes has a right to the benefit of water, but it is for the Court, as a matter of discretion, to measure their relative rights and obligations and to apportion the available water equitably, was taken note of in particular. The following passage from the Halsbury's Laws of

England, 4th Edition, Vol. 49(2), paragraph 121 was extracted to underscore the parity in the rights of co-riparian claimants to a reasonable enjoyment and use of the water:-

> "121. Rights and duties as to quality of water. The right of a Riparian owner to the flow of water is subject to certain qualifications with respect to the quantity of water which he is entitled to receive. The right is subject to the similar rights of other Riparian owners on the same stream to the reasonable enjoyment of it, and each Riparian owner has a right of action in respect of any unreasonable use of the water by another Riparian owner...
>
> A Riparian owner must not use and apply the water so as to cause any material injury or annoyance to his neighbours opposite, above or below him, who have equal rights to the use of the water and an equal duty towards him."

202. The Tribunal next marked the advent of the Helsinki Rules of 1966 which rejected the Harmon doctrine and laid emphasis on the need of equitable utilization of such international rivers. The said Rules recognize equitable use of water by each basin State setting out the factors, not exhaustive though, to be collectively taken into consideration for working out the reasonable and equitable share of the riparian states. The indicated factors, *inter alia*, include the geography of the basin, the hydrology of the basin, the climate, past utilization of waters, economic and social needs of each basin State,

population dependent on the waters of the basin in each basin State, availability of other resources and the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State. The emphasis clearly is that in determining the reasonable and equitable share, all relevant factors are to be considered together and a conclusion is to be reached on the whole.

203. The Tribunal, in this regard, recalled that this Court in the ***Presidential Reference*** in which the ***"Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991"*** fell for scrutiny had reiterated the same law and principles to govern the equitable allocation of water of an inter-state river between the different riparian States. Paragraph 72 of the decision rendered by this Court in the said proceedings was extracted.

204. In the background of the above exposition, the Tribunal recorded that so long as the river flows are not wholly obstructed or diverted or appropriation of the water by the upper riparian States is not more than just and reasonable use, it cannot be said to be wrongful or injurious to the right of the lower riparian State. It

stated that equitable apportionment would, thus, protect only those rights to the water that were reasonably required and applied especially in those cases where water was scarce or limited. It emphasized that the water of a river being a treasure in a sense, wasteful or inefficient use thereof cannot be approved and only diligence and good faith would keep the privilege alive. It, however, reflected that the theory of equitable apportionment pre-supposed equitable and not equal rights and any order, direction, agreement or treaty has to take into consideration the economic and social needs of different riparian States. It reiterated that while determining the reasonable and equitable share, all relevant factors are to be cumulatively considered.

205. The Tribunal also took into consideration the report of the 71st Conference of the International Law Association held in Berlin in August 2004 where the relevant factors necessary for determining an equitable and reasonable use were again outlined. The factors mentioned in the Helsinki Rules were retained along with precise emphasis on the precept of collective consideration thereof for reaching a conclusion qua apportionment of just and equitable share of water of an inter-state river. Apart also from

adverting to the "The Campione Consolidation of the ILA Rules on International Water Resources, 1966-1999" which substantially reiterated the above principles, the Tribunal also reminded itself of the verdict of this Court that it was an acknowledged principle of distribution and allocation of waters between the riparian States that the same has to be done on the basis of equitable share of each state, however leaving it open to decide such equitable share depending on the facts of each case. The Tribunal, thus, concluded that no doubt that prior use has to be given due weight because cultivators have been irrigating their lands in the lower riparian State as in the Delta in the case in hand for centuries, but that factor has to be taken into consideration along with several other factors for the purpose of determination of the just and equitable share of water amongst the competing riparian states, more particularly when the resources in demand were in short supply. The Tribunal, therefore, held the view that though past utilization was a relevant factor, yet it was possible that the circumstances in the other riparian States could be such that their demands for reasonable share might outweigh such past utilization of any particular riparian State and, consequently, the Courts and

Tribunals would have ample power for taking into consideration the overall relevant circumstances to curtail and modify the past uses by any riparian State. This was more so in view of Article IV of the Helsinki Rules which clearly indicate that each basin state is entitled within its territory to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

206. Reverting to the contextual facts and the controversy founded thereon, the Tribunal analyzed the existing scenario and observed that prior to the year 1924, the river Cauvery was in a state of flow in the sense that whatever water came from the source and the tributaries in the State of Mysore and Madras used to pass through the Delta and the utilization of Cauvery water within the State of Mysore was negligible compared to that in the State of Madras especially in the Delta area. It further observed that the utilization of Cauvery water so far as Kerala was concerned was virtually nil. The situation started changing with the constructions of reservoirs in Mysore and Mettur in Madras for which the flow of water of Cauvery was regulated to a great extent.

207. The Tribunal apprised itself of the background and observed that the main development and utilization of Cauvery basin before 1924 occurred in Madras mostly in the Delta area and it being the lower riparian State, enjoyed almost full flow of river Cauvery as well as its tributaries. It noted that as per the report submitted by the Cauvery Fact Finding Committee in the year 1972, the inter se utilization of waters of Cauvery by Tamil Nadu including the Karaikal region of Union Territory of Puducherry, Mysore and Kerala used to be 566.60 TMC, 176.82 TMC and 5 TMC respectively. In the background of the Agreements of 1892 and 1924, the Tribunal recapitulated the persistent protests of the State of Karnataka qua the restraints put on it on the use of the waters of the Cauvery river for which it was not possible on its part to irrigate lands even as contemplated under the Agreement of 1924. The plea based on judicially enounced view that neither the upper riparian State can claim paramount right to appropriate more water than what is its reasonable requirement nor the lower riparian State can claim any prescriptive right to the flow of water was noted. The Tribunal, thus, accepted, as its guide, the principle that the waters of an inter-State or international river are to be shared in a just and

equitable manner so as to serve the need and necessity of each riparian State.

P.6 Determination of "irrigated areas" in Tamil Nadu and Karnataka

208. With reference to the norms suggested by the party-States for apportionment of Cauvery waters for pre and post Agreement of 1924 in the context of the irrigated areas corresponding to this time phase, the Tribunal enumerated the following four categories, the needs of irrigation whereof were required to be addressed:-

> "(i) Areas which were developed before the agreement of the year 1924.
>
> (ii) Areas which have been contemplated for development in terms of the agreement of the year 1924.
>
> (iii) Areas which have been developed outside the agreement from 1924 upto 2.6.1990, the date of the constitution of the Tribunal. (i.e. from 1924 to 1990)
>
> (iv) Areas which may be allowed to be irrigated on the principle of equitable apportionment."

209. Having laid the preface for the discernment of the areas developed for irrigation in the competing States prior to, under and beyond the Agreement of 1924 and also areas which could be allowed to be irrigated on the principle of equitable apportionment,

the Tribunal took up the claims of the competing States in succession.

210. Qua the areas developed by Madras/Tamil Nadu, it principally adjudged the entitlements on the touchstone of Clauses 10(v), 10(xii) and 10(xiv) of the Agreement of 1924 together with the Administrative Report, 1923-24, CFFC Report, 1972, C.C. Patel Committee Report as well as the reports of the Irrigation Commission and National Commission for Agriculture, 1976. While accounting for the water requirement for the second crop in the irrigated areas grown prior to and in terms of the 1924 Agreement, the same was disallowed for the areas beyond it. Having regard to the scarcity of water resources in the Cauvery Basin and the principle of equitable apportionment, it noted that the practice of double crops in the same field during an agricultural season required more water and, thus, the areas where the cultivable land is more and the availability of water is a constraint, the projects are designed to cover larger areas for cultivation of light irrigated crops. It observed that since paddy was high water consuming crop, it would cover smaller areas than semi-dry crops which needed lesser water for which the extent of areas could sometimes be 2 to 3 times.

Having regard to the fact that in a country like India, where the bulk of population was engaged in agriculture for its livelihood, the Government policy was to cover as large area as possible, a concept known as "Extensive Irrigation". It was of the view that in a water deficit basin like Cauvery, the annual intensity of irrigation (Annual Intensity of Irrigation means acreage – area under irrigation) is a very significant factor and needed to be considered keeping in view the large number of small farmers for sustenance of their livelihood and bearing that in mind, it construed it to be proper to restrict the annual intensity of irrigation to 100% and, accordingly, allowed the extent of areas to be irrigated in each State depending upon the availability of water. It referred to the CFFC Report vis-a-vis Tamil Nadu wherein it was observed qua the crops of Kuruvai, Samba and Thaladi that savings could be effected by (i) restricting the double crop paddy area; (ii) introduction of shorter duration variety in place of Samba and; (iii) growing crops requiring less water.

211. The Tribunal, thus, determined the necessity to restrict the double crop area as far as possible. Further, the recommendation of the National Commission on Agriculture, 1976 to the effect that rice should be grown in no rainy season area or low rainfall areas

only if the available irrigation supplies cannot be put to more economic use for other crops was noted in endorsement of this finding. It noted as well the opinion of Dr. M.S. Swaminathan, witness for the State of Tamil Nadu, to the same effect.

212. Keeping in mind the fair and equitable share principle, it expressed that in order to assess reasonable water requirements, it would be essential to first consider the extent of areas which had already been developed vis-a-vis the development permitted under the Agreement and thereafter consider the just and fair claim of development for irrigation as placed by the party-States before it. It noted that the total claim of the party-States for development of irrigation in the territories did far exceed the availability of waters which called for imperative restrictions. It mentioned that in the State of Tamil Nadu, the entire development in the past and future was based on paddy cultivation which was a high water consuming crop and the State had almost reached the ultimate potential of its irrigation development by 1974 as was evident from the CFFC Report and also as claimed by it. In contrast, qua Karnataka, the Tribunal marked that in the past, it had been growing paddy wherever it could get irrigation facility but could not complete the

development as contemplated under the 1924 Agreement by 1974. It, however, noted that the State of Karnataka had embarked on the construction of reservoir schemes some years previous to the completion of 50 years of the 1924 Agreement and along with the progress of the reservoirs, kept on releasing waters to the newly opened areas for irrigation so that by the year 1990, its contemplated development was almost thrice in extent to the development achieved in 1974. The fact that in comparison, Kerala could hardly mark any development of irrigation except under minor irrigation in a total area of about 50,000 acres till 1990, was noticed. The Tribunal took up the task of ascertaining the extent of development which could be allowed to the party-States and the crop water requirement therefor so that a fair and reasonable allocation of surplus water would become possible. It observed that for equitable distribution, one of the considerations ought to be the existing development of irrigation. Keeping this in view, the double crop developed beyond the provisions of the 1924 Agreement, whether in Tamil Nadu or in Karnataka, was not taken note of. The Tribunal was, in this regard, also impelled by the fact that equity demanded that the farming families should at least be having one

single crop which they could raise for their livelihood with the support of irrigation facilities and thereby derive the benefit from the natural river water resources which was common to all. In this respect, the Tribunal underlined that the paddy crop should be so planned as to make maximum advantage of the rainy season in the Cauvery basin area, relaxation however being extended to areas over which second paddy crop was being grown prior to the Agreement of 1924 as well as second crop permitted by the said Agreement by way of extension. While identifying the areas developed or undergoing development in the State of Tamil Nadu beyond the entitlements contemplated in the 1924 Agreement, the Tribunal applied the following criteria, namely, no double crop/perennial crop *de hors* the 1924 Agreement; no area for summer paddy; the area of summer paddy raised prior to 1924 to be replaced by semi-dry crop; annual intensity of irrigation to be restricted to 100%; cropping period to be restricted within the irrigation season, i.e., from 1st June to 31st January and ambitious Lift Irrigation Schemes to be discouraged. Apart from this, the Tribunal excluded the areas beyond the Cauvery Basin as well as those utilized for high water consuming crop like sugarcane.

Keeping in view the shortfall in supply of water, the Tribunal, based on contemporaneous data, did also scale down areas proportionately under some schemes but did account for dry areas sought to be catered by the corresponding projects.

213. Applying these principles generally, after an exhaustive analysis of the relevant facts, it did fix the areas under the afore-mentioned four categories qua Madras/Tamil Nadu as hereinbelow:

> (i) Area under irrigation in Madras/Tamil Nadu prior to 1924 Agreement = 15.193 lakh acres.
>
> (ii) Area for development as per the provisions of 1924 Agreement = 6.19 lakh acres.
>
> (iii) Area developed/under ongoing development beyond the entitlements contemplated in the 1924 Agreement between 1924 and 1990 = 2.06 lakh acres.

214. Thus, the Tribunal under the above three heads together with the area developed/under minor irrigation, which it ascertained to be 1.25 lakh acres, determined the total area in Tamil Nadu which had been developed prior to 1924 along with those developed under ongoing development in the State beyond the entitlement contemplated under the 1924 Agreement upto 1990 at 24.71 lakh acres. As the narration to this effect would demonstrate, the

Tribunal, while determining this area as a whole, did take note of the crop pattern, the locations thereof in the Basin with reference to the corresponding projects/schemes/channels, etc. and the area developed under minor irrigation.

215. In the process of examination of the claim of the State of Karnataka with regard to the development of the irrigated areas in the State in the Cauvery Basin, the Tribunal as in the case of Tamil Nadu did cast its scrutiny over the same four categories, namely, areas developed before the Agreement of 1924; those contemplated for development in terms thereof; those developed outside the Agreement up to 02.06.1990 and the areas which could be allowed to be irrigated on the principle of equitable apportionment. It noted that at the commencement of the century, irrigation in the then State of Mysore was mainly from direct diversion channels from the rivers together with the system of tank irrigation which was mentionably quite widespread. As there was no reservoir, the waters of the Cauvery and its tributaries like Kabini, Hemawathy, Harangi and Suvaranwathi used to flow through the State but their ultimate destination was the Delta area of the then State of Madras. The Tribunal mentioned that

prior to the 1924 Agreement, irrigation in Mysore was mostly through Anicut Canal and minor irrigation and as admitted by the State of Tamil Nadu in their statement, Karnataka had developed only 3.14 lakh acres of land by 1924. Karnataka, however, stated that its irrigated area under the projects at the time of the 1924 Agreement was 3.1 lakh acres which increased to 3.14 acres in 1928. On an analysis of the facts available on record, the Tribunal accepted the irrigated area of the State of Karnataka before 1924 to be 3.43 lakh acres which, of course, included areas covered by minor irrigation.

216. In respect of the entitlement of the States in terms of the Agreement of 1924, the Tribunal referred to, in particular, Clauses 10(iv), (xii), (xiii) & (xiv) to determine the new development of irrigation and extension of irrigation thereunder. It noted that there was no time limit for the envisaged development of irrigation under the various clauses of the Agreement and proceeded on the premise that once the construction on the project envisaged under any term/clause thereof had been started, that ought to be considered as permissible even though its completion date had spilled over 1974. The relevant provisions of the Agreement were

referred to precisely to recall the entitlements of the parties thereto as defined thereby permitting extension/development of the areas for irrigation in the time to come. To draw sustenance for the view that it was permissible to take account a project, the construction whereof had been started under any term/clause of the Agreement of 1924, though the completion date thereof was after 1974, the Tribunal referred to the decision of the U.S. Supreme Court in ***State of Wyomoing v. State of Colorado*** (supra) as well as Article VIII (2)(a) of the Helsinki Rules to the effect that a project was entitled to priority from the date when the actual work of construction had begun and not from a date anterior to the time when there was a fixed and definite purpose to take it up and carry it through. On this basis, the plea of the State of Tamil Nadu to the contrary was negated and it was concluded that all the projects on which construction had started prior to 1974 would be covered under Category II (entitlement under the terms of the 1924 Agreement) irrespective of the date of completion provided those projects did qualify otherwise under any of the clauses of the Agreement. From the materials on record, the Tribunal noted that the development achieved by Karnataka under the 1924

Agreement till 1974 under Clauses 10(iv), (xii), (xiii) and (xiv) taken together was 2.15 lakh acres, though it was entitled to achieve 7.45 lakh acres. It also recorded that the planned irrigated area claimed by Karnataka under the Agreement was 14.18 acres (net), i.e., single crop and 17.04 lakh acres (gross) indicating single + second crop. These figures represented the statistics both prior to and after 1974. It was noted that the State had claimed second crop area under the projects involved while setting out the gross plan area of irrigation as 17.046 lakh acres which included 2.862 lakh acres as second crop area.

217. The Tribunal undertook an exhaustive exercise to examine the tenability of the claim under the aforementioned clauses of the Agreement and accepted the area permissible for development of irrigation under the 1924 Agreement, i.e., Category II to be 7.23 lakh acres. As would be evident from the table, while allowing this figure, the Tribunal did take into account the variety of the crops involved and the extent of their coverage/acreage (which included Kharif Paddy, Perennial Crops, Kharif semi-dry crop, Rabi-semi dry crop). The Tribunal recorded that like Tamil Nadu, the State of Karnataka had extended irrigation by way of minor irrigation and

there was extension of new areas under the existing projects and new projects after 1974.

218. Vis-a-vis the areas developed/under ongoing development in the State beyond the entitlements contemplated in the 1924 Agreement upto the year 1990, the Tribunal marked the claim of the State of Karnataka to be 20.98 lakh acres under various projects. Having regard to the date of the reference of the dispute to it, it adopted 1990 to be the cut-off year for considering the equities between the party-States in the matter of ascertaining the requirement of water. It, therefore, as a corollary, decided to take note of the developments that had taken place in between. Dealing with the plea of the State of Tamil Nadu that the relevant date for the apportionment should be 1974 when the period of 50 years from the date of execution of the Agreement of 1924 had expired, the Tribunal observed that no attempt had ever been made by the State of Tamil Nadu either before it or before this Court to contend that the areas which could be irrigated during the pendency of the proceedings should be those which had been developed by Karnataka only upto the year 1974 and on the other

hand, the parties had pursued their claim of apportionment of water with reference to the constitution of the date of the Tribunal.

219. With regard to the claim of the State of Karnataka in respect of the area of planned development as made by it in June, 1990 as 20.98 lakh acres, the Tribunal observed that it included areas developed prior to the Agreement of 1924, permitted in terms of the said agreement and developed or committed for development outside the Agreement upto June, 1990, though such areas had been planned and schemes had been put into execution much before the cut-off year. From the data furnished by the State of Karnataka in support of its area of development as in June 1990 to be 20.98 lakh acres, the Tribunal discerned that the additional area which was under progress for irrigation development outside the Agreement was 10.30 lakh acres, by that time.

220. In the process of verification of the claim under this head, i.e., areas developed or under ongoing development beyond the entitlement under the Agreement of 1924 and upto the year 1990, the Tribunal examined the relevant facts qua every individual project and returned a finding that the State of Karnataka was

entitled to an area of 6.91 lakh acres. To this, an area of 1.26 lakh acres was allowed under minor irrigation. Thus, in all, the Tribunal allowed 18.85 lakh acres of area under Categories I, II and III, i.e., area existing under irrigation prior to 1974, permitted to be developed under the different provisions of the Agreement and the area and minor irrigation works during the period form 1924 to 1990.

221. In arriving at this figure, the Tribunal did not take note of the development of the second crop in view of the scarcity of water in the Basin and considered each item of claim on the yardstick of merit and equity, judged on the touchstone of the entitlements under the Agreement and the ground realities. In many cases, it kept in mind the rainfall pattern and support and restricted the crop variety apart from suggesting the timings thereof. The scope of several projects were limited/curtailed on the index of 100% annual intensity of irrigation and ayacuts (irrigated areas) served by gravity flow were generally allowed and those tended by lift schemes were excluded. To ensure economy of consumption of water, crop pattern was also suggested. The Tribunal, however, clarified that though the claims of the States had been examined

in respect of areas requiring irrigation in the four categories, none of these was to get any priority or precedence over the other in the matter of allocation of water and all were to be treated at par according to the respective need and necessity.

P.7 Assessment of water for "irrigation needs" in Tamil Nadu and Karnataka

222. The Tribunal next delved into the exercise of making an assessment of the water required for irrigation for the areas delineated for the competing States. It noted that on the aspect of such requirement, the States had produced documents including information provided in the common format and had examined witnesses who are experts in the field. It was indicated in particular that having regard to the demand of the States, i.e., 566 TMC by Tamil Nadu, 466 TMC by Karnataka, 100 TMC by Kerala and 9 TMC by Union Territory of Puducherry, some curtailments were indispensable in view of the total yield of the Basin computed on 50% dependability at 740 TMC. The Tribunal in order to ensure equitable share to each State, adopted the following considerations for the purpose:-

> "i) The **State of Tamil Nadu** was having three paddy crops in the delta area as well as in some other areas. In

the same field they were having first Kuruvai and followed by Thaladi and in the rest, Samba crop which takes a longer time to mature was being grown. After examining the records it appeared that Madras/Tamil Nadu was having Kuruvai followed by Thaladi in about 95,000 acres prior to the agreement of the year 1924 in the delta area. From the agreement of 1924 read with its Annexures it shall appear that the State of Madras was allowed to extend double crop in the same field by 90,000 acres (70,000 acres in the old delta and 20,000 acres in the Mettur Project area). The total being 1,85,000 acres. The practice of growing double crop by the cultivators in the aforesaid area of 95,000 acres was being followed much before the execution of the agreement; it is difficult to direct to discontinue that practice. Same is the position so far the balance of 90,000 acres are concerned because that was permitted under the terms of the agreement and has been specifically mentioned in the Cauvery Mettur Project Report (1921) as well. All these aspects have been discussed in earlier chapters. But it is an admitted position that State of Madras/Tamil Nadu with the copious flows of water being available started growing double crop of paddy in the same field in different areas. The total of such areas has been discussed in earlier chapters. Similarly Karnataka also followed a practice of growing double crops which were not permitted by the agreement. In this background it is considered necessary in the end of justice not to take note for the purpose of apportioning the waters of inter-State river Cauvery in respect of growing second paddy crop or any other crop in the same field in the same agriculture year except in the areas in which these practices were being followed prior to 1924 agreement or was specifically permitted under the terms of the agreement.

ii) The **State of Karnataka** under the terms of the agreement of the year 1924 was allowed to grow sugar-cane only on 40,000 acres which it has raised to about

70,000 to 90,000 acres. It is well known that crop like sugarcane requires much more water, affecting equitable distribution of waters. Therefore, note is being taken of areas for sugarcane only upto 40000 acres as provided in the agreement for the purpose of apportioning the waters of inter-State river Cauvery .

iii) It is admitted position that both the States were having summer crop including summer paddy from the waters of river Cauvery. When there is so much scarcity of water in the basin, they have to be restricted from growing any summer paddy except in some area where it was being grown prior to 1924 agreement, even that is to be replaced by any light irrigated crop within the irrigation season.

iv) The delta of water claimed on behalf of the two States in respect of different crops including paddy have to be reduced in view of the new variety of paddy and other inputs which have been developed of late which require lesser delta of water.

v) Trans-basin diversion takes out the water of the basin to another basin. As such no note is being taken for the purpose of determining the need and the equitable share of the each State in the waters of the inter-State river Cauvery in respect of any trans-basin diversion already made or proposed for providing extra waters.

vi) Lift schemes will not be considered for water allocation."

223. The stand of the two States, i.e., Tamil Nadu and Karnataka, that admittedly the water requirement of the crops over the years (after 1920) have been reduced with the new variety of seeds of paddy and semi-dry and dry crops was recorded. The position taken by the State of Karnataka that it was not going to grow wet

crop which consumed more water in the new project areas and that only semi-dry crops could be grown thereafter and water would be provided according to the requirements of the plans was noted as well. After the examination of the expert witnesses produced by the States and in course of the arguments, the Tribunal, by its order dated 12.11.2002, required the States to file affidavits furnishing details of the water requirement as well as the crops which they were growing with an indication of the minimum crop water requirement in view of the scarcity of water in river Cauvery. Resultantly, Tamil Nadu filed its affidavit on 08.07.2004 (Ext. TN 1665) and Karnataka did so on 28.03.2003 (Ext. KAR 518) providing the details of, amongst others, the crops, the requirements of water including the Delta (water depth) required in different seasons in different projects and also supported the data furnished with various documents. It is necessary to state here that the acceptance of Tamil Nadu's affidavit has been seriously questioned before on the simon pure reason that the deponent was not made available for cross-examination. In defence of the affidavit, it is the stand of the State of Tamil Nadu that it was a compilation of all that had been brought on record earlier. We have

already dealt with the same. We only repeat that what is admissible having already been recorded on any public report shall alone be looked into.

224. The Tribunal mentioned that till 1928, the States of Mysore and Madras did resort to age old cultivation mostly of paddy crop wherever irrigation facilities were available in the Basin and whereas in Mysore, the paddy cultivation was provided irrigation through anicut canals or tanks, the same was the case also in Tamil Nadu where bulk of paddy cultivation was in the Cauvery Delta Area fed by Grand Anicut and through other Anicuts across Cauvery, Bhavani and Amaravathi and later on, with the installation of the Krishna Raja Sagara Reservoir (KRS) and the Mettur Reservoir as per the provisions of the 1924 Agreement, Mysore and Madras respectively extended their irrigation to new areas. The Tribunal noted that though after the construction of these two major reservoirs facilitating large scale irrigation facilities, the bulk of cultivation in both the States remained confined to Paddy crop, yet in Karnataka sugarcane which is a perennial crop was also resorted to.

225. The Tribunal next took on record the existing crops of the two States as per the information furnished in their common formats. Qua Tamil Nadu, it recorded that in respect of the Cauvery Delta system, “Kuruvai” and “Thaladi” crops of paddy and Samba crops were being grown. In other projects of the State, sugarcane, banana and other crops (groundnut and garden crop) had been introduced from 1980 onwards. Besides, in the Anicut system, summer paddy in some projects had also been introduced. Tamil Nadu in its common format indicated as well that the normal pattern in the Cauvery Basin was to raise the first crop of short duration paddy known as “Kurubhai” in June with the waters of South-West monsoon flowing down the river whereafter a second crop of paddy of medium term duration known as “Thaladi” was grown on the same area with the benefit of North-East monsoon to be harvested by January – February. It was stated that in the rest of the areas, only one single crop of paddy of long term duration known as “Samba” was grown from July/August to be harvested in December/January. In addition thereto, in other riverine tracks subject to availability of supply, two paddy crops were being grown followed by a cash crop like green gram and black gram.

226. Karnataka, in its statement, elaborated on the crop pattern by indicating that in the Cauvery Basin in the State, Ragi, Jawar, Sesame, Groundnut, Redgram and short duration pulses were common Kharif crops (monsoon crops) under rain fed conditions and in some areas, where there were pockets of retentive soils or where late rain occurred, some Rabi crops like Jawar, Bengalgram and cotton were being cultivated. It was indicated as well that failure of rains was very common in these areas which were, as such, severely drought prone for which appropriate doses of irrigation were necessary to help increase the productivity and stability of the yield. It was explained that in the Cauvery Basin, particularly in the old irrigation projects in Karnataka, rice and sugarcane were the main crops under irrigation, but in years of inadequate monsoons, rice was discouraged and light irrigated crops like ragi, groundnut, etc. were grown in rabi/summer. Karnataka explained further that in the new irrigation projects, there was no provision to grow paddy even during Kharif season except in limited areas to a limited extent. It was underlined that irrigation in the State, including the Cauvery Basin Projects, was aimed at extensive rather than intensive use of water to afford

protection to the drought affected areas. It was also mentioned that in all the new projects, emphasis was on the growing of light irrigated crops and that cropping pattern was largely Kharif and to a limited extent Rabi. Karnataka stated that in the irrigated areas, rice was the pre-dominant crop, whereas in the light irrigated areas, Ragi was the main crop followed by maize and potato and that depending on the availability of water, sugarcane, mulberry, coconut and other fruit crops were also grown. The Tribunal referred to the report of the National Commission of Agriculture, 1976 which mentioned that in India, rice was grown in about 40% of the irrigated area under all crops and that rice crop was the largest consumer of irrigation water accounting for 50% of the total irrigation supply, next to that it was wheat which consumed 15% followed by other cereals which accounted for 12% of the irrigation supplies. The report, as the Tribunal has noted, *inter alia,* recorded that in the southern States, wherever the heavier black cotton soil was located in the valleys and the lighter red soils were higher up, it was a good arrangement to confine growing rice in the valleys and reserving the lighter soils for light irrigated crops, as otherwise apart from consuming more water, due to greater percolation

losses, the percolated water would make the heavy soil lower down soggy, thereby rendering it unfit for growing any crop other than rice. The Tribunal noted the view of the National Commission on Agriculture that rice should be grown preferably where there was good support of rainfall which had a permeability of less than 5 mm per day and that as water resources were scanty, irrigation supplies, more particularly to the low rainfall areas, was required to be put to the most economical use to extend the benefit of irrigation to as large a number of people as possible. This view was subscribed to by Dr. M.S. Swaminathan, a renowned agricultural scientist, who was examined as an expert witness for the State of Tamil Nadu and who endorsed the recommendation of the Commission that a second rice crop, particularly in the non-rainy season, should be grown in an area only if the irrigation supplies cannot be put to better use. The witness, however, observed that as soil and climate in the Delta area in Tamil Nadu was very conducive for growing paddy, there should not be any restriction on the number of paddy crops grown in the same field in the same agricultural year. The Tribunal was of the view that having regard to the principles of equitable apportionment, the approach in the

matter of allocation ought to be balanced so much so that the upper riparian States have equal right to develop along with those located in the downstream. It reminisced the stages of evolution of the principle of equitable apportionment, now recognized throughout the world, to meet the necessity of the dependent millions of riverine dwellers justifying that one crop in one agriculture year to every cultivator ought to be allowed. It also recalled its decision to permit growing of "Kuruvai" and "Thaladi" along with "Samba" in the areas which were grown prior to the Agreement of 1924 as well as in the areas permitted by the Agreement of 1924. It, however, keeping in view the shortage of water in the Basin, reiterated that the second crop beyond the areas covered by the above two categories could not be permitted. Vis-a-vis Karnataka, the Tribunal recounted that as paddy and sugarcane were more water consuming crops, they had been restricted to the areas for the period prior to 1924 as well as permitted under the terms of the Agreement. The evidence of Dr. I.C. Mahapatra, the expert witness for the State of Karnataka, that a suitable cropping pattern in the State would include ragi, pulses, oil seeds, sugarcane and one crop of rice along with horticultural crops of fruits, flowers

and useful areas was taken note of. His testimony to the effect that two crops of rice which were being cultivated in some parts of Karnataka ought to be discouraged was also accounted for. The Tribunal took on record the statement of this witness to the effect that Tamil Nadu had two or three crops of rice in different parts of the State as the temperature in the Cauvery Delta was not a limiting factor. The witness, however, emphasized on the rainfall pattern to design the cropping model depending on the relation to water availability. In response to a query, this witness observed that the farmers of Tamil Nadu were anxious to grow Kuruvai crop, as it was a short term crop and its cultivation process in putting fields saplings, etc. could be started by the end of June. The Tribunal mentioned that for growing Kuruvai, the State of Tamil Nadu was primarily dependent on the release of water by Karnataka to Mettur reservoir.

227. The Tribunal next adverted to the evidence of Dr. J.S. Kanwar, expert witness on behalf of the State of Karnataka, who, in his affidavit, analyzed the various aspects of managing agriculture in the drought areas in the Cauvery Basin lying in the State. It contemplated area receiving less than 750 mm rainfall over 20% of

the year as drought areas where the percentage of irrigated areas was less than 30% of the culturable area. The fact that 28 Taluks in Karnataka have been identified as drought-prone areas by the Irrigation Commission within the Cauvery Basin was taken note of by the Tribunal, more particularly with reference to the details thereof as furnished in the affidavit of the witness. The testimony of Dr. Kanwar to the effect that the lands in Karnataka were mostly red sandy soil and red loamy soil which have low water holding capacity requiring artificial irrigation by way of artificial supplies and not by pattern of rainfall as is available in the drought areas of the States and that 28 drought prone taluqs, thus, necessarily needed protected irrigation for mitigating the effect of drought, was taken note of.

228. The Tribunal marked the definition of "crop water requirement" as provided in the Government of India guidelines as the depth of water needed for achieving full production potential. The fact that the crop water requirement takes note of the topography of the land, water in-take characteristics of the soil and its irrigability class besides climatic conditions was noticed. It also took into account the observations of the CFFC with regard to the

nature of crops which were grown in the two States. In Mysore, mostly all the crops were grown in the Kharif season alone, and the extent of rabi and summer crop was very small, and the areas under ragi, jowar, pulses, etc., which were mostly rain-fed, were predominant. For Mysore, the CFFC concluded that ragi was the major crop accounting for 44% of the area followed by paddy claiming 21%. It mentioned as well that the crop season in the State for paddy was from June - July to December-January.

229. Vis-a-vis Tamil Nadu, the Cauvery Fact Finding Committee expressed that the Cauvery delta was the most important agricultural track and almost the entire area was under paddy. It was mentioned that agricultural operations in the Delta start with the advent of freshets (rush of fresh water) in the river with the commencement of South-West monsoon and the Mettur reservoir is opened for irrigation only when the said monsoon actively sets in. It affirmed that in some areas, the first crop of paddy “Kuruvai” is grown with 105 days duration and after the harvest of this crop, a second shorter duration crop known as “Thaladi” is grown. It also mentioned about the long term crop “Samba” of 180 days duration which was a major crop in the Delta. The Tribunal, in the above

premise, observed that the practice was necessary to be changed and the water depths (Delta), which were provided by these States for their crops were required to be revised in order to ensure a fair deal to all the cultivators of the Basin States. Referring to the CFFC Report, the Tribunal took cognizance of the fact that in the old channels in Karnataka, the Delta varied from 5.2 ft to 6.3 ft. and in the newer projects from 5.3 ft. to 6.6 ft. which suggested that even in the newer systems, the high Delta indicated excessive use. The Tribunal also did not disregard the observation of the CFFC that in the circumstances, if the Kharif Ragi could be grown under irrigated conditions instead of paddy, there would be saving in water without any economic detriment to the farmers. The fact that Karnataka had categorically stated before the Tribunal that in its new projects, the State Government was planning to raise only semi-dry crop, was noted. Vis-a-vis Tamil Nadu, the Tribunal recorded that in the case of the Cauvery Delta system which covered the major irrigated area, the Delta varied from 5.3 ft. in 1901 to 4.2 ft in 1971 and in the new projects like Cauvery Mettur project, Lower Bhavani and Mettur Canals, the Delta arrived in 1971 had been in the range of 4

ft. to 5.9 ft. The following recommendations of the Cauvery Fact Finding Committee to effect savings were taken note of as well:-

(a) Restricting the double crop paddy area.

(b) Introduction of short duration variety in place of samba.

(c) Growing crops requiring less water.

230. As from the pleadings of the parties and the data furnished by them, it appeared to the Tribunal that excessive water was being used for raising of crops by the party States, it, during the course of hearing, on 12.11.2002, directed them as well as the Union Territory of Puducherry to file affidavits disclosing the steps already taken to reduce the requirement of water for cultivation and likely to be taken in near future indicating as well the minimum Delta that would be required for different crop varieties in their areas.

231. Accordingly, to reiterate, Karnataka and Tamil Nadu filed their respective affidavits marked as Ext. KAR-518 and Ext. TN–1665 in which they furnished details of the parameters normally used in the computation of crop water requirement, i.e., crop duration, ET crop, puddling requirements, percolation losses, effective rainfall and

system efficiency. In the compilations so furnished, the States elaborated the particulars vis-a-vis their different projects/systems. Whereas Tamil Nadu recorded its crop water requirement to be 444.15 TMC for an area of 25.824 lakh acres with a separate demand of 68.9 TMC for an area of 3.445 lakh acres under minor irrigation and 10 TMC on the count of reservoir evaporation losses, Karnataka registered a claim of 381.71 TMC for cropped area of 25.27 lakh acres including therein 71.3 TMC for an area of 3.30 lakh acres under minor irrigation. In addition, Karnataka demanded 28.158 TMC for its proposed projects covering an area of 2.008 lakh acres to which the Tribunal responded by observing that these proposed projects could be considered subject to the availability of water after meeting the requirements of the existing and ongoing projects, domestic water, industrial water, environmental needs, etc.

232. Before undertaking the actual computation of the water requirement on the basis of the information furnished by the States, the Tribunal dealt with the aspect of trans basin diversion of waters of river Cauvery or its Tributaries. In this regard, it held a view that normally, all the available water in a river basin should be

utilised to meet the in-basin requirements, i.e., different beneficial uses like drinking water for human and animal population, irrigation, hydro-power generation, industrial use and environmental protection, etc. and that after meeting such requirements, if there is still any surplus of water, the same could be considered for transfer to other needy basin(s). However having regard to the admitted position that the yield in Cauvery was much less than the claims by different riparian States, the Tribunal eventually concluded that no note can be taken of the claims made by the States for trans basin diversion already made or proposed for any purpose. In arriving at this determination, it noted that though in the Helsinki Rules of 1966, reference had been made to basin States, yet it was of the opinion that diversion could not be resorted to by any one of the riparian States, at the cost of other lower riparian States affecting their irrigation, economy and social needs. The view expressed by the Krishna Water Disputes Tribunal and the Narmada Water Disputes Tribunal, in substance, is that diversion of water to another watershed may be permitted, but normally in absence of an agreement, the prudent course may be to limit the diversion to the surplus water left after liberally allowing for the

pressing needs of the basin areas. Reference was also made to the observation of the U.S. Supreme Court in ***State of New Jersey v. State of New York*** (supra) that removal of water to a different watershed obviously must be allowed at times, unless the States are to be deprived of the most beneficial use on formal grounds. The comment of the Expert Committee, 1973 headed by Shri C.C. Patel, as set up by the Government of India, to study the report of the CFFC and suggest the scope of economy in the use of Cauvery Water, that since the basin itself was short of water, trans-basin transfers were not desirable, was given due weight as well.

233. The Tribunal, after having determined the areas in the Cauvery basin over which the States of Tamil Nadu and Karnataka were entitled to irrigate and having as well determined the nature of crops grown and ought to be grown, keeping in view the criteria applied, i.e., no double crop/perennial crop *de hors* the 1924 Agreement, no summer paddy and area under summer paddy existing prior to 1924 to be replaced by any semi-dry crop, proceeded to make the apportionment of the Cauvery Waters for irrigation. In undertaking its exercise, the Tribunal took note of the details of the various parameters furnished by the States mainly in

respect of two categories of crops, i.e., Paddy and its varieties and semi-dry crops (during Kharif and Rabi season). The parameters were enumerated thus:-

	Paddy	**Semi-dry crops**
1.	Crop duration	Crop duration
2.	Puddling	Main field preparation
3.	E.T. Crop (Evapo-transpiration)	E.T. Crop (Evapo-transpiration)
4.	Percolation loss	-
5.	Effective rainfall	Effective rainfall
6.	System efficiency	System efficiency.

234. The States of Tamil Nadu and Karnataka, as per the orders of the Tribunal, also filed their crop calendars. Qua Tamil Nadu, the duration of the three varieties of paddy were shown to be:-

(i) Kuruvai	105 days
(ii) Thaladi	135 days
(iii) Samba	150 days

235. The Tribunal, with the replacement of different variety of seeds of Samba Paddy, observed that the duration of the said crop should be reduced to 135 days or near about that. It was also of the opinion that “Navarai' crop of Tamil Nadu grown between the first week of December and last week of March ought to be replaced by any light irrigated crop within the irrigation season of June - January. The aspect that identical economy of water should be

practised in Amaravathi and Lower Bhavani Project was also stressed upon. The Tribunal recalled that the principal crops raised in the Cauvery basin in Karnataka were Kharif paddy, kharif semi-dry, i.e., ragi, maize etc; rabi semi-dry, i.e., groundnut, pulses, etc. together with perennial crops like sugarcane, mulberry, garden crops, etc. besides summer crops, i.e., rabi/summer paddy and rabi summer semi-dry. In view of the scarcity of water, the Tribunal excluded summer paddy and summer semi-dry crops and recorded the view that it would be prudent on the part of Karnataka to go in for a paddy crop of medium duration which would give higher yield. The fact that the State Government had successfully persuaded the farmers to introduce short duration paddy variety of 120 to 130 days which resulted in saving of about 10% water compared to the medium duration of the variety was noted. It suggested that the State Government of Karnataka should also encourage, as far as possible, replacement of the area of Kharif paddy by Ragi which is a Kharif semi-dry crop. On the basis of the said analysis, the Tribunal clearly emphasized upon the need of reduction of crop period to ensure economic and prudent use of water and also suggested modification of the crop pattern in chime therewith.

236. The Tribunal took into account the claims made by the States for different quantities of water vis-a-vis the corresponding stages required for different crops, namely:-

1. Nursery Preparation
2. Puddling while preparing the main field.
3. Evapo Transpiration
4. Percolation Losses
5. Effective rainfall and
6. System Efficiency

237. It was noted that in deciding the reasonable Delta (water depth) required for a crop, all these factors had a vital role. On the aspect of land preparation, the Tribunal observed that as per Karnataka, its crop water requirement in respect of semi-dry crops was about 100 mm for field preparation in respect of semi-dry crops before the crops are sown and that normally the operation of sowing the seed was undertaken when the field was wet for easy ploughing and as wetting of the soil by rainfall was not certain as it depended upon the natural rainfall, provision for wetting the soil was to be made so that the sowing of the crop as per the crop calendar would become possible. The Tribunal, in this regard, adopted the overall Delta for these crops as indicated in the project reports of Karnataka.

238. With regard to puddling, the Tribunal marked the emphasis of Tamil Nadu on the requirement of water for this factor as most of the areas in the basin including the Delta grow paddy. The Tribunal, however, accepted the data furnished by the party-States in their respective statements as those were construed to be reasonable.

239. On the criterion of Evapo-Transpiration – E.T. Crop, the Tribunal noted that the scientific computation of this parameter depended on various factors, namely, (i) temperature along with day and night weather conditions; (ii) elevation/altitude of the field; (iii) solar radiation; (iv) sunshine hours; (v) wind velocity; (vi) humidity, etc.

240. It gathered from the Government of India guidelines issued in May, 1984 that the effect of climate on crop water requirements was given by the reference of evapo-transpiration. It referred to the formula to compute the Evapo-Transpiration of a particular crop with the observation that the said factor for a particular crop grown in different regions would differ because of the variation in one or more or several ingredients thereof. Though the Tribunal took note

of the dissension between the two States with regard to the applicability of the Food and Agriculture Organization, United Nations and the Government of India guidelines, yet it eventually accepted the coefficient (a factor applied for computing evapo-transpiration) adopted by Tamil Nadu as worked out by the Coimbatore Agriculture University as it yielded a lower Delta as compared to the one worked out on the basis of Government of India Guidelines.

241. As regards the percolation losses, it took note of the observation of the expert witness, Dr. I.C. Mahapatra, cited by Karnataka, that the same could be considerably reduced by proper puddling of the field. The Tribunal noted that percolation losses of water depended on the nature of the soil, climatic condition, etc. It recalled that the soil of Karnataka was mostly red soil and at places was sandy in nature in contrast to the Tamil Nadu soil which was sandy loam specially in Delta, formed with the deposit of silt over ages and was not as porous as that of Karnataka. After taking into account the computations provided by Tamil Nadu for the old Delta system and the remaining basin area and having regard to the difference in the soil in the two locations, it allowed percolation

losses per day at 2.5 mm. In respect of Karnataka, having regard to the fact that paddy was being grown in low lying areas and close to the river course for last several decades, percolation loss was fixed at 3 mm per day for that State.

242. To compute the effective rainfall, the following recognized factors, namely, (i) topography of land; (ii) soil characteristics of the land proposed to be irrigated; (iii) initial soil moisture content of the land; (iv) ground water characteristics; (v) rate of consumptive use by a crop variety; (vi) intensity, timing and duration of rainfall; (vii) frequency and distribution of rainfall;(viii) climatic conditions; (ix) variety of crop and its stage of growth; and (x)water conservation of practices, etc., were taken note of.

243. After referring to the Irrigation and Drainage paper no.25 on "Effective rainfall in irrigated Agriculture" published by the Food and Agriculture Organization of United Nations in 1974 dealing with the measurement of effective rainfall and evaluation of various methods with regard thereto, the Tribunal concluded that effective rainfall would vary from place to place and hence, its computed value would accordingly change. In this regard, the Tribunal noted

that both the States had furnished their crop water requirement including effective rainfall in respect of their projects in consultation with the experts.

244. On the aspect of system efficiency, the Tribunal registered that both these States as per the information furnished by them claimed that they had worked out their crop water requirement as was optimally required for different crops. Referring to the report of the National Commission on Agriculture, 1976, the Tribunal observed that in water short areas, giving fewer than optimum number of waterings to a large crop area at appropriate stages of crop growth would result in greater overall agricultural production and, therefore, planning projects with optimum Delta (water depth) would result in higher water demand and may not be necessary in water paucity areas compared to an irrigation system catering for fewer waterings which may cover larger areas and secure greater overall production. The Tribunal was, thus, of the view that the party-States should improve their crop water management practices which enfold several parameters involved in achieving the desired results. It suggested that both the States should improve the system efficiency to 65% in the existing projects which was possible

and appropriate. In this regard, it noted the suggestion of the C.C. Patel Expert Committee of the year 1972 that efficiency should be 67% in both the States.

245. For the State of Tamil Nadu, the Tribunal, by taking the system efficiency of 65%, worked out the Delta for 3 varieties of paddy crop in the old Delta area and Lower Coleroon System as hereunder:-

A. Old Delta Area: Delta (Water Depth)
(i) Kuruvai - 4.00 ft.
(ii) Samba - 3.40 “
(iii) Thaladi - 2.50 “

B. Lower Coleroon Area:
(i) Kuruvai - 3.80 ft.
(ii) Samba - 3.20 “
(iii) Thaladi - 2.50 “

246. For the new Delta on the same yardstick, the following Delta was adjudged:-

(i) Kuruvai - 4.10 ft.
(ii) Samba - 3.90 ft.
(iii) Thaladi - 3.20 ft.

247. Calculation of Delta for other project areas was also undertaken by applying system efficiency at 65% and finally, the water requirement for the State of Tamil Nadu, by adopting the

deltas so computed for main crops and applying the same to the cropped areas worked out on the need basis, was quantified at 390.85 TMC for an area of 24.71 lakh acres including reservoir losses of 10 TMC. In arriving at this figure, the Tribunal rejected the contention of Karnataka that the demand should be limited to 242 TMC as worked out in the Cauvery Mettur Project Report of 1921. This was, amongst others, by accepting the explanation of Tamil Nadu that the state water requirement was only an estimated one based on very high duty factors which proved to be impractical and arbitrary and further the assessment of crop water requirement of each State was necessary to be made on present day standards. Further, the Tribunal was of the view that whatever be the claim of water made by the two States, it has to be worked out in such a manner that neither the crops starve nor the apportionment of the available water becomes an impossible task.

248. In the process of assessing the water requirement of Karnataka, the Tribunal noted that the computations by it had been made adopting the Government of India guidelines. While recounting that the nature of soil as well as the crops grown in Karnataka were different from that of Tamil Nadu and that paddy

and sugarcane require a lot of water, the Tribunal suggested improvement of system efficiency to 65% for the existing projects and 70% for the ongoing projects and further fixed the percolation losses to 3 mm per day keeping in view the opinions of various experts. For the computation of Delta, in respect of kharif paddy cultivation, the projects within the State of Karnataka in the basin were divided into two categories, (i) projects falling above Krishna Raja Sagara reservoir where rainfall was higher; (ii) those falling below Krishna Raja Sagara reservoir (including Krishna Raja Sagara Command) where the incidence of rainfall was comparatively less.

249. For the existing projects, the Delta for kharif paddy was worked out to be 4.6 ft. and for the ongoing projects as 4.25 ft. for the areas falling below Krishna Raja Sagara reservoir including KRS command. Pertaining to the areas falling above Krishna Raja Sagara the Delta was worked out to be 4.3 ft. for existing projects and 4 ft. for the ongoing projects. Similarly, the Delta of other projects as regards semi-dry crops cultivated both in Kharif as well as in Rabi season was worked out. For the perennial crop of sugarcane, 7½ ft. of Delta was permitted. 1 TMC of water for mulberry cultivation was also allowed. On the basis of the above parameters, the water

requirement of Karnataka was computed to be 250.62 TMC for 18.85 lakh acres. Though the assessors had advised otherwise, yet the Tribunal was of the view that instead of keeping of water for the purpose of carry over storage, it would be better to allocate the same amongst the parties keeping in view the principle of equity for use by the concerned States for any beneficial purpose according to the individual State's own priority.

P.8 Assessment of water for "Domestic and Industrial Purposes" in Tamil Nadu and Karnataka

250. The Tribunal thereafter proceeded to assess the domestic and industrial water requirements of Karnataka and Tamil Nadu. It noticed that under the beneficial uses of waters of an inter-state river system, drinking water requirement has been given the first priority not only in our National Water Policy but also by the Courts of different countries. It noted the water supply requirement as recorded in the Indian Standard – "Code of Basic Requirement for Water Supply Drainage and Sanitation" IS.1172-1993 (4th revision) presented by Tamil Nadu in its note wherein a minimum of 72 to 100 litres per head per day (for short "phpd") has been considered to be adequate for domestic needs of urban communities apart from

non-domestic needs as flushing requirements. The said Code divided communities on the basis of population as also by the type of water supply delivery systems catering to their needs while specifying the water requirements which is enumerated as hereinbelow:-

1)	For communities with population up to20,000 and without flushing system. a) water supply through standpost b) water supply through house service connection.	40 (Min.) 70 to 100 lts. phpd
2)	For communities with population 20,000 to 1,00,000 together with full flushing system.	100 to 150 lts. phpd
3)	For communities with population above 1,00,000 together with full flushing system.	150 to 200 lts. phpd

251. The Tribunal also noted the statistics furnished in the Manual of Water Supply and Treatment (3rd Edition) revised and updated by the Ministry of Urban Development, New Delhi - May 1999 setting out per capita water supply levels for designing schemes as under:-

Sl. No.	**Classification of towns/ cities**	**Recommended maximum water supply levels (lpcd)**

1.	Towns provided with piped water supply but without sewerage system	70
2.	Cities provided with piped water supply where sewerage system is existing/contemplated	135
3.	Metropolitan and Mega cities provided with piped water supply where sewerage system is existing/contemplated.	150

252. Being of the view that detailed information regarding the population of various towns and cities, etc. in the Cauvery basin and also the type of water supply delivery systems were not available in exactness, it assessed the drinking water requirement of urban population as hereunder:

(i) 25% of urban population at 135 lts. phpd

(ii) Remaining 75% of urban population at 100 lts. phpd

253. Qua the drinking water supply needs for rural areas, it referred to the norms adopted by the Government of India in National Drinking Water Mission publication Chapter–I at 40 lts. phpd with a breakup as follows:-

Purpose	Quantity (lt. phpd)
Drinking	3
Cooking	5
Bathing	15

Washing utensils & house	7
Ablution	10

In addition, 30 lts. phpd for animals in hot and cold desert/eco-system in the areas as mentioned therein was recommended. The Tribunal, in the absence of livestock figures of the party-States and the Union Territory of Puducherry, premised that the animal population was equal to the rural human population and accorded 30 lts. phpd for animals and 40 lts. phpd for human beings aggregating 70 lts. phpd in all.

254. The Tribunal was of the view that as drinking water requirement would be spread over the entire area of the basin, it would be reasonable to assess that 50% of the drinking water requirement would be met from ground water sources as it is generally seen that wells and tube-wells in urban and rural areas cater substantially to the said need. It acknowledged that though the States were asked to project their population for the period from 2000 to 2025 for working out the drinking water requirement, it considered it to be apt to make such assessment taking 2011 to be the yardstick as it construed it to be sufficient. It also noticed that

out of 100 units of water initially lifted for domestic use, only about 20 units are consumed and the remaining 80 units returned into the river basin. To this effect, the Tribunal referred to the CFFC report as well as the report of the Godavari Water Disputes Tribunal which reproduced the percentage of actual utilization qua various heads of uses as hereunder:-

Use	**Measurement**
(i)Irrigation use	100 per cent of the quantity diverted or lifted from the river or any of the tributaries or from any reservoir, storage or canal and 100 per cent of evaporation losses in these storages.
(ii)Power use	100 per cent of evaporation losses in the storage.
iii)Domestic and municipal water supply within the basin	20 per cent of the quantity of water diverted or lifted from the river or any of its tributaries or from any reservoir, storage or canal
(iv)Industrial use within the basin.	2.5 per cent of the quantity of water diverted or lifted from the river or any of its tributaries or from any reservoir, storage or canal.
(v) All uses outside the	100 per cent of the quantity diverted or lifted from the river or any of its

basin.	tributaries or from any reservoir, storage or canal.

255. The fact that the above observations were also quoted by the Krishna Water Disputes Tribunal in its report was noted.

256. Vis-a-vis the requirement of the city of Bengaluru, the Tribunal concluded that from the information furnished by Karnataka, 64% of the city area lay outside the basin and only 36% thereof fell within it. It, therefore, proceeded on the basis that 1/3rd of the city area is located within the basin and 2/3rd beyond it. After referring to the materials furnished by Karnataka indicating the existing and ongoing drinking water schemes and its demand on that count for Bengaluru city as 30 TMC in a projection of 20 to 25 years, it estimated the same to be 14.52 TMC on the basis of its existing requirements as indicated by it as in 1990. The Tribunal was of the view that as 2/3rd of the Bengaluru city lay outside the basin, its drinking water requirement for that area only which lay within the Cauvery basin along with the remaining basin area and for drinking water requirements for urban and rural population, worked out by projecting the population of the basin for the year 2011, needed to be computed. It recalled that 25% of the urban

population had been allowed 135 lts. phpd and 75% thereof 100 lts. phpd keeping in view the different categories of cities and towns falling in the Cauvery basin. It assigned 150 lts. phpd to Bengaluru city area falling within the basin and worked out the water requirement for the urban population to be 8.70 TMC. Vis-a-vis the rural population at the rate of 70 lts. phpd, the water requirement was quantified at 8.52 TMC, thus making the total drinking water requirement to be 17.72 TMC. By assuming that 50% of the drinking water requirement would be met from ground water, it was estimated that the component of river supply including transit losses would be 8.75 TMC. The consumptive use, i.e., 20% of the total for human population including livestock, was, thus calculated to be 1.75 TMC.

257. By adopting the same norms, by and large, the domestic water requirement for the State of Tamil Nadu was computed. The total drinking water requirement for the projected population of 2011 was fixed at 21.98 TMC out of which 50% was supposed to be met by the ground water sources and 50% from surface water which came to 10.99 TMC. Judged by the consumptive use at the rate of 20%, 2.20 TMC was allocated to Tamil Nadu from surface water.

258. The Tribunal vis-a-vis the industrial water requirement of Tamil Nadu recorded its demand of 7.43 TMC during 2001 and 13.60 TMC in 2025. Having regard to the fact that industrial development depended on several factors including energy, infrastructure and massive financial investments, it was of the view that the projection made by the State was on the higher side. The Tribunal held the opinion that as the industrial water requirement for the year 2011 was in contemplation, 100% increase on that count on the existing requirement in 1990 would be reasonable and, on that basis, worked out the same as 9.9 TMC out of which the consumptive use was assessed at 2.5%. To it was added the water requirement of the State for existing thermal power station at Mettur as 54.339 cusecs with consumptive use of 9.057 cusecs which equals to .28 TMC. It worked out the total consumptive use of water for industrial purposes at .53 TMC (.25 + .28).

259. As far as Karnataka is concerned, the Tribunal noted its existing industrial requirement with 3.20 TMC with the projected demand as 5.71 TMC and 8.02 TMC for 2000 and 2025 giving a growth ratio of 1.4 times. Noticing that the industrial development over the years had gathered a good momentum in the State and as

the industrial water requirement for the year 2011 was applied as the benchmark, the Tribunal awarded 6.40 TMC (3.20 x 2) towards this item of requirement. It was noted that the State had indicated that at present about 2.58 TMC would be met from ground water sources signifying that the total industrial water requirement from the Cauvery basin would be to the tune of 3.82 TMC (6.40-2.58) and by allowing consumptive utilisation at the rate of 2.5% of the total requirement, the consumptive water requirement would turn out to be .10 TMC.

260. The domestic and industrial water requirements of the States of Karnataka and Tamil Nadu were, thus, quantified at 1.85 TMC and 2.73 TMC respectively.

P.9 Assessment of water for "Environment Protection and Inevitable Escapages into Sea" in Tamil Nadu and Karnataka

261. On the aspect of water requirement for Environmental Protection and Inevitable Escapages into sea, the Tribunal underlined the significance thereof by observing that the balance and purity of the environmental and ecological regime gets disturbed on account of injudicious use of available resources by human beings which is further aggravated by the explosion of

population and distorted life style oriented towards consumerism. It took note of the fact that river water pollution on account of industrial development, deforestation leading to siltation of reservoirs, excessive use of irrigation water causing water logging and salinity, etc. were areas of concern so much so that as a result of insensible application of irrigation waters, fertile lands have suffered from water logging and salinity. It reminded itself of its role of apportioning available supplies for various beneficial uses of the competing States and while doing so also to take note of the environmental requirements and to reserve some quantity of water for maintaining the river regime in its various reaches right upto the mouth of the river Cauvery. It was of the view that during the crop seasons, regulated releases from reservoirs would flow not only into the canal system but also in the river lower down which would normally help in maintaining the river regime and its health but during the non-irrigation season which coincides with the non-monsoon summer months from February to May, conscious efforts were required to be made to ensure that there are minimum flows running in the system, particularly in the downstream. It referred to the testimony of Dr. B.B. Sundaresan, former Director, National

Environmental Engineering Research Institute, that lack of adequate river flows is an overwhelming factor contributing to degradation of mangroves in Cauvery estuary as mangroves thrive only at the fresh water – sea water interface. The Tribunal noted the stand of Tamil Nadu and Karnataka in this regard and recorded that right from 1924 onwards, a minimum flow of 1900 cusecs was being led into the river during non-irrigation months which was sufficient to meet the minimum water requirement for environmental purposes. It, thus, assigned 10 TMC to be reserved from the common pool to meet the needs of environmental aspects from 1st February to 31st May to be maintained from Mettur reservoir downward in the river Cauvery every year.

262. On account of inevitable escapages into the sea, the Tribunal recorded that rainfall during the North-East monsoon season comes in the form of cyclonic storms with heavy downpours for some days with interspersed dry spell periods and as such, heavy surface flows during the months of October, November and December in the Delta region result in outflow into the sea as the flood flows. The Tribunal, on an assessment of the materials on record and taking note of the opinions of different experts, concluded that only those

escapages which flow down into the sea as surplus at Lower Coleroon Anicut during the normal or below normal years of precipitation could be counted as inevitable escapages and quantified the volume to that effect as 4 TMC to be deducted from the normal yield of 740 TMC available for apportionment.

P.10 Water allocation for the State of Kerala and Union Territory of Pondicherry (presently named as "Puducherry")

263. The Tribunal, at this juncture, turned to determine the allocations for Kerala and the Union Territory of Puducherry.

264. In apportioning the share of the State of Kerala, the Tribunal adverted to the report of the Cauvery Fact Finding Committee and recorded that so far as the first and second crops are concerned, the requirements of irrigation were nominal. From the chart appended to the report showing the weekly evapo-transpiration and rainfall, it construed that the rainfall was so evenly distributed over the months of May to November and in excess of evapo-transpiration that only occasional assistance by artificial irrigation was required in the event of some failures in small periods. It noticed the stand of Kerala in its statement of case that agriculture

was the basic occupation of the people in Kabini, Bhavani and Pambar basins with the main crop in the low elevation being paddy, and plantation crops being grown in the middle and higher elevations. Kerala had claimed that in the absence of assured water supply from irrigation projects, excepting a few minor irrigation works serving limited ayacut, the agricultural crops in the Cauvery basin therein were dependent on the seasonal rainfall. Kerala had pleaded that after Malabar came over to it, it had submitted several schemes to the Government of India for approval but except one project, viz., Karapuzha in the Cauvery basin, no other scheme was approved because of the pending dispute on sharing of water. According to Kerala, it was for this historical fact that despite the availability and potential to use Cauvery water, the Malabar area could not take up irrigation projects. The demand of Kerala in its statement of case was 92.9 TMC under different heads covering Kabini, Bhavani and Pambar sub-basins. The Tribunal noticed that out of this volume of water, 35 TMC was demanded by Kerala for trans-basin diversion to generate hydro-power. As a matter of fact, it claimed that its contribution to the Cauvery basin was about 20% of the total yield of 740 TMC and, thus, considering its peculiar

needs as an over populated and industrially under developed State, its share of water works out as 99.8 TMC including non-consumptive use of Pambar HE Scheme – 5.6 TMC, Siruvani Water Supply Scheme for Coimbatore – 1.3 TMC in addition to their claim of 92.9 TMC. The demand of the State that it was entitled to the use of Cauvery water for irrigation for paddy crop wherever possible and plantation crops in the hill slopes in addition to the use of such water for the generation of hydro-electric power was minuted. The Tribunal took note of the stand of Tamil Nadu to limit the claim of Kerala on the basis of an Agreement of 1969 between the two States, but negated the same and decided that its claim for its share of water was to be considered on merit. While adjudging the demand of Kerala, the Tribunal took note of the stand of Karnataka that in view of the sufficient rain during South-West and North-East monsoons, the first two paddy crops, namely, Virippu and Mundakan do not need any irrigation support; summer paddy crop should not be allowed; since 1975 the overall area under paddy cultivation in the State had been declining and as a whole, it had sufficient hydro-power potential in large number and as such, transbasin diversion should not be allowed. The demurral of

Karnataka based on the project reports of Kerala that it proposed to have three crops in all the projects, was also accounted for. The Tribunal, in this context, reflected on the efforts made by Kerala to push its projects unsuccessfully over the years and its emphasis for the need to develop the hilly region of Wyned and Attappaty which were under developed. Before examining the tenability of the demand of Kerala, the Tribunal first set out the broad heads thereof as under:-

	Items	TMC
1.	Multi-purpose projects for hydro-power generation and incidental use for irrigation outside the Cauvery basin involving trans-basin diversion.	35.0
2.	Medium irrigation schemes for covering areas within the basin.	38.8
3.	Minor irrigation works (existing, ongoing & proposed).	6.1
4.	Domestic water supply (ultimate requirement).	5.5
5.	Industrial uses (ultimate requirement).	7.5

6.	Non-consumptive use for Pambar Hydro-electric Scheme within the basin.	5.6
7.	Committed utilisation for Siruvani drinking water supply for the benefit of Tamil Nadu.	1.3
	Total	99.8

265. Vis-a-vis the first item, the Tribunal held that the water of inter-State river was meant for use by all the riparian States according to the reasonable needs and necessity of each State within the basin. While underlining that irrigation had always been given higher preference over generation of hydroelectricity unless water was surplus, it enumerated the water allocation priorities as prescribed by the National Water Policy of 2002 as hereinbelow:-

- Drinking water
- Irrigation
- Hydro-power
- Ecology
- Argo-industries and non-agricultural industries
- Navigation and other use.

266. Rejecting the plea on behalf of Kerala in support of transbasin diversion based on the necessity and need of the whole State, the Tribunal held that if it is accepted that while determining the

equitable share of a particular riparian State, even the shortage of water in the neighbouring basin which is outside the basin in question is to be considered, it would lead to an anomalous situation. In its view, though in the Helsinki Rules of 1966, there is a reference of basin states, yet the process of diversion could not be executed by one of the riparian States at the cost of other lower riparian States affecting their irrigation, economy and social needs. The observation of the Krishna Water Disputes Tribunal and the Narmada Water Disputes Tribunal in substance to the effect that in the absence of any agreement, the prudent course may be to limit the diversion to the surplus waters left after liberally allowing for the pressing needs of basin areas, was reiterated. The following observations of the U.S. Supreme Court in ***State of New Jersey v. State of New York*** (supra) were also recorded:-

> "The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds.
>
> Diversion of water from one river basin to another is viewed with distrust and resisted by the basin population."

267. The Tribunal also referred to the observation of the Expert Committee headed by Shri C.C. Patel, the then Additional Secretary, Ministry of Irrigation and Power, against trans-basin diversions in a water deficit basin. It, therefore, concluded that because of shortage of water, no note could be taken of claims made by the States for apportionment of water in respect of any trans-basin diversion already made or proposed to be made for any purpose. The Tribunal, thus, declined to allocate water for the projects involving transbasin diversion of waters.

268. Qua the demand for irrigation, domestic and industrial water use, the Tribunal, on a scrutiny of the project reports as furnished in the common format, catalogued the following aspects:-

> "(i) Out of the irrigation schemes projected, only one scheme i.e. Karapuzha project had been approved by the Government of India.
>
> (ii) While the State had been emphasizing on spice and plantation crops, while placing demand, it had only submitted its requirement mainly for paddy and vegetable crop, besides indicating demand for domestic and industrial uses along with hydropower projects involving interbasin transfer of water.
>
> (iii) As regards culturable command area (CCA) and ayacut under individual projects, the extent of proposed ayacut was much less than CCA because of the physical nature of the area, which was undulating in character.

(iv) Main crop in the low elevation areas was paddy, whereas in the middle and higher elevations, it was plantation crops for which reasonable needs were to be assessed, so that the irrigated area could be made equal to the CCA for the State has proposed two paddy crops and one vegetable crop for the Kabini sub-basin. While the first crop "Virippu" was raised during May to September, water requirement whereof was met from South-West monsoon, the second crop "Mundakan" was raised from end of September to end of January with the support of North-East monsoon. The first was the rain fed crop and the second principally, an irrigated crop. The third crop "Puncha" grown from January end to early May was a summer crop, which however could not be allowed because of non-availability of rainfall support.

(v) Though the State had proposed three paddy crops in their Attappady Project in Bhavani sub-basin noticing that this basin used to receive rainfall during South-West monsoon, which was weaker, only one paddy crop was to be allowed during North-East monsoon, whereas the proposed paddy crop during South-West monsoon was recommended to be replaced by any semi dry crop. For Pambar sub-basin as well, though the State had proposed two paddy crops, one paddy crop and one semi dry crop was suggested.

(vi) No lift irrigation for raising paddy cultivation was allowable.

(vii) Demand for domestic and industrial water use was excessive. The excessive demand for industrial use was restricted to 33% of the quantity of the existing actual utilization for project development till 2011.

(viii) The Tribunal having regard to its above responses and bearing in mind that the State had substantial tribal population in Cauvery basin area worked out the project-wise allocations based on socio-economic needs, agro-

climatic conditions and availability of land for cultivation."

269. The analysis that followed reveals that the Tribunal did examine the demand vis-a-vis the different projects in the Kabini, Bhavani and Pambar basins in the context of their individual features and corresponding crop water requirement. While doing so, the Tribunal also, *inter alia*, examined the viability of the projects and excluded those which were not viable. In assessing the claims made, the Tribunal was particularly mindful of the crop pattern, annual intensity of irrigation, delta requirements, etc. with specific reference to rainfall support. In addition, demand towards minor irrigation schemes/projects in the aforenamed basins were accounted for and eventually, the irrigation water requirement of Cauvery basin, Bhavani basin and Pambar basin was assessed to be as hereunder:

Kabini basin – 19.43 TMC
Bhavani basin – 5.52 TMC
Pambar basin – 2.95 TMC

270. Noticeably, the Tribunal, while assessing the crop water requirement for the above three sub-basins, allowed allocations for "Virippu" and "Mundakan" paddy crops for Kabini sub-basin; kharif

semi-dry and miscellaneous, “Mundakan” and perennial crop for Bhavani sub-basin and kharif semi-dry and miscellaneous and “Mundakan” for Pambar sub-basin.

271. While working out the domestic and industrial water requirement, the Tribunal considered the population projection for 2011 and adopted the ratio of urban and rural population at the ratio of 30:70. Against the drinking water requirement at a flat rate of 120 lts. phpd for the entire population, the Tribunal thought it reasonable to bifurcate the demand between the rural and urban areas and quantified it to be 120 lts. phpd for urban population and 70 lts. phpd for the rural population (human-being 40 lts. phpd + cattle 30 lts. phpd), thereby adjudging the drinking water requirement on the above norms for Kabini, Bhavani and Pambar sub-basins together at 1.53 TMC. As the actual consumptive use out of the above would be limited to only 20% and the remaining 80% would gradually flow back to the river system over a period of time, the actual allocated share on this head was, thus, assessed to be .31 TMC for the three sub-basins.

272. Dealing with the industrial water requirement, the Tribunal took into account the existing industrial water use for different

types of industries in Kabini basin estimated at .50 TMC which was expected to increase by another 33% by the year 2011 thus becoming .69 TMC. Working on the same lines, the industrial water need for Bhavani sub-basin and Pambar sub-basin was assessed at .21 TMC and .26 TMC respectively making the total tally of 1.16 TMC. However, as the consumptive use for industrial purposes was limited to 2.5% of the volume, the Tribunal adjudged the share on this count to be .04 TMC as the remaining bulk would return to the river system.

273. The Tribunal, on the basis of the population ratio inter se the States, awarded Kerala 1.51 TMC out of the savings of 45.08 TMC so as to enable it to use the same keeping in view its own priorities in public interest. Thus, the total water requirement of Kerala, taking into account all heads of demand, was quantified at 29.76 TMC rounded up to 30 TMC. In parting, the Tribunal clarified that the allocation was based on the needs established and accepted and did not signify the sanction of any project by it, as the clearance thereof under the law was to be granted by the State Government. Having regard to the historical facts that Kerala would take some time to utilize its full allocated share so much so that some

unutilized water from its share would be flowing in Kabini, Bhavani and Amaravathi reservoirs and recalling that the Tribunal had not taken note of the claim of Tamil Nadu of its irrigated area of second/double crop totaling 2,80,800 acres, it was provided that till such time Kerala would be in a position to utilize its allocated share of water, the unutilized water from its share be permitted to be used by Tamil Nadu. While holding so, the Tribunal observed that this temporary arrangement of use by Tamil Nadu of the unutilized water from the share of Kerala, however, would not confer any right on it.

274. Adverting to the claim of the Union Territory of Puducherry for the Karaikal region, the Tribunal recorded that the economy of that region was predominantly based on agriculture and that due to its close proximity to the sea, the ground water was generally brackish and unsuitable for drinking and irrigation purposes. The claim of the Union Territory for its water requirement vis-a-vis the crop grown as extracted hereinbelow was noticed:-

S.No.	Crop	Area (hectares)	Water Requirement (Mcft.)
(1)	Samba (Single Crop)	4760	3006
(2)	Kuruvai (Khariff double crop)	6230	2868
3)	Thalady (Rabi – double crop)	6230	3366
		Total	9240

275. Thus, the total area summed up to 42,533 acres and the total water requirement was estimated at 9.355 TMC including 115 mcft for drinking water. The Tribunal marked that there was, in fact, no denial of the irrigated area claimed by the party-States, though Karnataka, in its rejoinder, did not admit its crop pattern as projected and the corresponding water requirement. The fact that the irrigated area of 43000 acres had also been endorsed by the Cauvery Fact Finding Committee was duly noted. Further, the aspect that the Union Territory of Puducherry, due to its own

compulsions, did not have any scope for extension of the said area also did not miss the attention of the Tribunal and, thus, on a totality of the above considerations, its claim for second crop was allowed in particular keeping in view the geographical and climatic conditions and the soil features of the territory.

276. Noticeably, the State of Tamil Nadu, while arguing its demand of water as well as the area under irrigation, had indicated its stand in respect of the Union Territory of Puducherry and provided the following particulars to demonstrate the overall need of the Union Territory:-

S. No.	Sector	Pondicherry	
		Area in lakh acres	Water required in TMC
(1)	(2)	(3)	(4)
A	Domestic and livestock need		0.356
B	Environmental/Ecological Needs		0.000
C	Irrigation requirement for the area under Priority – I to IV	0.430	6.840
C	Industrial & Power		0.070
	Total	0.430	7.266

277. From this, the Tribunal construed that not only Tamil Nadu admitted that the gross irrigated area in Puducherry was 43000 acres, but also measured its total water requirement to be 7.266 TMC.

278. In respect of the crop water requirement of Puducherry in particular, the Tribunal observed that the extent of area under Kuruvai, Samba and Thaladi was 15,388, 11,757 and 15,388 acres respectively out of which the first crop (Kuruvai and Samba) covered 27,145 acres and the second crop (Thaladi) was raised over 15,388 acres. The Tribunal also mentioned that the Karaikal region of the Union Territory of Puducherry was situated at the tail end of the Tamil Nadu Delta system and for all practical purposes, could be taken to be the natural extension of the Cauvery Delta system of Tamil Nadu and, therefore, the cropping pattern as well as the water requirement for the crops did also broadly match. It was, however, indicated that the Karaikal region was in the close proximity of the sea for which the effect of sea water on the cultivable area was an aspect which needed special consideration. This was, as the Tribunal underlined, to ensure that the brackish water remained well below the crop root zone for which liberal

provision for irrigation water was warranted. Though it noted that the North-East monsoon helps in leaching the salt deposited over the land as well as in the sub-soil, yet having regard to the above factors, a volume of 6.35 TMC by way of crop water requirement was allowed.

279. For domestic and industrial water requirement of the Union Territory, the Tribunal noted that the total population of its Karaikal region, as projected for 2011, was to be applied. It construed the ratio of urban to rural population to be 35:65 and by applying the yardstick of 120 lpcd against urban domestic water supply requirement and 70 lpcd for the rural population including livestock, it worked out the total domestic water requirement to be .225 TMC. Though 80% of the domestic water supply was generally expected to return back to the river system, yet in the case of Karaikal region, this norm was not applied as the water would not take that course but would flow into the brackish sub-soil or into the sea. The Tribunal, thus, allowed the full quantity of .225 TMC for domestic water requirement.

280. In respect of its industrial water requirement, the Union Territory of Puducherry, in its common format, indicated its

demand to be .034 TMC. The Tribunal was of the view that by 2011, this demand would increase by about 33% to become .045 TMC. As on the analogy of reasonings qua domestic water requirement, the industrial water taken for use from the river system will not return to it and, hence, the full quantity, i.e., .045 TMC was accepted. Thus, the total water requirement of the Union Territory of Puducherry towards irrigation, domestic water supply and industrial use was assessed at 6.62 TMC.

281. Added to this, out of the balance water of 45.08 TMC on savings, as per its population in the year 1991, the bench mark used for the other States, its share was worked out to be .22 TMC. The total allocation of water for Puducherry on all these counts, thus, totalled to 6.84 TMC which was rounded upto 7 TMC. It was mentioned that this quota allocated to Karaikal was required to be delivered at the seven locations at the inter-state crossing points (between Tamil Nadu and Karaikal) of 7 rivers, namely, Nandalar, Nattar, Vanjiar, Noolar, Arasalar, Thirumalairajanar and Pravadayanar. With regard to the monthly delivery of supplies, it was noted that Tamil Nadu and Union Territory of Puducherry had an agreement which had been working satisfactorily and, thus, it

was ordered that the same would continue. It was indicated that in case of any disagreement, the matter could be resolved by the Cauvery Management Board.

P.11 <u>Final water allocation amongst competing States</u>

282. Having dealt with the allocations for the individual States as above, the final calculations were set out in a tabular form as herein below:-

	States				Total
	Kerala	Karnataka	Tamil Nadu	UT of Poncidherry	
i) Area	1.93	18.85	24.71	0.43	45.92
ii)Irrigation requirement	27.90	250.62	390.85	6.35	675.72
iii) Domestic and Industrial water requirement projected for 2011	0.35	1.85	2.73	0.27	5.20
iv) Water requirement for environmental protection	-	-	-	-	10.00
v) Inevitable escapages into sea	-	-gv	-	-	4.00
vi) Share in balance water	1.51	17.64	25.71	0.22	45.08
Total	29.76	270.11	419.29	6.84	740.00
Say	30.00	270.00	419.00	7.00	726+14

					=740

283. Simply put, the final allocated shares of the competing States together with the provisions for environmental protection and inevitable escapages into sea, as determined by the Tribunal, can be reflected thus:-

1. Kerala	30 TMC
2. Karnataka	270
3. Tamil Nadu	419
4. Union Territory of Pondicherry	7
5. Environmental protection	10
6. Inevitable escapages into sea	4
	740 TMC

284. Significantly, in computing the balance quantity of 45.08 TMC which the Tribunal distributed on the basis of the respective population figure, the Tribunal attributed this quantum to the proposed carry over storage of 10 TMC, each for the States of Karnataka and Tamil Nadu, as recommended by the Assessors as well as a volume of 25.08 TMC that was available in view of the limitations prescribed in allotment. According to the Tribunal, on a consideration of different aspects, it was decided to keep 20 TMC

(10 TMC x 2) as advised by the Assessors as carry over storage, to allocate the same together with the other 25.08 TMC available to the States on the principle of equity, leaving them at liberty to utilize the same as per their own priority.

P.12 Monthly schedule for delivery of water at inter-State contact points

285. The Tribunal next dwelt upon the monthly schedule of flows at the inter-State contact point between Karnataka and Tamil Nadu to ensure timely supplies for successfully raising crops in different crop seasons. It noticed that for the fields in which paddy was grown by the State of Tamil Nadu, the nurseries were put in the field between middle of June to middle of July followed by transplantation during last week of July onwards. Having regard to the fact that in Tamil Nadu, the first crop of "Kuruvai" was harvested in September followed by the second crop "Thaladi" to be harvested in January-February and that the main crop "Samba" is transplanted in the month of August- September and harvested in December, the Tribunal prepared a schedule of the monthly releases from mid-June to end of January spanning over the agricultural season so that the interests of both the states of Tamil

Nadu and Karnataka were taken care of. In drawing up the monthly schedule of release of water, the Tribunal kept in mind that in normal years, such release would not pose any difficulty to the State of Karnataka and at the same time would meet the requirement of Tamil Nadu. The inter-state contact points were enumerated thus:-

i)	Between Kerala and Karnataka	:	Kabini reservoir site
ii)	Between Kerala and Tamil Nadu	:	
	(a) For Bhavani sub-basin It is reported that Chavadiyoor gauge site was being operated by the State of Kerala which could be revived for inter-State observations.	:	Chavadiyoor G.D. site
	(b) For Pambar sub-basin	:	Amaravathi reservoir site
iii)	Between Karnataka and Tamil Nadu	:	Billigundulu G.D. site/any other site on common border
iv)	Between Tamil Nadu and Pondicherry	:	Seven Contact points"

286. It was mentioned that the identified inter-state contact point between Karnataka and Tamil Nadu was at Billigundulu gauge where the discharge site was maintained by the Central Water Commission, an independent organization of the Central Government having due expertise in the river gauging techniques. The Tribunal was of the opinion that the gauge and discharge observation stations where direct observations can be made would be a better location than a reservoir site where the measurements can be taken only in an indirect way. The Regulatory Authority was, however, left at its discretion, if needed, to require the Central Water Commission, in consultation with the State Governments, to establish new gauge and discharge station on the common border. The unutilized water allocated to the State of Kerala, which would be flowing to the lower States, namely, Karnataka and Tamil Nadu and the existing reservoirs of Kabini, Bhavani and Amaravathi from which the distribution was ordered was to be monitored by the Cauvery Management Board. The fact that the annual allocation of 7 TMC for the Union Territory of Puducherry would be required to be delivered by Tamil Nadu over a period of one year at 7 different contact points, as in the past, was indicated. The calculations of the

flow required to be delivered at the inter-state site were summed up as hereunder:-

		TMC
"1)	The total yield of the basin at 50% dependability	740
2)	Yield at Mettur reservoir. (Ref: TNDC Vol.XV, page 87 and TN Statement No.57, item 1 dated 10.2.2005)	508
3)	Yield generated in Tamil Nadu area above Mettur reservoir (Ref: TN Statement No.57, item 4 and TN Statement 86, item 1)	25
4)	(a) Yield available below Mettur (740–508) (Ref: TN Note 46, Annexure-3, page 54; TN Statement 83, item 1)	232
	(b) Deducting following uses:-	
	i)Allocation to Kerala in Bhavani sub-basin - 6 TMC ii)Allocation to Kerala in Pambar sub-basin - 3 TMC iii)Allocation to UT of Pondicherry - 7 TMC iv)Inevitable escapages into sea - 4 TMC 20 TMC	20
	(c) Balance available for use in Tamil Nadu (232–20)	212
5)	Total of water available for use in Tamil Nadu (212+25)	237"

287. Deducing therefrom and having regard to the allocated share of 419 TMC, the Tribunal ordered that the balance 182 TMC (419-237) + 10 TMC for environmental protection, i.e., 192 TMC was to be delivered by the State of Karnataka at the inter-State border. In this regard, the three components contributing to the annual quantum of water to be delivered by the State of Karnataka at the inter-State contact point were identified as herein below:

> "i) Flows coming in the river Cauvery from the uncontrolled catchment of Kabini sub-basin downstream of Kabini reservoir, the catchment of main stream of Cauvery river below Krishnarajasagara, uncontrolled flows from Shimsha, Arkavathy and Suvernavathy sub-basins and various other small streams.
>
> ii) Regulated releases from Kabini reservoir; and
>
> iii) Regulated releases from Krishnarajasagara reservoir."

288. It was clarified as well that the delivery of 192 TMC of water at the inter-state contact point was to be maintained in a normal year and that if there was any deficiency in the quantum of inflows, it would be open to the Cauvery Management Board/Regulatory Authority to suitably adjust the flows. The monthly schedule of deliveries finally prepared in consultation with and on the basis of the advice of the assessors at Billingundulu was designed thus:-

"Month	TMC	Month	TMC
June	10	December	8
July	34	January	3
August	50	February	2.5
September	40	March	2.5
October	22	April	2.5
November	15	May	2.5
		Total	192 TMC"

289. While clarifying that Kabini's flows of the unutilized water out of the Kerala's allocated share, from Kerala to Tamil Nadu would be in addition to the flow of 192 TMC as per the monthly schedule till Kerala develops its own potential to use the same, the Cauvery Management Board/Regulatory Authority was also required to set up its mechanism and further devise its method to determine the quantum of unutilized water to be received from Kerala by Tamil Nadu through Kabini and its tributaries and ensure the delivery thereof in Tamil Nadu at the common border. The Regulatory Authority was also required to monitor flows from Krishna Raja Sagara reservoir as also from Kabini and other tributaries meeting Kabini below Krishna Raja Sagara upto Billigundulu site. It was again clarified that the monthly schedule of deliveries was on the basis of the flow in a normal year giving a total annual yield of 740

TMC at 50% dependability which was a theoretical computation based on the crop water requirement of different projects and the computed withdrawal therefor along with the data of inflows into the various reservoirs as furnished by the party-States in their common formats. However, the Tribunal was not unmindful of the fact that rainfall during any monsoon season was likely to vary in space and time and also in intensity and duration which would have impact upon the pattern of flows in different sub-basins and which may not tally with the flows considered for working out the above schedule. In this premise, the Tribunal suggested an entity, namely, the Cauvery Management Board/Regulatory Authority to monitor, with the help of the Cauvery Regulation Committee and the concerned State Authorities, the available storage position in the Cauvery basin along with the trend of rainfall and make an assessment about the likely inflows which may be available for distribution amongst the party-States within the overall schedule of water deliveries as suggested. It was also made clear that in case the yield was less in a distress year, the allocated shares would be proportionately reduced amongst the States involved by the Regulatory Authority. Having regard to the fact that the irrigation

season starts from 1st of June and the normal date of onset of South-West monsoon in Kerala is of the same date so much so that any delay in the advent of the said monsoon would affect the inflows and consequently dislocate the schedule of releases from Krishna Raja Sagara and Kabini reservoirs, the Tribunal felt it to be advisable that at the end of May each year, as much storage as was possible during a good year should be consciously conserved as that would help in adhering to the schedule of monthly deliveries. The Tribunal, however, authorized the Cauvery Management Board/Regulatory Authority to relax the schedule of deliveries and get the reservoirs operated in an integrated manner through the States to minimize any harsh effect of a bad monsoon year in the event of two consecutive distress years. The Cauvery Management Board/Regulatory Authority was also required to monitor the entire spectrum of monthly availability of storages and rainfall pattern vis-a-vis the schedule of monthly flows to be delivered at Billigundulu/inter-State contact point for a period of five years and to effect the necessary adjustments in the monthly schedule in consultation with the party-States and with the help of the Central Water Commission without, however, changing the annual

allocation awarded to the parties. In suggesting these measures, the Tribunal was conscious that there was no element of human control on the happenings in nature and that only an attempt was to be made to ensure beneficial use of the available quantum of flows in any year and to distribute the same for the benefit of the basin as a whole by integrating the releases from different storage reservoirs. A caveat was also sounded to the upper riparian State to desist from any action so as to affect the scheduled deliveries of water to the lower riparian States.

Q. Mechanism (Cauvery Management Board) for implementation of Tribunal's decisions

290. The Tribunal also did devise the machinery for implementation of its final decisions/orders and in doing so, took note of Section 6A introduced in the 1956 Act by Act 45 of 1980 with effect from 27.08.1980 empowering the Central Government to frame schemes, if any, in respect of such implementation. It also noticed the amendment to Section 6 of the Act whereby in terms of Section 6(2), the decision of the Tribunal after its publication in the Official Gazette was to have the same force as an order or decree of the Supreme Court. In this statutory background, the Tribunal was of

the view that any direction to frame a scheme for the implementation of its decision would result in an anomalous situation. However, in its view, as the Inter-State Water Disputes (Amendment) Act, 1980 did not provide for details with regard the to constitution of the machinery and its functions, it had the implied power to make recommendations in that regard for implementing its decision. It, thus, recommended that the Cauvery Management Board be constituted on the lines of Bhakra Beas Management Board by the Central Government. It underlined that unless an appropriate mechanism was set up, the prospect of implementation of its decision would not be secured. It further recommended that as its award involved regulation of supplies from various reservoirs and other important nodal points/diversion structures, it was imperative that the mechanism, Cauvery Management Board, be entrusted with the function of supervision of the operation of reservoirs and the regulation of water releases therefrom with the assistance of the Cauvery Water Regulation Committee (to be constituted by the Board). It then suggested the constitution of the Cauvery Management Board, its composition, its items of business, etc. It also recommended the composition of the

Cauvery Water Regulatory Committee and outlined its functions. The Cauvery Management Board was also required to submit an annual report to the four party-States before the 30th of September of each year. The Tribunal prescribed guidelines for the Cauvery Management Board which besides being exhaustive were intended to touch upon the functional details relating to the supplies out of the allocated shares. We do not intend to state the guidelines laid down by the Tribunal as we shall be addressing to many an aspect while analyzing the concept of the scheme as envisaged under Section 6.1 of the 1956 Act

R. <u>Final order of the Tribunal</u>

291. On the culmination of the above exercises, the Tribunal formulated its final order with its determinations and directions on all the facets of the dispute. As the layout of the final order portrays the summation of the adjudication made, it would be apposite to quote the same as hereunder for immediate reference:

> **"Final Order and Decision of the Cauvery Water Disputes Tribunal**
>
> The Tribunal hereby passes, in conclusion the following order:-

Clause-I

This order shall come into operation on the date of the publication of the decision of this Tribunal in the official gazette under Section 6 of the Inter-State Water Disputes Act, 1956 as amended from time to time.

Clause-II

Agreements of the years 1892 and 1924:

The Agreements of the years 1892 and 1924 which were executed between the then Governments of Mysore and Madras cannot be held to be invalid, specially after a lapse of about more than 110 and 80 years respectively. Before the execution of the two agreements, there was full consultation between the then Governments of Madras and Mysore. However, the agreement of 1924 provides for review of some of the clauses after 1974. Accordingly, we have reviewed and re-examined various provisions of the agreement on the principles of just and equitable apportionment.

Clause-III

This order shall supersede –

i) The agreement of 1892 between the then Government of Madras and the Government of Mysore so far as it related to the Cauvery river system.

ii) The agreement of 1924 between the then Government of Madras and the Government of Mysore so far as it related to the Cauvery river system.

Clause-IV

The Tribunal hereby determines that the utilisable quantum of waters of the Cauvery at Lower Coleroon Anicut site on the basis of 50% dependability to be 740 thousand million cubic feet-TMC (20,954 M.cu.m.).

Clause-V

The Tribunal hereby orders that the waters of the river Cauvery be allocated in three States of Kerala, Karnataka and Tamil Nadu and U.T. of Pondicherry for their beneficial uses as mentioned hereunder:-

i) The State of Kerala	-	30 TMC
ii) The State of Karnataka	-	270 TMC
iii) The State of Tamil Nadu	-	419 TMC
iv) U.T. of Pondicherry	-	7 TMC
		726 TMC

In addition, we reserve some quantity of water for (i) environmental protection and (ii) inevitable escapages into the sea as under:-

(i) Quantity reserved for environmental protection – 10 TMC

(ii) Quantity determined for inevitable escapages into the sea – 4 TMC

14 TMC

Total (726 + 14) 740 TMC

Clause – VI

The State of Kerala has been allocated a total share of 30 TMC, the distribution of which in different tributary basins is as under:

(i) Kabini sub-basin	-	21 TMC
(ii) Bhavani sub-basin	-	6 TMC
(iii) Pambar sub-basin	-	3 TMC

Clause – VII

In case the yield of Cauvery basin is less in a distress year, the allocated shares shall be proportionately reduced among the States of Kerala, Karnataka, Tamil Nadu and Union Territory of Pondicherry.

Clause VIII

The following inter-State contact points are identified for monitoring the water deliveries:

i)	Between Kerala and Karnataka	:	Kabini reservoir site
ii)	Between Kerala and Tamil Nadu	-	
	a) For Bhavani sub-basin	:	Chavadiyoor G.D. site
	It is reported that Chavadiyoor gauge site was being operated by the State of Kerala which could be revived for inter-State observations.		
	b) For Pambar sub-basin	:	Amaravathy reservoir site
iii)	Between Karnataka and Tamil Nadu	:	Billigundulu G.D. site/any other site on common border
iv)	Between Tamil Nadu and	:	Seven Contact points as

Pondicherry	already in operation”

Clause-IX

Since the major shareholders in the Cauvery waters are the States of Karnataka and Tamil Nadu, we order the tentative monthly deliveries during a normal year to be made available by the State of Karnataka at the inter-State contact point presently identified as Billigundulu gauge and discharge station located on the common border as under:

Month	TMC	Month	TMC
June	10	December	8
July	34	January	3
August	50	February	2.5
September	40	March	2.5
October	22	April	2.5
November	15	May	2.5
			192 TMC

The above quantum of 192 TMC of water comprises of 182 TMC from the allocated share of Tamil Nadu and 10 TMC of water allocated for environmental purposes.

The above monthly releases shall be broken in 10 daily intervals by the Regulatory Authority.

The Authority shall properly monitor the working of monthly schedule with the help of the concerned States and Central Water Commission for a period of five years and if any modification/adjustment is needed in the schedule thereafter, it may be worked out in consultation with the party States and help of Central Water Commission for future adoption without changing the annual allocation amongst the parties.

Clause X

The available utilisable waters during a water year will include the waters carried over from the previous water year as assessed on the 1st of June on the basis of stored waters available on that date in all the reservoirs with effective storage capacity of 3 TMC and above.

Clause – XI

Any upper riparian State shall not take any action so as to affect the scheduled deliveries of water to the lower riparian States. However, the States concerned can by mutual agreement and in consultation with the Regulatory Authority make any amendment in the pattern of water deliveries.

Clause-XII

The use of underground waters by any riparian State and U.T. of Pondicherry shall not be reckoned as use of the water of the river Cauvery.

The above declaration shall not in any way alter the rights, if any, under the law for the time being in force, of any private individuals, bodies or authorities.

Clause-XIII

The States of Karnataka and Tamil Nadu brought to our notice that a few hydro-power projects in the common reach boundary are being negotiated with the National Hydro-Power Corporation (NHPC). In this connection, we have only to observe that whenever any such hydro-power project is constructed and Cauvery waters are stored in the reservoir, the pattern of downstream releases should be consistent with our order so that the irrigation requirements are not jeopardized.

Clause-XIV

Use of water shall be measured by the extent of its depletion of the waters of the river Cauvery including its tributaries in any manner whatsoever; the depletion would also include the evaporation losses from the reservoirs. The storage in any reservoir across any stream of the Cauvery river system except the annual evaporation losses shall form part of the available water. The water diverted from any reservoir by a State for its own use during any water year shall be reckoned as use by that State in that water year. The measurement for domestic and municipal water supply, as also the industrial use shall be made in the manner indicated below:

Use	Measurement
Domestic and municipal Water supply	By 20 per cent of the quantity of water diverted or lifted from the river or any of its tributaries or from any reservoir, storage or canal.
Industrial use	By 2.5 per cent of the quantity of water diverted or lifted from the river or any of its tributaries or from any reservoir, storage or canal.

Clause-XV

In any riparian State or U.T. of Pondicherry is not able to make use of any portion of its allocated share during any month in a particular water year and requests for its storage in the designated reservoirs, it shall be at liberty to make use of its unutilized share in any other subsequent month during the same water year provided this arrangement is approved by the implementing Authority.

Clause-XVI

Inability of any State to make use of some portion of the water allocated to it during any water year shall not constitute forfeiture or abandonment of its share of water in any subsequent water year nor shall it increase the share of other State in the subsequent year if such State has used that water.

Clause-XVII

In addition, note shall be taken of all such orders, directions, recommendations, suggestions etc. which have been detailed earlier in different chapters/volumes of the report with decision for appropriate action.

Clause XVIII

Nothing in the order of this Tribunal shall impair the right or power or authority of any State to regulate within its boundaries the use of water, or to enjoy the benefit of waters within that State in a manner not inconsistent with the order of this Tribunal.

Clause-XIX

In this order,

(a) "Normal year" shall mean a year in which the total yield of the Cauvery basin is 740 TMC.

(b) Use of the water of the river Cauvery by any person or entity of any nature whatsoever, within the territories of a State shall be reckoned as use by that State.

(c) The expression "water year" shall mean the year commencing on 1st June and ending on 31st May.

(d) The "irrigation season" shall mean the season commencing on 1st June and ending on 31st January of the next year.

(e) The expression "Cauvery river" includes the main stream of the Cauvery river, all its tributaries and all other streams contributing water directly or indirectly to the Cauvery river.

(f) The expression "TMC" means thousand million cubic feet of water.

Clause-XX

Nothing contained herein shall prevent the alteration, amendment or modification of all or any of the foregoing clauses by agreement between the parties".

[emphasis supplied]

S. Arguments advanced on behalf of State of Karnataka as regards the allocation of water on various heads

S.1 Submissions of Mr. Fali S. Nariman:

292. It is submitted by Mr. Nariman, learned senior counsel appearing on behalf of the State of Karnataka, that while Tamil Nadu's statement of claim before the Tribunal set out that it had developed 28.20 lakh acres of irrigation before 1974, the Tribunal's final order recognised Tamil Nadu's right to develop only 21.38 lakh acres. However, the Tribunal, in an unreasonable and inequitable manner, allocated water to Tamil Nadu for irrigating an additional 3.32 lakh acres on the vague ground of "merit and equity". This

additional allocation for 3.32 lakh acres lay squarely outside the ambit of the 1924 Agreement and could not be termed as equitable apportionment. Further, the Tribunal's allocation of water was not based on the principles of equitable apportionment as elaborated in the Helsinki Rules, 1966 which set out that such kind of apportionment must be done to satisfy the needs of a basin State without causing substantial injury to a co-basin State. The Tribunal allocated water on the basis of the 1924 Agreement which was based on flow rather than on the basis of established and comparative needs of the parties. He submitted that Karnataka's stance before the Tribunal had always been that the needs of the States, rather than the flow of the water, ought to be the basis for apportionment. This need-based apportionment depends on the contribution of water to the river valley by each State, the population of each State in the river basin and the cultivable area of each State in the basin requiring application of water to grow crops. None of these factors had been given due importance by the Tribunal even though they were highlighted by this Court in ***In Re:***

Presidential Reference (Cauvery Water Disputes Tribunal) (supra).

293. He submitted that such quantum of water had been allocated after taking into account the land in Tamil Nadu which was outside the scope and purview of the 1924 Agreement. Tamil Nadu itself had consistently taken the stand that the 1924 Agreement was the law on the subject and that the parties had to be governed by the terms therein. Thus, Tamil Nadu could not benefit from excess water allocated on the basis of land which lay outside the scope of the 1924 Agreement. It is his further submission that over and above the transgressions made by the Tribunal, it had also treated Karnataka unfairly by failing to consider the constraints imposed on Karnataka's predecessor State and by overlooking the needs of Karnataka while allocating water. The Tribunal has given several concessions to Tamil Nadu during the course of hearing and also granted Tamil Nadu water far in excess of its needs and outside the scope of the 1924 Agreement despite the evidence on record. He highlighted this aspect by referring to the Saldanha Committee Report, 1977 which had recommended large savings in existing use

of water and had allocated only 393 TMC of water to Tamil Nadu as opposed to the significantly larger quantum allocated by the Tribunal.

294. He argued that alternatively, the allocation of water could be done equitably and in accordance with justice by restoring equal rights to the party-States. He submitted that Karnataka and Tamil Nadu were co-equal States and that justice had to be done to both while allocating water, a fact which the Tribunal had failed to recognise. He submitted that the various applicable factors set out in the Helsinki Rules, 1966 were more or less evenly balanced between the two States and the same have not been kept in view. Further, based on the maxim that equality was equity, the balance or remaining volume of water available after subtracting the share of Kerala and Puducherry and after accounting for wastage ought to have been divided equally between Karnataka and Tamil Nadu. According to his calculations, Karnataka and Tamil Nadu would each get 339.5 TMC of water.

S.2 <u>Submission of Mr. S.S. Javali</u>:

295. Supplementing the argument of Mr. Nariman, Mr. Javali, learned senior counsel appearing for Karnataka, submitted that the Tribunal had recorded its findings based on conjectures and surmises rather than on evidence. He took this Court through the record of proceedings to highlight the point as to how the Tribunal had made several observations which are founded on materials on record. Further, the Tribunal also allowed Tamil Nadu to file an affidavit (Ext. 1665) regarding crop water requirement much after the stage of closing of evidence and, in fact, relied upon the said affidavit while allocating water. Karnataka was not even allowed to cross examine Tamil Nadu on the said affidavit and Tamil Nadu unjustly gained an advantage over Karnataka. Additionally, Tamil Nadu failed to establish that it had suffered injury on account of Karnataka's actions, a *sine qua non* for maintaining the complaint. He also touched on several other aspects that the Tribunal failed to consider, including drinking water for the city of Bengaluru, excess water already available to Tamil Nadu, Karnataka's water projects and its drought areas, and overall, the frustration of Karnataka's

claims and the denial of complete justice to Karnataka. The Tribunal failed to account for all the aforesaid shortcomings and its final decision was grossly violative of the principles of natural justice.

296. He relied upon the judgments in **In *Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra), ***Union of India and another v. Tulsiram Patel***[32], ***Satyavir Singh and others v. Union of India and others***[33], ***A.K. Kaul and another v. Union of India andanother***[34], ***Anisminic Ltd. v. Foreign Compensation***[35], ***Ganga Kumar Srivastava v. State of Bihar***[36], ***P.S.R. Sadhanantham v. Arunachalam and another***[37], ***Bengal Chemicals & Pharmaceuticals Works Ltd., Calcutta v. Their Workmen***[38], ***Jose Da Costa & another v. Bascora Sadasiv Sinai Narcornim and others.***[39], ***Ram Piari v. Bhagwant and others***[40], ***Phulchand Exports Ltd. v. O.O.O. Patriot***[41], ***Crompton***

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[32] (1985) 3 SCC 398
[33] (1985) 4 SCC 252
[34] (1995) 4 SCC 73
[35] [1969] 1 All ER 208
[36] (2005) 6 SCC 211
[37] (1980) 3 SCC 141
[38] (1959) (Supp) (2) SCR 136
[39] (1976) 2 SCC 917
[40] (1990) 3 SCC 364
[41] (2011) 10 SCC 300

Parkinson (Works) Pvt. Ltd., Bombay v. Its Workmen and others[42], ***Vashit Narain Sharma v. Dev Chandra and others***[43], ***Ram Bharosey Agarwal v. Har Swarup Maheshwari***[44] and ***Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai and another***[45].

S.3 <u>Contention raised by Mr. Mohan V. Katarki</u>:

297. Mr. Katarki, appearing for the State of Karnataka, urged that the affidavit (Ext.1665) stated that the crop water requirements mentioned therein were estimated in consultation with Tamil Nadu Agriculture University; however, no material was placed on record to justify such consultation. Certain formulae mentioned in the affidavit (Ext. 1665) to arrive at the crop water requirements were also incorrect. The assertions made in the affidavit (Ext.1665) especially with regard to over estimation of evaporation of crops and under estimation of effective rainfall, were blatantly incorrect. Tamil Nadu also incorrectly interpreted the evidence of Karnataka in an attempt to bolster its own case. Tamil Nadu also attempted to

[42] (1959) Supp (2) SCR 936
[43] (1955) 1 SCR 509
[44] (1976) 3 SCC 435
[45] (2004) 3 SCC 214

justify its affidavit (Ext. 1665) by arguing that the calculations made therein with respect to evaporation were based on the Government of India (GoI) guidelines, 1984 whereas Karnataka had relied upon papers from the United Nations Food and Agriculture Organisation (FAO). Tamil Nadu incorrectly argued that in such conflict, the guidelines issued by the GoI had to take precedence. He submitted that the GoI guidelines and FAO papers had to be read together and that the methodology adopted by Tamil Nadu in making such calculations was too general. Such general methodology could not be applied to the specific facts of the case. During cross examination, Tamil Nadu's own witness deposed that Tamil Nadu's water requirement was only 242 TMC and on this basis itself, the calculation of water to be provided by Karnataka at the Mettur reservoir should have only been 137 TMC as against the 377 TMC claimed by Tamil Nadu.

298. He took this Court through the factual aspects of how the quantity of rainfall affected the flow of the river. Heavy rainfall resulted in greater run-off water which fed the river while moderate

or lesser rainfall resulted in lesser run-off as the water would percolate into the ground and increase the level of ground water.

299. He then submitted that the Tribunal also failed to factor Tamil Nadu's admission before the Cauvery Fact Finding Committee that its Samba crop was fed primarily by the North-East monsoon. Tamil Nadu intentionally downplayed the contribution of this rainfall in its affidavit (Ext. 1665) to assert that it needed more water to irrigate such crop. The Tribunal adopted almost the entirety of Tamil Nadu's affidavit (Ext. 1665) for estimating crop water requirements while making only minor corrections in its final order.

300. He further submitted that Tamil Nadu obstructed the development of water projects in Karnataka thereby resulting in large tracts of land in Karnataka remaining undeveloped. Tamil Nadu wrongly invoked Karnataka's so-called obligation to obtain its consent under the 1892 and 1924 Agreements and in the case of the Kabini project, Tamil Nadu did not give its consent even after its own technical officers had agreed to the same. Tamil Nadu also stalled the Harangi project by wrongly insisting on consent from the

erstwhile State of Coorg which was not even a requirement under the Agreements.

301. He then submitted that the equitable share of water to be allocated to the party-States had to be based on needs rather than on the flow of the river. No State had any right to natural flow of an inter-state river and several factors had to be considered while assessing the needs, like basin factors, drought area and population. He took us through several doctrines and theories including the Harmon Doctrine, Natural Flow Theory and Helsinki Rules, 1966 to emphasise his point. He also relied upon the judgment of ***New Jersey v. New York*** *(supra).*

302. He submitted that in Karnataka's case, the aforementioned factors had to be looked at in combination with Karnataka's claim under the 1924 Agreement of an area of 12.64 lakh acres. Karnataka had a large extent of drought prone areas which required a suitable allocation of water. While Karnataka claimed a quantity of 408 TMC for irrigation of 27.29 lakh acres, the Tribunal arbitrarily considered an area of only 18.85 lakh acres while allocating water to Karnataka. The Tribunal applied the rule of

priority contrary to the rules of equitable apportionment and excluded large areas of land based on incorrect interpretation of the 1924 Agreement and also reduced the water allocated to various water projects based on flimsy reasoning. By reducing the allocation of water to various water projects in Karnataka on the ground of constraint of water availability/highly water-deficit basin, the Tribunal was left with 45.08 TMC of water, termed as "balance amount" of water, which it then distributed between all the States. This reduction and redistribution of water was grossly inappropriate and not based on the principles of equity. Such volume of "balance amount of water" had been taken from Karnataka's projects citing lack of water for other States and then been unfairly distributed between all the States. As per Karnataka's calculations, the actual amount of water to be allocated to Tamil Nadu ought to have been 311.6 TMC as opposed to the amount of 390.85 TMC allocated by the Tribunal.

303. He then argued that Tamil Nadu was not entitled, either in law or on fact, to claim water on the ground of protected use. He submitted that the concept of "existing use" could not be claimed as

a right but could only be considered as a factor influencing equitable apportionment. Existing use had to arise as a legally protected interest of the State and was not justifiable either by domestic law or by international law. Although several international legislations provided for existing use, in each of those cases, it was clear that existing use along with potential use was, at best, to be considered as a contributing factor and not as a right. The extent of existing use had to be measured by the concept of beneficial use and not by diversion or natural flow. Tamil Nadu's claim of existing use of water for irrigating 28.2 lakh acres was untenable. The concept of whole flow/natural flow was also imposed on Mysore by virtue of the impugned agreements. He has commended us to the authorities in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra), ***State of Nebraska v. State of Wyoming*** (supra), ***State of Colorado v. State of New Mexico*** (supra), ***The State of Washington Department of Ecology v. Clarence E. and Peggy V. Grimes***[46] and ***In Re: Hague v. Nephi Irrigation Co***.[47].

[46] 121 Wash. 2d. 459
[47] 16 Utah 421, 52 P. 765 (1898) : 41 LRA 311

304. He further argued that Karnataka was entitled to water allocation of 407.70 TMC considering the scale of its existing and ongoing water projects set out in its statement of claim before the Tribunal in 1990. Tamil Nadu did not dispute that these water projects presently existed and ongoing, rather it only argued that they were unauthorized, illegal and operating without taking its consent as supposedly mandated under the 1892 and 1924 Agreements.

305. He then submitted that the territorial changes of the riparian States lying in the Cauvery river and its tributaries materially affected the basis of rights and obligations of Madras and Mysore under the 1924 Agreement. He elaborated as to how several territories were either upper or lower riparian based on the 1892 and 1924 Agreements. After the commencement of the Constitution and subsequently, the 1956 Act, the new State of Mysore, which was originally a mid-riparian State, became an upper riparian State and the State of Madras, which was earlier both upper and lower riparian, became a lower riparian State.

306. He challenged Tamil Nadu's argument that water allocated to Karnataka for its crop should be reduced. Karnataka's crop water requirement had not been challenged by any State and any argument to the contrary was merely an after-thought. Further, Tamil Nadu's entire argument revolved around the premise that the soil in Karnataka was unproductive for irrigation and was unsustainable for paddy growth. This premise itself was baseless insofar as Tamil Nadu admitted in its own pleadings that Karnataka's soils were "favourable to grow a wide range of crops". Further, the Helsinki Rules, which set out the basis for equitable apportionment, did not recognise soil condition or quality as a relevant factor in equitable allotment. The relevant factors were the existence of cultivable land or area and shortage of rainfall to meet the consumptive utilisation of crop. He also argued that one riparian State's productive use of water was no ground to deprive another co-riparian State's share.

307. It is canvassed by him that the Tribunal did not allocate excessive water to Karnataka's water projects, especially the Hemavathy Project. He urged that Karnataka was entitled to

construct a reservoir of 45 TMC with utilisation capacity of 67.5 TMC. Since the current gross capacity of the Hemavathy reservoir was only 37.1 TMC and the Tribunal had allocated only 43.67 TMC, there was no question of any excessive water being allocated to Karnataka. As regards Tamil Nadu's argument that the number of days to be considered for growing paddy in Karnataka should be reduced from 145 days to 120 days and that the water allocation should be reduced accordingly, as also the argument that the puddling requirement should be reduced from 267 mm to 150/200 mm, he replied that these facts and figures had, in fact, been nullified by the findings of the Tribunal and by the Assessors appointed by the Tribunal whose findings were contrary to the said argument.

308. He also challenged Tamil Nadu's argument before the Tribunal that excessive water had been allocated to Karnataka for rice cultivation. He submitted that the rice cultivated in Karnataka was in drought regions and could not be compared to the rice cultivated in non-drought areas in Tamil Nadu as there was a substantial difference in contributing factors such as percolation and puddling

losses. Climatic constraints justified higher water allocation to drought areas. For the same reason, Tamil Nadu's demand for higher allocation of water was also unjustified and improper. Infact, Tamil Nadu's cultivation of double crop was completely inconsistent with the prevailing climatic conditions in the area. Tamil Nadu's Kuruvai crop, which would have benefitted from water provided by the North-East monsoon, was instead primarily sustained by irrigation supplies from Karnataka as it was cultivated much before the onset of the rains. The only sensible course of action would be to disallow Tamil Nadu's Kuruvai double crop and allow only the Samba single crop.

S.4 <u>Proponements of Mr. Shyam Divan</u>:

309. Mr. Divan, learned senior counsel appearing for Karnataka, has stressed on the need to recognize the importance of ground water while allocating available water resources. Ground water is a renewable resource and, if not extracted regularly, would reduce the absorption capacity of the underlying aquifer resulting in rain water/surface water being wasted as run-off. Extraction of ground water is, thus, an optimal utilisation of available resources.

310. He submitted that the Tribunal had erroneously excluded a large coastal area while rejecting the argument for groundwater. He also submitted that the Tribunal committed a patent error by failing to reduce the amount of water allocated to Tamil Nadu despite recognising the availability of 20 TMC ground water in Tamil Nadu and the conjunctive use of the same along with surface water. Such quantum of ground water ought to have been factored in as an available/additional resource in Tamil Nadu for the purposes of irrigation.

311. The quantum of water allocated to Tamil Nadu under the head of "irrigation requirement" ought to have been reduced by the quantum of available ground water by either 47 TMC (as per Tamil Nadu's rejoinder recorded in the final report of the Tribunal) or 30 TMC (as per Tamil Nadu's pleadings) or, at the very least, 20 TMC (as per the findings of the Tribunal) and, accordingly, the quantum of water to be provided by Karnataka at the inter-state border also ought to have been reduced proportionately. The efficiency of utilising ground water, as compared to surface water, was much higher and when factoring the available amount of ground water

and its greater utilisation efficiency, the aforementioned figures of 47/30/20 TMC ought to be increased to 72/46/30 TMC respectively.

312. He then submitted that the Tribunal had completely overlooked the water requirements for the city of Bengaluru in its final order. Bengaluru being a metropolis with a burgeoning population ought to have been treated as *sui generis* and been given special dispensation while water was being allocated. Water supply for Bengaluru was entirely sourced from the Cauvery river but its use could not be treated as a trans-basin diversion as erroneously claimed by Tamil Nadu which itself was responsible for trans-basin diversion of water to irrigate an area of 3.29 lakh acres within its territory. The Tribunal allocated a miniscule amount of 1.85 TMC to Karnataka under the head "domestic and industrial water requirement projected for 2011" while arriving at 20% consumptive use for domestic purposes and 2.5% for industrial purposes. He did not challenge the percentage of consumptive use; rather he contended that the Tribunal had not considered the actual water requirements for the city of Bengaluru.

313. He then contended that the Tribunal had wrongly considered water allocation for only 1/3rd of the population of Bengaluru on the basis that 36% of the city lay within the basin. This amount of water was even further reduced by the Tribunal on the basis of unverified figures provided by Tamil Nadu. The Tribunal also reduced the quantum of water allocated to Bengaluru on the basis that 50% of its needs could be met from groundwater without relying upon any evidence or pleadings to that effect. For Bengaluru, groundwater, at best, could be considered as a complementary/supplementary source rather than a primary source. While allocating water to the States, priority had to be given to drinking water but the Tribunal had failed to consider this aspect. Accordingly, Bengaluru should be given an increased water allocation of 10.14 TMC.

314. He contended that the water requirements for Bengaluru were projected up till the year 2011 as set out in the pleadings/submissions which had been submitted at the time of the initial hearing in 1990. Seventeen years had elapsed by the time the final order was passed. The projections mentioned in the

pleadings, thus, could not be limited till the year 2011 especially when the Tribunal itself had suggested that drinking water ought to be calculated on the basis of projections for 2025. Despite this factual situation, the Tribunal proceeded on the basis of projections till the year 2011. The time gap between the submission of pleadings and the final order ought to have been a relevant factor while allocating water.

315. It is further urged by him that the Tribunal had erroneously rejected Karnataka's claim of water for its second crop while allowing Tamil Nadu's claim for second crop. Such rejection was inequitable and improper. The Tribunal had allowed allocation of water for Tamil Nadu's Thaladi second crop to the extent of 1.85 lakh acres with the justification that approximately 95,000 acres were developed prior to 1924 and a further 90,000 acres were developed as per the 1924 Agreement. Based on equitable apportionment, Karnataka should have been allocated atleast the same amount of water for an equivalent area of 1.85 lakh acres, but the Tribunal failed to do so. Surprisingly, while recognising

Karnataka's entitlement for second crop to the extent of 67,000 acres, the Tribunal failed to allocate any water for the same.

316. The Tribunal also failed to account for the fact that Karnataka's farmers had been growing second crops much prior to 1974 and by the time the final order was passed in 2007, the farmers had been growing second crop for decades. These farmers had developed their practices and expectations based on second crop and it was wholly inequitable for the Tribunal to reject Karnataka's claim. He also reiterated Karnataka's stance that the final figure of 45.08 TMC "balance resource" of water was erroneously arrived at. The Tribunal should have first considered and allocated water for Karnataka's claim for second crop after which it could have arrived at a "balance" amount of water available.

317. It is his further submission that the Tribunal had incorrectly rejected all schemes for lift irrigation in its final order. This was problematic for Karnataka which relied upon lift irrigation, particularly in drought-prone areas like the Kabini region, to the extent of almost 3.04 lakh acres which requires approximately 18

TMC of water. Tamil Nadu, on the other hand, primarily relied on flow irrigation and minor irrigation and did not have any major lift irrigation schemes. Thus, the Tribunal's order rejecting all lift irrigation schemes substantially affected Karnataka while making negligible impact on Tamil Nadu.

318. He also argued that the Tribunal had unjustifiably allocated an excess amount of water to Tamil Nadu with respect to the Cauvery Mettur project. The 54.68 TMC of water allocated to Tamil Nadu for 3.21 lakh acres was based on the deposition of Tamil Nadu's Witness No. 1 and Tamil Nadu's affidavit (Ext. 1665). The deposition of Tamil Nadu's Witness No. 1 confirmed the contents of the Cauvery Mettur Project Report which indicated that Tamil Nadu's water requirement was actually 41.89 TMC. On the other hand, Ext. 1665 had no evidentiary value since the same was an unverified affidavit for which Karnataka was not allowed to cross-examine the deponent. Even the Tribunal had indicated that the said affidavit would not be relied upon for supporting Tamil Nadu's case, rather it would only be used as an admission. The reliance placed on Ext. 1665 was misplaced and ought not to have been

considered at all. The evidence of Tamil Nadu's Witness No. 1 should have been the sole criteria for allocation of water for the Cauvery Mettur project. Thus, the Tribunal should have allocated not more than 41.89 TMC of water to Tamil Nadu for the said project and not 54.68 TMC as done in the final order.

319. Finally, he submitted that the Tribunal had failed to recognize that the area of irrigation requiring water allocation, as submitted by Tamil Nadu, was covered by two irrigation projects/systems in Tamil Nadu and had awarded an excess amount of 9.51 TMC in that regard. This "double accounting" of irrigable areas was erroneous and the water allocated to Tamil Nadu had to be proportionately reduced. Tamil Nadu's witness, A. Mohanakrishnan, had himself admitted that the existing second crop area was 70,000 acres whereas the Tribunal considered the area to be 87,500 acres. Similar admissions had been made with respect to other areas in Tamil Nadu. Thus, the water allocated by the Tribunal was far in excess of the water required by such areas for irrigation.

T. Arguments put forth by the State of Tamil Nadu

T.1 Submissions of Mr. Shekhar Naphade:

320. Mr. Naphade, learned senior counsel, opened the arguments on behalf of the State of Tamil Nadu by taking this Court through several documents, including the National Water Policies of 1987 and 1992, the Helsinki Rules, 1966 and the Campione Consolidation of the International Law Association Rules on International Water Resources, relevant historical aspects of the matter and the evidence on record. He also took this Court through the scope and extent of the 1956 Act and pointed out the interplay between several sections of the Act. He submitted that the term 'agreement' as mentioned in Section 2(c) of the 1956 Act included all agreements executed prior to the coming into force of the Act and that there was no limitation on any kind of agreement under this section. Even pre-1947 agreements in relation to the use, distribution or control of inter-State waters were brought under this ambit. Thus, Karnataka's submission that the 1892 and 1924 Agreements were not within the scope of the said Act was baseless.

He submitted that the river was a hydrological unit and remained unaffected by political boundaries.

321. He then took this Court through certain statistical data and evidence on the basis of which water ought to be apportioned between the States. He submitted that the water ought to be apportioned equitably in line with the formula laid down in the Helsinki Rules, 1966. The density of population is much higher in Tamil Nadu than in Karnataka thus putting a greater demand on water for all sectoral uses. He submitted that the Cauvery basin upto the Mettur Dam is influenced by the South-West monsoons whereas the area downstream of the Mettur Dam is influenced by the North-East monsoons which are erratic, undependable and, being associated with cyclonic storms, also responsible for heavy rainfall and consequent loss of agricultural produce in the basin. Karnataka is primarily influenced by the more effective South-West monsoons whereas Tamil Nadu, lying downstream from the Mettur Dam, faces the brunt of the ineffective North-East monsoons. He stressed that the North-East monsoons could not be relied upon for irrigation owing to their unpredictability, a fact which Karnataka's

witnesses had also deposed to. He referred to the Saldanha Report, 1977, specifically the chart therein, which set out the storage capacity of water much above the 124 TMC figure. He expressed his apprehension that if Karnataka was granted further capacity to store water, such excess water retention would be the cause for further disputes between the States.

322. On the aspect of soil capacity in the two States, he submitted that while Tamil Nadu has clayey soil which is ideal for paddy cultivation, Karnataka has red, loamy/laterite soil which is more suited for dry crop. He highlighted several pieces of evidence to buttress this argument including depositions from Karnataka's witnesses wherein it has been stated that Karnataka should restrict its rice crop and not grow a second rice crop. He submitted that the water requirement for growing paddy in Tamil Nadu is substantially less than the requirement for growing the same amount of paddy in Karnataka and there is greater productivity of growing paddy crops in Tamil Nadu. He also mentioned that the recommendations made by the C.C. Patel Committee were outdated and that Karnataka's reliance on the same was unjustified.

323. He also set out the three main kinds of paddy crop grown in Tamil Nadu, namely, Kuruvai, Thaladi and Samba, and the water requirements for growing these crops and how Tamil Nadu's climate was ideal for growing such crop. He submitted that owing to the cropping pattern combined with the soil types, there should be no restriction on Tamil Nadu for growing second crop of paddy whereas Karnataka should be restricted from growing any second rice crop and even its first rice crop should be limited. He has placed reliance on data and evidence regarding Karnataka's Kabini and Hemavathy water projects. He argued that these projects had violated the provisions of the 1892 and 1924 Agreements and have affected Tamil Nadu's existing use of water. It is submitted that Karnataka constructed the Hemavathy Project without taking Tamil Nadu's consent and also failed to provide Tamil Nadu with details about the project as mandated under the 1892 and 1924 Agreements. The Hemavathy reservoir was designed in such a way as to deplete its entire storage capacity without making provisions for carry-over storage thereby preventing any surplus water from being released to Tamil Nadu. Karnataka proposed the Kabini

Project in such a manner as to utilise the entire yield of water at the site of the dam thereby denying water to the lower riparian States. The Kabini reservoir diminished the flow of water downstream to Tamil Nadu, thus, affecting Tamil Nadu's existing use. Karnataka submitted multiple proposals for supplementing the water from this project with lift irrigation schemes but this was expressly disallowed by the Tribunal in its final order. In spite of this, Karnataka has gone ahead and executed a lift irrigation scheme in the Kabini sub-basin and utilized the same for irrigation, while refusing to release water to Tamil Nadu.

324. He submitted that while the Tribunal had overall allocated water to Karnataka for an area of 18.853 lakh acres, that figure included an area of 3.44 lakh acres which had been erroneously allowed on grounds of merit without any evidence or material to justify the same. Thus, the overall figure of 18.853 lakh acres deserved to be reduced by 3.44 lakh acres. This was without prejudice to the argument that the area to be considered had to be restricted to the existing area as in June 1990, the cut-off date for the Tribunal's consideration. Further, the area under consideration

for Karnataka's Kharif paddy has to be reduced and the number of days for cultivation also had to be cut down from 145 to 125 days. He stressed on the evidence on record submitting that there is uncontroverted expert opinion which categorically states that Karnataka was responsible for wastage of large quantities of water and that Karnataka ought to reduce its paddy crop. This evidence had not been considered by the Tribunal. He also submitted that Karnataka should not be allowed to draw water from the major water reservoirs, viz., Harangi, Hemavathy, Krishna Raja Sagara and Kabini, during the summer season except for perennial crop and domestic needs and this, too, has to be monitored by the Regulatory Authority. He suggested that Karnataka ought to consider the possibility of building another dam above Mettur at the border to resolve its water problems.

325. It is further argued by him that around 64% of Bengaluru lay outside the basin and the Tribunal was right to consider only 1/3rd of Bengaluru's needs while determining its water supply. Any further water supplied to Bengaluru would amount to trans-basin diversion in complete contravention of the principles of equitable

apportionment, the National Water Policy and the Helsinki Rules, 1966. Such trans-basin diversion is detrimental and would lead to chaos. He also submitted that Karnataka's contention that the Tribunal ought to have considered water projections for the year 2025 would necessarily imply that water resources for Tamil Nadu's territories, especially the urban areas, would also have to be distributed in the same light. Karnataka did not follow the Town Planning Act/Rules and allowed Bengaluru to grow unchecked and unplanned and also failed to plan for the development of Bengaluru's water supply, a fact made clear from its Master Plan of 1976 which significantly omits to provide for the domestic water needs of Bengaluru. Further, Karnataka did not treat the sewage water released by Bengaluru and such sewage was being released into the Cauvery which, in turn, was flowing down to Tamil Nadu. Karnataka would be able to procure a large amount of water for Bengaluru if it treated such sewage water.

326. He argued that Karnataka already had adequate and alternate water resources for Bengaluru, including ground water, the Netravathy River and the Tungabhadra tributary of Krishna River.

These resources were under-utilised and could be used to provide water to Bengaluru. Per contra, Chennai was woefully in short supply of water owing to lack of water resources and poor rainfall. Tamil Nadu was forced to divert water from other areas to Chennai to meet such shortfall. He argued that it was unfair to burden Tamil Nadu with the responsibility of providing for Bengaluru's water supply when Karnataka itself had been negligent in planning for it, especially when the Cauvery basin was a drought basin and large parts of Tamil Nadu were also drought prone.

327. He also stressed on Tamil Nadu's method used to calculate crop water requirements as the guidelines based on Food and Agriculture Organisation (FAO) guidelines which were also recorded in the Government of India (GoI) Guidelines, 1984. He took this Court through the various factors and calculations involved under these guidelines, including evapo-transpiration, percolation loss, puddling and nursery requirements, system efficiency and effective rainfall. He submitted that Tamil Nadu had adopted calculations for the above factors based on the FAO and that Karnataka's

contention that Tamil Nadu had miscalculated the extent of evapo-transpiration and effective rainfall was baseless.

328. He argued that as on the cut-off date (June 1990), Tamil Nadu had developed/irrigated an area of 29.269 lakh acres whereas the area developed in 1972 was 28.208 lakh acres. Despite the above figures, the Tribunal gave a concession for only 24.708 lakh acres while also disallowing large areas for second crop even though the agro-climatic conditions prevalent in the area were ideal for raising two crops. He highlighted that while Tamil Nadu had adopted 60% overall efficiency while calculating the gross irrigation requirement which was the maximum possible level allowed, the Tribunal chose to adopt a higher figure of 65%. He took this Court through the evidence and record to submit that the Tribunal ought to have allocated a higher quantum of water to Tamil Nadu and reduced the quantum allocated to Karnataka. He submitted that under the 1924 Agreement, both Karnataka and Tamil Nadu were allowed to extend the area under irrigation solely by improvement of duty, without any increase in the quantity of water used, apart from the area permitted under Clauses 10(iv) and 10(v). Karnataka strictly

adhered to the 1924 Agreement till 1974 but claimed entitlement for areas which it had not even developed after 1974. Tamil Nadu never claimed any extra quantity of water other than the volume it was entitled to under the Agreement. He also stressed on the need to allow Tamil Nadu double cropping owing to the favourable climatic and soil conditions whereas Karnataka ought not to be allowed double cropping owing to its drought areas and sub-standard soil conditions.

329. He then countered Karnataka's submission that groundwater was an additional resource and submitted that such water supply could not be considered as an additional resource as it was recharged by surface water and was subject to various factors like rainfall and soil characteristics. Ground water levels were not consistent throughout the year and Karnataka's construction of water projects had even reduced the flow of water into the Mettur Reservoir which, in turn, had drastically reduced the groundwater recharge level available to Tamil Nadu. Estimating the levels of ground water was scientifically complicated and difficult requiring huge amounts of data and field exploration. In fact, there was no

single comprehensive technique to determine ground water and Karnataka's own witness had deposed that it was not possible to estimate the recharge component of ground water when it was recharged by surface flows and rainfall. The other Water Tribunals like NWDT and KWDT had not considered groundwater to be a factor while apportioning water, a fact which was recorded by the Tribunal. The UNDP Report relied upon by Karnataka to establish its argument was not relevant in the present context as the same was outdated and there had been a substantial change in the flow regime. The Central Water Board too had not agreed with the assessment of the UNDP Report, concluding that the use of ground water could not be reckoned as use of the Cauvery river water. He also referred to the study conducted by W. Barber of World Bank, 1985 and the UNDP Study Report, 1973 in that regard.

330. He submitted that in any event, from February to June/July, the water requirements of the entire Delta region had to be met from ground water as there was no surface flow during that time. Reports from government bodies recorded that the groundwater was required for domestic and livestock uses during the aforestated

months and, thus, such water could not be used for irrigation purposes. Additionally, groundwater in the Delta region was used for protective irrigation and to grow early nurseries. He submitted that the evidence on record showed that in the Cauvery Delta region, reduction in surface flow resulted in lesser groundwater recharge which ultimately resulted in salt water intrusion from the sea. The quality of available ground water was ultimately poor, saline/brackish and unsuitable for use.

331. He submitted that Karnataka could not ask for 5 TMC water out of the 10 TMC which had been allotted to Tamil Nadu towards environmental needs. He submitted that a certain minimum flow of the river had to be maintained to keep the river free flowing as set out in the National Water Policy, 2002. Such natural flow could not be considered as wastage as it was essential for maintaining the ecology and ecosystem in and around the river. He also submitted that as regards the allegation that 88 TMC of water was going into the sea and being wasted, there were several factors to consider in that regard and that Tamil Nadu was taking utmost care to ensure that no wastage occurred. A certain minimum standard of outflow

had to be maintained to prevent erosion, reduce salt water intrusion and to maintain marine life and bio diversity. Further, the topography of the Delta region was such that no viable storage area could be built to conserve this water. He submitted that the North-East monsoons, being erratic, would result in heavy showers, not all of which could be conserved.

332. Further, Karnataka's contention that there had to be an equal apportionment of water between the two States was untenable. He relied upon the observation made by the Narmada and Krishna Water Disputes Tribunals that the principle of equality did not imply that there must be an equal division of water between the States but instead meant that the States must have equal consideration and equal economic opportunity. Such equality would not necessarily result in the same quantity of water being provided to the parties.

333. He stressed that Tamil Nadu needed month-wise release of water from June onwards to ensure that its Kuruvai crops were irrigated. Post 1974, Karnataka had been impounding water in its reservoirs and delaying flow of water to Tamil Nadu and contending

that any shortfall could be adjusted at the end of the season. He submitted that the water was needed at a particular time, from June onwards, to irrigate its crops and that any end-of-season release of water would not fulfill the objective of such water being used for irrigation purposes.

334. He also argued that Karnataka had been persistently defiant in preventing Tamil Nadu from utilizing its share of the Cauvery water and that such defiance necessitated the need for the Cauvery Management Board. Karnataka had started construction on four reservoirs across the Cauvery tributaries, viz., Kabini, Hemavathy, Suvarnavathy and Harangi, without taking the requisite approvals from the Planning Commission or consent from Tamil Nadu. Karnataka also objected to the formation of the Tribunal and needlessly delayed the proceedings. Even after the formation of the Tribunal, Karnataka violated the Tribunal's interim order which had directed it to release 205 TMC of water at Mettur. Karnataka even went so far as to promulgate an Ordinance to nullify the interim order which was then set aside by this Court. Even when compelled to follow the interim order, Karnataka delayed in

constituting the implementation machinery required to enforce the said order and also challenged the Tribunal's order in separate court proceedings to delay its implementation. Karnataka also refused to strictly follow the order thereby failing to ensure monthly quantities of water inflows at the Mettur during the June period. Even after the final award was passed, Karnataka failed to ensure stipulated flows mandated by the award. In the light of Karnataka's transgressions, he submitted that there was a need for effective machinery to implement the Tribunal's order.

335. He also argued that the Tribunal was completely justified in rejecting Kerala's claims for trans-basin diversion of water. Kerala had wrongly claimed that the Cauvery basin was a surplus basin, something completely contrary to fact and which had been recorded by the Tribunal. Trans-basin diversion of water could not be allowed unless the needs of in-basin requirements were met and even then, such diversion was against the spirit of the Inter-State Water Disputes Act. Kerala wished to operate its hydro-electric projects but the Tribunal had clearly held that irrigation projects had to be given preference to. Kerala tried to hoodwink the Tribunal

by adding irrigation components to its hydro-electric projects. The irrigation components were incidental to the primary use of these projects and in fact, such projects had not even been approved by the competent authorities.

336. Even otherwise, the irrigation sought to be achieved by Kerala was excessively high and was done so without keeping in mind its limitations in respect of soil and topography which required excessive water to be utilised. Kerala was seeking to grow summer and perennial crops utilizing water from a deficient basin which was an unsuitable proposition. Kerala already had a good irrigation system in place and such irrigation was supplemented by rainfall which it receives. Kerala also received drinking water supply from the Siruvani reservoir and several dams had already been constructed across its rivers for providing water. The Tribunal, thus, rightly rejected Kerala's claims.

337. He also challenged Karnataka's submission as regards its drought area. He submitted that there is no universally accepted definition of drought and if at all drought is to be considered as a factor for equitable apportionment, then Tamil Nadu too has a

significant drought area. Karnataka's claimed drought area is highly exaggerated but if the Tribunal was to consider Karnataka's drought area while allocating water, then Tamil Nadu also ought to be given a proportionate share of water to irrigate its own drought area.

T.2 <u>Contentions raised by Mr. Rakesh Dwivedi</u>:

338. Mr. Dwivedi, learned senior counsel appearing for Tamil Nadu, argued, apart from other aspects which we have already addressed, on the aspect of injury suffered by/prejudicial affectation caused to Tamil Nadu on account of Karnataka's actions. He submitted that there was ample evidence on record to prove that Karnataka's upstream abstraction post 1974 substantially reduced the area and quantum of water available to Tamil Nadu. Karnataka increased the area of irrigation much beyond the scope of the 1924 Agreement which, in turn, affected the existing irrigation of Tamil Nadu and the evidence for the same had been placed before the Tribunal. It was further submitted that existing use of water was a

facet of equitable apportionment and Karnataka had failed to prove that its planned diversion of water would not harm the existing, established use. Tamil Nadu's claim was not with regard to the flow of water, as wrongly claimed by Karnataka, rather it was based on protection of existing use established under the 1892 and 1924 Agreements.

339. He argued that Karnataka's plea that the erstwhile State of Madras effectively had veto power over its water projects was untenable. The entire purpose of seeking consent from Madras before constructing any water project was to ensure that existing irrigation was not jeopardized and even otherwise, consent was always required from the lower riparian State when constructing such projects. He also submitted that there had been no violation of natural justice by the Tribunal while hearing the matter. It was submitted that the Tribunal had clearly analysed every parameter and made suitable changes to such parameters as required while passing the final order. Tamil Nadu's affidavit (Ext. 1665) was merely a collation of materials already available on record.

Pertinently, Karnataka itself contended that the Tribunal's Assessors were not competent to assess crop water requirement as they relied on Ext. 1665 but then relied upon the Assessors' recommendation for justifying its own crop water requirement.

340. Both Mr. Naphade and Mr. Dwivedi touched upon the scope and extent of this Court's power under Article 136 of the Constitution of India to hear an appeal against the Tribunal's orders. It was submitted that this Court had the discretion to use such power and that while the extent of this power is wide in amplitude, this Court has traditionally applied judicial restraint while exercising it. It is submitted that the present dispute is complex and riddled with factual and scientific complexities which this Court may find insurmountable while assessing. It is also put forth that the Tribunal had taken into account various factual aspects and relied upon the assistance of technical experts while considering the scientific principles applicable to the present dispute in the course of the long hearing in the matter. The Tribunal has also considered socio-economic factors and public interest while rendering its final decision. Considering the above

submissions, a thorough understanding of scientific principles as well as possessing a relevant discipline in science to apply the scientific principles to the factual matrix is required and it is an exercise which would not fit into the accepted principle of judicially manageable standards.

341. Mr. Naphade and Mr. Dwivedi have placed reliance on number of decisions to bolster their stand some of which have already been referred to and some shall be referred to wherever necessary.

U. Arguments advanced on behalf of the State of Kerala

342. Mr. Jaideep Gupta, learned senior counsel appearing on behalf of the State of Kerala, submitted that Kerala contributed around 147 TMC to the Cauvery basin, around 20% of the water, and had asked for a proportionate share of water by claiming 99.8 TMC. The Tribunal, however, had allocated a meagre 30 TMC of water to Kerala, around 4%, for its needs. Such allocation is absolutely not equitable. He argued that equity, and not equality, should govern the allocation of water between the States and that it was unreasonable that Karnataka and Tamil Nadu should be given

equal share of the entire amount of water allocated by the Tribunal. The concept of equity has been recognized in the Helsinki Rules, 1966 and the factors governing such apportionment have also been mentioned therein, later affirmed in the Berlin Rules.

343. He went into the historical perspective and explained to this Court as to how Kerala, which was not party to the 1892 and 1924 Agreements, became introduced to the dispute. He submitted that Karnataka and Tamil Nadu were not wholly representative of the Cauvery basin and that Kerala too was an integral part of the basin, contributing a large percentage of the water. The 1892 and 1924 Agreements executed by and between Mysore and Madras did not bind Kerala, which was not party to the same. None of the predecessor States to Kerala, viz., Travancore, Cochin or Malabar, were recognized as interested parties during the disputes between the riparian States of the Cauvery basin and these riparian States also objected to the involvement of Kerala in the dispute. He elaborated that even as per the definitions given in the 1956 Act, Kerala could not be considered as a principal successor State to its predecessor as its predecessor States were not party to the 1924

Agreement. As the 1892 and 1924 Agreements were in the form of treaties entered into between two sovereign entities, the Tribunal lacked the jurisdiction to enforce them. He also submitted that when Kerala raised its objections before this Court regarding the necessity to be involved in the matter, it was told to abstain from the proceedings until the matter was finally adjudicated between Tamil Nadu and Karnataka.

344. He submitted that allocation of water by the Tribunal was required to be based on certain factors and that such allocation had to be done in a particular manner. First, the Tribunal had to determine the total yield of basin water including surface and ground water. Then, the total yield of water had to be apportioned and there had to be a mechanism for release of such water. Finally, there needed to be a monitoring system to ensure that such release of water was done properly. He also submitted that the allocation of water had to be done on a need-based priority and the Tribunal ought to have considered the consumptive and non-consumptive needs while making such allocation.

345. He submitted that although the Kabini and Bhavani tributaries of the Cauvery flowed through the erstwhile Malabar district of Madras, yet no developmental activities could be taken up in that region. Even after the State of Kerala was formed in 1956 by combining Travancore, Cochin and Malabar, it could not take up any developmental activities in the Malabar region due to protests from Tamil Nadu and Karnataka who argued that the 1924 Agreement could only be reviewed in 1974. Even after 1974, all but one of Kerala's projects were denied sanction by the Central Government despite the fact that the Cauvery Basin in Kerala had a high head and steep gradient, thus, making the area ideal for generation of hydro-electricity. Owing to its geography and topography, Kerala has a higher capacity/potential to generate hydro-electricity. This fact had been proved before the Tribunal. Kerala also has an acute shortage of electricity, a problem which has stunted its industrial growth and there is a pressing need to utilise the potential of water projects in the State. There was also an inability to set up alternate types of power plants like nuclear power owing to the topography of the region. Also, the rainfall

distribution in Kerala was such that there is no rain in summer and the west flowing rivers within the State go dry during the summer thereby causing water scarcity. All these factors have necessitated the construction of water projects in Kerala.

346. He argued that the Tribunal's refusal to allow Kerala's water projects is based on an erroneous assumption that such projects would result in trans-basin diversion of water. He submitted that Tamil Nadu and Karnataka had exaggerated their claims resulting in an impression being created that the Cauvery basin could not cater to their needs and, hence, was water deficient. He argued that legally, there is no bar on preventing trans-basin diversion from a water deficit basin. He also touched upon the concept of the doctrine of stability and submitted that while the Tribunal had the jurisdiction to allocate the water to the States, the States are to be allowed to utilise such water in a manner that they deemed fit and that the Tribunal could not dictate as to how the States used such water. Next, he argued that in the present case, trans-basin diversion is essential to ensure the most economical way of utilizing the river's water and that a basin State must have full freedom to

utilise the waters which it is entitled to. He further argued that the Tribunal had allowed water projects to come up in Tamil Nadu and Karnataka which have actually diverted water from the Cauvery basin but in Kerala's case, where there was an urgent and pressing need for such projects, the Tribunal has rejected Kerala's proposals. Finally, he argued that the rights in interstate river waters belonged to the inhabitants of the basin State and not to the inhabitants of the basin itself.

347. He argued that the Tribunal has erroneously omitted to account for 20TMC of ground water which was available in Tamil Nadu. Tamil Nadu had access to ground water resources while Kerala did not as set out in the report of the Cauvery Fact Finding Committee. He also argued that the Tribunal has failed to account for the hydrology of the basin, particularly the contribution of water by each basin State. The Tribunal ought to have allocated appropriate volume of water for Kerala's Banasurasagar project, the Mananthody Scheme and Kerala Bhavani Scheme, apart from other water projects being developed in the State.

348. He also challenged the Tribunal's decision to make Kerala adopt a single-crop paddy. He argued that Tamil Nadu and Puducherry had been allocated water for three-crop paddy as also for dry irrigated crops, whereas Kerala's farmers had been barred from cultivating their crops in their traditional manner. He argued that the Tribunal's decision is contrary to the prevailing geological, geomorphological, climatic and soil patterns prevalent in the State and also erroneous in restricting Kerala from optimal cropping patterns. Combined with the Tribunal's decision to restrict all lift irrigation schemes, the Tribunal's decision left Kerala with limited cultivation.

349. He has further submitted that Tamil Nadu has been intentionally obstructing Kerala from setting up water projects as it was benefitting from the transitional provisions in the Tribunal's award. He submitted that pending the completion of its water projects, Kerala was unable to retain the full amount of 30TMC water allocated to it. The Tribunal has directed Kerala to release water in excess of 30TMC to Karnataka and Tamil Nadu until it is

capable of utilizing the full capacity. To benefit from this transitional provision, Tamil Nadu has purposely been impeding Kerala's water projects.

350. He submitted that the Tribunal has failed to make provisions for surplus water, restricting Kerala's water allocation to 30 TMC a year in case of a surplus. This would benefit the other States due to lack of a specific provision for sharing surplus water with Kerala. He also submitted that Tamil Nadu is responsible for wasting large amounts of water and that the Tribunal has failed to rectify the situation. He also submitted that Kerala ought to be compensated for the water supplied from its Siruvani reservoir to Coimbatore. He referred to the judgments of in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra) and ***Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam v. Union of India and others***[48] while making his submissions.

[48] 1990 (3) SCC 440

V. Submissions urged on behalf of Union Territory of Puducherry

351. Mr. Nambiar, learned senior counsel appearing for the Union Territory of Puducherry, submitted that Puducherry had claimed 9 TMC of water for its needs whereas the Tribunal had allocated only 7 TMC of water to it. Puducherry was now seeking only an additional 1 TMC of water to be allocated to it from the month of June onwards which could either be released by Tamil Nadu or be allocated to Puducherry out of the 10 TMC reserved by the Tribunal for environmental purposes.

352. He submitted that Puducherry's topography, soil and climatic conditions favoured cultivation of only paddy crop and that no other crop could survive in the heavy clay prevalent in the region's soil. Further, the topography in the region being plain and monotonous, there was no scope for putting up storage structures for holding water and Puducherry was completely dependent on the water released by Mettur dam. He submitted that Puducherry has 27,000 acres of cultivable area which has remained static over the years and that there is no scope for increase of such area. He also submitted that the rainfall in the region is erratic coming primarily

from the North-East monsoons. This resulted in heavy bursts of rain with long, dry spells. Such sudden and heavy influx of water damaged the standing crops and flowed into the sea since there is no facility capable of storing such water. Thus, Puducherry's only reliable source of water is from the Mettur Dam. However, water released from the Mettur Dam is sometimes insufficient for Puducherry's needs and is incapable of irrigating Puducherry's entire paddy crop.

353. He then submitted that there is no extractable ground water in the region due to the intrusion of saline water from the neighbouring Bay of Bengal. He submitted that saline water has intruded 6 kilometres into the land along the river channels and has rendered wells and shallow aquifers unusable for irrigation and domestic needs. In light of this, he submitted that ground water could not be taken into consideration while allocating river water. He also argued that the Tribunal's scope of adjudication is limited to inter-State river water and that ground water could not be treated as river water. While the Berlin Rules set out that river

water included groundwater, no such definition is available either in the Constitution or any other Indian law.

354. He also submitted the cropping pattern in Puducherry required higher allocation of water. He submitted that Kuruvai crop is grown between July and September after which Thaladi crop is grown on the same land and then the Samba crop is grown. He submitted that the Kuruvai and Samba crop could only be planted after flushing off the salt on the land. This flushing required around 0.5TMC of water before planting the crop in June. The Tribunal, however, erroneously directed Puducherry to obtain the requisite water from rainwater, the supply of which was not only erratic but also primarily occurring from October onwards.

355. He submitted that despite the Tribunal having allocated 7TMC of water to Puducherry, such volume is not being made available to it. He submitted that since Puducherry does not have adequate storage capacity, such volume of water ought to be made available by Tamil Nadu at the border.

356. He argued that Puducherry has not filed an appeal under Article 136 of the Constitution against the Tribunal's final order as

it is of the opinion that this Court could not entertain such an appeal against the final order. Hence, Puducherry had filed an application under Section 5(3) of the 1956 Act instead, which is pending. He argued that since this Court is hearing the matter finally, Puducherry's application under Section 5(3) ought to be considered by this Court.

357. He also submitted that the waters of the Cauvery ought to be free-flowing for effective utilisation and in the light of the same, Karnataka ought not to be allowed to build any further structures to impede/obstruct such flow.

W. <u>Arguments on behalf of Union of India</u>

358. Mr. Ranjit Kumar, the learned Solicitor General of India, contended that the purpose of enacting the 1956 Act is to provide a mechanism for adjudication of water disputes arising among the various States and that it is a complete code in itself. He took this Court through various sections of the Act to buttress his argument that a con-joint reading of Sections 4, 6, 6A and 11 provides for the constitution of a Tribunal to hear water disputes, the power to make a scheme to implement the decision of the Tribunal and

further there is a constitutional bar on the jurisdiction of this Court and other courts in respect of such water disputes. Such extensive provisions highlight that the Act is a complete code in itself.

359. He submitted that as per the provisions of the Act, once the Tribunal's award has been published in the Official Gazette, the same is final and the mechanism for implementation of this award is set out in Section 6A of the Act and empowers the Central Government to make schemes to implement the said award. Such scheme had to be tabled before both Houses of the Parliament. The Central Government is also empowered to decide the jurisdiction and powers of the Authority established to implement the Tribunal's award. As contrasted with the provisions of the Consumer Protection Act which allowed for the Consumer Forum's order to be sent to a civil court for execution in case the Forum was unable to execute it, the provisions of the 1956 Act only allows for the award of the Tribunal to be treated as a decree of this Court and be implemented by virtue of a Central Government scheme.

360. It is submitted by Mr. Ranjit Kumar, learned Solicitor General appearing for the Union of India, that the word used “may” instead

of "shall" has a purpose because in certain situations there may be no necessity to frame a scheme for implementation of the awards passed by the Tribunal. He has apprised us that awards were passed by the Krishna Water Disputes Tribunal, Godavari Water Disputes Tribunal and Narmada Water Disputes Tribunal and a scheme for implementation of award was framed when required and only in the case of Narmada Water Disputes Tribunal and no scheme was framed in respect of awards passed by the other Tribunals. According to him, framing of a scheme is not mandatory and the Central Government being alive to its role shall do the needful at the relevant time. It is further argued that it is the mandate of the 1956 Act that the scheme framed under Section 6A is to be by laying before both Houses of the Parliament and, hence, it has to be treated as a legislative policy and, therefore, the Court, in such a situation, should not issue any direction. He has drawn inspiration from the authorities in ***Atlas Cycle Industries Ltd. and others v. State of Haryana***[49], ***Common Cause v. Union of India and others***[50], ***K.T. Plantation Private Limited and***

[49] (1979) 2 SCC 196
[50] (2003) 8 SCC 250

another v. State of Karnataka[51] and ***Accountant General, State of Madhya Pradesh v. S.K. Dubey and another***[52]. Learned Solicitor General has also referred to Craies on Statute Law Interpretation which has been noticed with approval in ***Hukum Chand v. Union of India***[53] which speaks that there are three kinds of laying, namely, (i) laying without further procedure; (ii) laying subject to negative resolution; and (iii) laying subject to affirmative resolution. Emphasizing on "subject to affirmative resolution", learned Solicitor General would contend that Section 6(7) essentially commands that this Court should not issue a mandamus to the executive to enact a particular law in a particular manner at particular time or a stipulated time frame. He would further urge that Section 6A is a complete code in itself and, therefore, this Court should leave it to the discretion of the Central Government.

361. In oppugnation to propositions put forth by the learned Solicitor General, learned counsel for the other States and the senior counsel for the Union Territory of Puducherry submitted

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[51] (2011) 9 SCC 1
[52] (2012) 4 SCC 578
[53] (1972) 2 SCC 601

that Section 6A does not confer any extraordinary power on the Union of India except that it has the authority to frame a scheme singularly for implementation of the award as passed by the Tribunal or if modified by this Court. The further submission is that the formulation of the scheme and other procedural ancillaries do not confer any greater status on the authorities coming into existence under the scheme.

X. Our findings on issues of allocation

X.1 Principles of apportionment to be followed:

362. Having dealt with the issues of paramountcy, perceived unconscionability of the Agreements, continuation thereof after coming into force of the 1956 Act as well as non-maintainability of the dispute on the basis of such Agreements being in infraction of Article 363, it is now essential at this juncture, in the backdrop of the above contentious assertions, to dwell on the principles of allocation of water of the inter-state Cauvery river and the make-up thereof for uniform application. That apart, the fact of the Agreement of 1924 having expired after 50 years in the year 1974 has been already determined. As rightly minuted by the Tribunal, having regard to the progression of events after the execution of the

said Agreement, the accusations of breach and violations of the Agreement have to be treated as inconsequential at this distant point of time. Besides, there is no objective and judicially manageable standard to examine and evaluate the same in a golden scale or embark upon in an exercise of exactitude and precision to weigh the impact thereof for determination of allocation of the share.

363. As enunciated by this Court in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** (supra), the waters of an inter-State river passing through the corridors of the riparian States constitute national asset and cannot be said to be located in any one State. Being in a state of flow, no State can claim exclusive ownership of such waters or assert a prescriptive right so as to deprive the other States of their equitable share. It has been propounded therein that the right to flowing water is well-settled to be a right incident to property in the land and is a right *publici juris* of such character, that while it is common and equal to all through whose land it runs and no one can obstruct or divert it, yet as one of the beneficial gifts of Nature, each beneficiary has a right to just and reasonable use of it. We endorse the view of the Tribunal in the

attendant perspectives that the acknowledged principle of distribution and allocation of waters between the riparian States has to be done on the basis of their equitable share, however contingent on the facts of each case.

364. For the sake of brevity, we do not intend to dilate anew on the judicial precedents on this aspect of sharing of water of inter-state river and the evolution and/or shift of the principles relatable thereto from the "Harmon Doctrine" to that of equitable apportionment, a prescript internationally recognized and being applied in resolution of disputes pertaining thereto. This principle of equitable apportionment as is now intrinsically embedded generally in a pursuit for apportionment of water of an international drainage basin straddling over two or more States predicates that every riparian State is entitled to a fair share of the water according to its need, imbued with the philosophy that a river has been provided by nature for the common benefit of the community as a whole through whose territory it flows even though those territories may be divided by frontiers as postulated in law. With reference, in particular, to the Helsinki Rules of 1966, it has been expounded hereinbefore that Articles IV and V thereof recognize equitable use

of water by each basin State, setting out the factors, not exhaustive though, to be collectively taken into consideration as a whole. The view that the principle of equality does not imply equal division of water but connotes equal consideration and equal economic opportunity of the co-basin States and that justice ought to be done to them, has been emphasized in the course of the arguments. To conceive that equality rests on equal sharing of water within an arithmetical formula, would be fundamentally violative of the established conception of equitable apportionment because the said concept inheres a multiple factors. It is the obligation of the Tribunal to address the same and the duty of this Court is to adjudge within the permissible parameters of the justification of the said adjudication. To reiterate, having regard to the above propositions as well as the provisions of the 1956 Act, the dissension has to be addressed in the backdrop of equal Status of the States and the doctrine of equitability.

365. Though noticed in the passing hereinbefore, the prevalent rules as guiding precepts to endeavour equitable apportionment of waters of an international drainage basin and conceptually

extendable to an inter-state river deserve somewhat detailed scrutiny.

366. There is no quarrel that the Helsinki Rules on the use of waters of international rivers lack statutory status of binding nature, yet the same, having been adopted by the International Law Association in its Conference held at Helsinki in August, 1966, set down the criteria to determine equitable utilization of waters of an international drainage basin. As the relevant portion thereof has been extracted before it is not necessary to reproduce the same. However, suffice it to refer to the relevant clauses for the present purpose. The statement in Article I that the general rules of International Law, as contained in the Chapters comprising the Rules, are applicable to the use of the waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States, attests the non-statutory character thereof. Article II defines international drainage basin to be a geographical area extending over two or more states determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus. The idea of international drainage basin per se inherits

some identifiable flexibility of the basin vis-a-vis the constituent states, separated by watershed limits of the system of waters so much so that in an exigent fact situation the basin need not be rigorously confined to the area immediately abutting it in a given state but depending on the situational topography may include other areas of the state concerned entitled to the benefit of the basin. The perception of "basin state" as explicated in Article III is a state, the territory of which includes a portion of an international drainage basin and projects it to be a single synthesized territorial component. As per Article IV, under Chapter II of the Rules, each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin. Article V enumerates the relevant factors, not exhaustive or limited thereto, to determine the reasonable and equitable share within the meaning of Article IV. These factors being unavoidably required to be extracted, are quoted hereinbelow:-

> "1. The geography of the basin, including in particular the extent of the drainage area in the territory of each basin state;

2. The hydrology of the basin, including in particular the contribution of water by each basin state;

3. The climate affecting the basin;

4. The past utilization of the waters of the basin, including in particular existing utilization;

5. The economic and social needs of each basin state;

6. The population dependent on the waters of the basin in each basin state;

7. The comparative costs of alternative means of satisfying the economic and social needs of each basin state;

8. The availability of other resources;

9. The avoidance of unnecessary waste in the utilization of waters of the basin;

10. The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

11. The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin state."

[Emphasis supplied]

367. Article V explicates in clear terms that the weight to be given to each factor as above is to be determined by its importance in comparison with that of other relevant factors, but in determining what is reasonable and equitable share, all relevant factors are to be considered together and the conclusion has to be reached on the

basis of the whole. The above factors, although not exhaustive, have been construed to be of significant bearing to ascertain the reasonable and equitable share of waters in an international drainage basin. The said principles can be regarded as functional dynamics while equitable distributing the water in an inter-State river disputes. The salient feature of all these factors has to have inherent variability and inevitable flexibility thereof having regard to the local conditions, for it is difficult to ignore the undeniable and common emphasis necessary to ensure beneficial use of the available resources for a basin state and logically for its dependent populace warranted by the economic and social needs. Be it stated, while determining the said needs, amongst others, past and existing utilization of the water have to be borne in mind. To remain oblivious to the same would amount to playing possum with the doctrine of equitable distribution *in praesenti*. The noticeable quintessence of the determinants is the predication for a delicate balance in adjustments of the needs based on realistic, reasonable, judicious and equitable canons so much so that while satisfying the requirements of a basin state, a co-basin state is not subjected to any substantial injury. Though in terms of Articles VI and VII, any

other category of users is not entitled to any inherent preference over any other use or category of users, yet the precedence of an existing reasonable use of a basin state over a proposed future use of a co-basin state has been recognized. Significantly, in terms of Article VIII, an existing reasonable use may continue in operation, unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use clearly signifying that an existing use is also not absolute in terms and is subject to exigency based adjustments.

368. Substantially on the same lines is the Campione Consolidation of ILA Rules on International Water Resources 1966-1999 (hereinafter to be referred to as the "Campione Rules"). The distinguishing attribute of these Rules is the inclusion of water of an aquifer, i.e., underground water or "fossil waters" intercepted by the boundary between the two or more states as international ground water so much so that it would form an international basin or part thereof qua the relevant factors to determine reasonable equitable share. These Rules include the criterion of interdependence of underground waters and other waters, including

any interconnections between aquifers and any leaching into aquifers caused by activities in areas under the jurisdiction of the basin states.

369. The next in line, before adverting to the National Water Policy of 1987 and 2002, is another set of rules on international drainage basin called the Berlin Rules adopted by the International Law Association in its Berlin Conference in the year 2004. On the aspect of equitable utilization, Article 12 thereof provides that basin states would in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner, having due regard for the obligation not to cause significant harm to other basin states and in particular, the basin states, would develop and use the waters of the basin in order to attain optimal and sustainable use thereof. The interest of the other basin states are to be kept in view.

370. Article 13 of the Rules catalogues as well the relevant factors to determine the equitable and reasonable use of a basin state. While reiterating in essence the Rules as prescribed by the Helsinki Rules, the additional aspect to be considered is minimization of

environmental harm. Article 14 of these Rules stipulates that in determining an equitable and reasonable use, the states shall first allocate waters to satisfy vital human needs and that no other use or category of uses shall have an inherent preference over any other use or category of uses. Article 17 postulates that every individual has a right of access to sufficient, safe, acceptable, physically accessible and affordable water to meet his vital human needs and it is the obligation of the States to ensure the implementation of right of access to water on a non-discriminatory basis.

371. The common thread decipherable from these Rules is the universal acknowledgment of the principle of equitable utilization as an effective and workable tool for the management of waters of an international drainage basin.

372. Presently, we shall refer to the National Water Policy which, in our estimate, occupies an extremely significant space to spearhead the planning and development of water resources. In its 1987 version, it sounded a threshold caveat that water is a prime natural resource, a basic human need and a precious national asset. While emphasizing that this resource is one of the most crucial elements

in development planning, the policy announced that it is a scarce and precious national asset to be planned, developed and conserved on an integrated environmentally sound basis, keeping in view the needs of the States concerned. It underlined that resource planning in the case of water has to be done for a hydrological unit such as drainage basin as a whole or for a sub-basin and that all individual developmental projects and proposals should be formulated by the States and considered within the framework of such an overall plan for a basin or sub-basin so that the best possible combination of options can be made.

373. As is manifest from the policy, it enjoined that water should be made available to water deficient areas by transfer from other areas including transfers from one river basin to another based on national perspectives after taking into account the requirements of the areas/basins. That apart, making provision for drinking water should be a primary consideration which was also highlighted. As regards the ground water resources, it was marked that exploitation thereof should be so regulated as not to exceed the recharging possibilities as also to ensure social equity and to prevent ingress of sea water into sweet water aquifers**.** In the realm of planning and

operation of systems, water allocation priorities were broadly outlined as (a) drinking water, (b) irrigation, (c) hydropower, (d) navigation and (e) industrial and other uses.

374. As far as the allocation is concerned, the uses are to be governed by the rider that these priorities must be modified, if necessary, in particular region with reference to area specific considerations. In conclusion, the policy laid stress that in view of vital importance of water for human and animal life, for maintaining ecological balance and for economic and developmental activities of all kinds and considering its increasing scarcity, the planning and management of this resource and its optimal, economical and equitable use has become a matter of utmost urgency. It emphasized that the success of the National Water Policy would depend entirely on the development and maintenance of a national consensus and commitments to its underlying principles and objectives. Significantly, the Policy, which is a national charter for Planning and Development of Water Resources for its disciplined and judicious utilization recognizes and accepts it to be scarce and valuable bounty of nature to be developed, conserved and put to planned use on an environmentally sound basis with due regard to

the needs of the State concerned. The Policy, thus, sustains the concept of basin state as contemplated in the Helsinki Rules, Campione Rules and Berlin Rules.

375. It is worthy to note that it significantly underlines that water starved areas ought to be serviced by transfer from one river basin to another based on national perspective after taking into account the needs of such areas/basins. Drinking water has been assigned the highest priority in the category of uses. Though use of ground water resources has not been wholly debarred, yet regulated exploitation thereof, not in excess of recharging possibilities, has been highlighted.

376. The National Water Policy of 2002 which is a revised and updated form of the earlier model, reiterates the emphasis on the need for planning, development and management of the water resources from the national stand point. Pertaining to water allocation priorities, this Policy added to the list, in particular, ecology and agro industries and non-agricultural industries, qualifying that the priorities as enumerated could be modified or added if warranted by the specific considerations of the

areas/regions. The primacy of drinking water was reiterated. On the aspect of ground water development, it was stated that a periodical re-assessment of the ground water potential on the scientific basis should be made taking into consideration the quality of water available and the economic viability of its extraction. Same caution against over exploitation of ground water was sounded. It was, *inter alia*, mandated that adequate safe drinking water facility should be provided to the entire population, both in urban and in rural areas, and irrigation and multipurpose projects should invariably include in it drinking water component wherever there is no alternative source of drinking water. It was clarified that drinking water needs of human beings and animals should be the first charge on any available water. Qua irrigation, the Policy stated that planning either in an individual project or in a basin as a whole should take into account the irrigability of land, cost effective irrigation options possible from all available sources of water and appropriate irrigation techniques for optimising water use efficiency. The aspect that the irrigation intensity should be such as to extend the benefits of irrigation to a large number of farm families as much as possible, keeping in view the need to maximize

production, was also underlined. It was most importantly provided that water sharing/distribution amongst the States should be guided by national perspective with due regard to the availability of water resources and the needs within the river basin. The Policy, therefore, did not bar as such the sharing or allocation of water in areas within the basin state. In conclusion, the Policy recorded that its success would depend entirely on evolving and maintaining national consensus and commitment to its underlying principles and objectives. It also laid emphasis on the needs of the community that requires to be taken into account for the development and management water resources.

377. The national policies of the country as above, therefore, evidently supplement and consolidate the prescriptions of the Helsinki Rules, Campione Rules and Berlin Rules in the matter of ascertainment of reasonable and equitable share of water in an inter-state river. To reiterate, the Helsinki Rules and the other Rules envisage a basin state on the issue of equitable apportionment of an inter-State river. Though the Rules predicate that in determining the share of one basin state, the other co-basin states would not be subjected to substantial injury, yet the clear

emphasis is to fulfill the economic and social needs of the population of the State and in the sphere of irrigation, its farmer community. Indubitably, the principle of apportionment would apply uniformly to all river basins in a State. The sharing of an inter-state river, as the professed norms of distribution suggest, has to be with the spirit of harmonious disposition and equanimous dispensation. The norms or the factors suggested, understandably, can never be exhaustive and designed only a balanced framework of pragmatic measures to ensure beneficial use of water resources in an inter-State river on need-based application thereof and reciprocal adjustments for common good. In the regime of a welfare state wedded to the guarantees enshrined in the National Charter, any yardstick for distribution of any national asset like water would have to be essentially in furtherance thereof. The criteria identified in the Rules and supplemented by the national policies in letter and spirit, though in quite detail, can only be construed as illustrative and cannot be perceived as a strait-jacket formula or put in a compartment of mathematical exactitude to exclude any other consideration or exigency to effect a desirable apportionment of water of an inter-state river depending on the prevalent

eventualities. Having regard to the geographic, hydrographic, hydrological, hydrogeological, climatic, ecological and other fluvial phenomena attendant on time, the spectrum of priorities and the factors associated therewith are bound to vary. Be it clearly stated that while no precise formula can be adopted, there has to be a sincere and pragmatic endeavour to have a rational amalgam of globally accepted norms and the local necessities founded on the doctrine of fairness and equity. The factors already enumerated, needless to say, may *inter se* demand precedence of one over the other depending on the ground realities, the ultimate test being to ensure that the allocations on the basis thereof in favour of one basin State ought not to be substantially detrimental to the co-basin States. The order of precedence in the areas of necessity, as set out in the National Policy, is not incompatible with the acknowledged determinants for ascertaining the reasonable and equitable share of an inter-State river. Nevertheless, the weightage of one item of need would depend in a given situation on the degree and priority thereof thereby necessitating grant of preference of one over the other in departure of the sequence set out in the policy. This again is to underline the attribute of variability in the approach

of application of the otherwise identified criteria, the ultimate goal being equitable apportionment of the resources. This concept gains more significance where the resource is scarce and inadequate qua the demand thereof. It is warrantable as the dispute involves the inhabitants of one State with the inhabitants of another State. Such involvement by statutory command engulfs the principle of obtaining situational adjustment having due regard to priority. In the above predominant conspectus, in our estimate, the factors as set out in the Helsinki Rules and endorsed as well as supplemented by the Campione Rules and the Berlin Rules and further consolidated by our national policies as above are efficient, rational, objective and pragmatic guidelines to conduct any exercise for determining the reasonable and equitable share of basin States in the water of an inter-state river like Cauvery as in the present case.

378. With these guidelines at disposal, the endeavour has to be essentially to ensure an appropriate balance of the genuine competing demands and interests of the basin States. The balancing has to be done in a pragmatic and feasible manner so that it will be ultimately functional and meet the aspirations of the riparian States. In such a working process, there has to be

adjustment of the available resources. That apart, the process indeed has to be informed with egalitarian vision for achieving utilitarian ends keeping in view the inclusive spirit and the pluralistic ethos. Thus viewed and understood, periodical reviews to update the allocations merited by changes in the aforementioned natural and environmental phenomena bearing on the resources for supply and resultant reorientation of the inter se needs of the basin States, would have to be unfailingly undertaken on time.

379. It needs to be stated that the gravamen of the rival assertions span from wrong application of the principles of equitable apportionment to the facts of the case, defective assessment of the materials on record bearing on the requirements registered by the competing States, faulty approach in the matter of evaluation of the parameters bearing in particular on the crop water requirement, ground water availability and use and unmerited rejection of various projects as testimony of rightful claims to resultant inaccurate allocation of the water of the inter-state river involved. As detailed hereinbefore, the impugned decision of the Tribunal would demonstrate that it had undertaken a detailed exercise on the basis of the pleadings of the parties, the evidence, oral and

documentary, including several contemporary official records and statistics supplemented by the testimony of various acclaimed experts in the field of water research and use over the years. Having regard to the jurisdiction being exercised, we would, in this factual backdrop, test the competing contentions on the basis of broad features of the controversy and the established legal postulates applicable thereto and interfere in the event of any discernible vitiating infirmity, incurably afflicting the adjudicative pursuit of the Tribunal thereby rendering its appraisal of the materials on record on any issue as well as the final determination to be patently unsustainable.

X.2 Determination of 'irrigated areas" in Tamil Nadu and Karnataka:

380. As we notice, the Tribunal, after adopting the principle of equitable apportionment, in the process of computing the reasonable and equitable shares of the basin States as the first initiative, determined the irrigated areas of the States and in doing so, noted from the report of the Cauvery Fact Finding Committee submitted in the year 1972 that the utilization of waters of Tamil Nadu including Karaikal region of the Union Territory of

Puducherry, Mysore and Kerala had been 566.60 TMC, 176.82 TMC and 5 TMC respectively. As the background of the Agreements of 1892 and 1924 would reveal, the State of Karnataka had been raising persistent protests against the restraints put on it on the use of the waters of the river for which it alleged that it was not possible on its part to irrigate lands even as envisaged in the Agreement of 1924. This was clearly by way of its remonstrance against Tamil Nadu's endeavours to wrest its dominion over the water by exercising its prescriptive right to the natural flow thereof within its territories. Noticeably, the principle of equitable apportionment, as has evolved over the time, has not been and rightly not disputed by the party-States as the yardstick for the allocation *in praesenti*. In view of the fact that river Cauvery is deficit in its water content compared to the demands of the riparian States involved, restrictions and savings in the matter of use thereof are not only necessary but also natural corollaries. In that view of the matter, it is incumbent to identify the areas under irrigation with the expansion thereof with time, together with the crop pattern and the suitability thereof, having regard to the extent of utilization of the deficient surface flow available. On the basis of the reports of

the various Committees and the recorded data referred to hereinabove, the bearing of the 1924 Agreement in particular over the march of events cannot also be totally disregarded. The Tribunal, after taking into account all these factors, vis-a-vis Tamil Nadu, applied the restrictions to work out the irrigated area to which it would be entitled to assert its share of allocation, namely, no area for summer paddy; area of summer paddy raised prior to 1924 to be replaced by semi-dry crop; annual intensity of irrigation to be restricted to 100%; cropping period to be restricted within the irrigated season, i.e., 31st June to 31st January and ambitious lift irrigation schemes to be discouraged. It, thus, quantified such area for Tamil Nadu to be 24.71 lakh acres against its claim of 29.26 lakh acres. As far as Karnataka is concerned, the Tribunal noticed that in the pre 1924 Agreement era, irrigation in the then State of Mysore was primarily from direct diversion channels from the rivers together with the system of tank irrigation and that in the absence of any reservoir, the waters of Cauvery and its tributaries like Kabini, Hemawathi, Harangi and Suvaranwathi used to flow through the State but their ultimate destination was the Delta State of the then State of Madras as a result whereof, even as admitted by

the State of Tamil Nadu, Karnataka could develop only 3.14 lakh acres of land by 1924. This inability of the State of Karnataka to develop its land for irrigation in the background of its persistent cavil of being deprived of its legitimate share and use of the water of Cauvery cannot be ignored. It is a recorded fact that though under the 1924 Agreement, Karnataka in terms of the relevant provisions thereof ought to have developed 7.45 lakh acres by 1974, it could achieve only 2.15 lakh acres. However, the Tribunal in all allowed 18.85 lakh acres of area to Karnataka being under irrigation prior to 1974 against its claim of 20.98 lakh acres. In case of Karnataka as well, the Tribunal excluded the development of second crop in view of the scarcity of water in the basin with due regard to the rainfall pattern and even suggested restrictions on the crop variety and the duration thereof. On an overall consideration of the relevant materials to which our attention has been drawn, we are of the view that having regard to the imperative of economy of consumption of water, the approach of the Tribunal cannot be found fault with having regard to the exiting situation

X.3 Assessment of water for "irrigation needs" in Tamil Nadu and Karnataka:

381. We may analyse the present demand qua the assessment of crop water requirement of the basin states, the relevant information of which had been furnished by them in common format supplemented by the oral testimony of experts and documentary evidence. They registered their demand for allocation as hereinbelow:

Tamil Nadu – 566 TMC

Karnataka – 466 TMC

Kerala – 100 TMC

Union Territory of Pondicherry – 9 TMC

The Tribunal, to reiterate, to ensure equitable share to each State, applied the following criteria:

(i) Double crop only over areas before the Agreement of the year 1924 and as permitted under the said Agreement and not beyond.

(ii) Summer crop restricted in some areas where it was grown prior to 1924 Agreement which ought to be replaced by any light irrigated crop within the irrigation season.

(iii) Delta to be reduced in view of new variety of paddy and developed techniques which require lesser Delta of water.

(iv) No transbasin diversion.

(v) No lift schemes.

382. As the records reveal, after the evidence of the expert witnesses was recorded, as required by the Tribunal, the States filed their affidavits furnishing details of water requirements as well as the crops grown by them together with an indication of a minimum crop water requirement. The affidavit filed on behalf of Tamil Nadu was marked as Ext. TN1665 and that of Karnataka as Ext. KAR518. Hence, we shall analyse the ultimate determination by the Tribunal and scrutinize its ultimate justification. As has been noted earlier, there has been a considerable dispute over Ext.1665 and the area of dispute relates to the violation of the principles of natural justice, non-providing of opportunity of cross-examination, admissibility of the affidavit in evidence and, above all, the transgression of the sense of propriety by the State of Tamil Nadu. We have already stated that what had already been available on record can be considered from the factual assertions of the affidavit. Be that as it may, there has to be an adjudication by this Court and not allow the main protagonist States to keep the fight in continuance. The Tribunal, as is demonstrable, on the basis of the

overall materials before it, took note, amongst others, of the crop pattern, duration of the crops, consumption of water thereby, soil conditions conducive thereto, rainfall pattern, Delta and system efficiency along with the drought conditions of Karnataka as projected by it, in conjunction with the testimony of the expert witnesses of both the States of Tamil Nadu and Karnataka, and in the interest of economical use of the water of the deficit basin, allocated 250.62 TMC to Karnataka for its irrigated area of 18.85 lakh acres and 390.85 TMC to Tamil Nadu for its irrigated area of 24.71 lakh acres. Significantly, it is worthwhile to notice, in this context, the recommendations of the Cauvery Fact Finding Committee required restriction on double crop paddy area; introduction of short duration variety in place of "Samba" crop and preference to crops needing less water. Further, the Tribunal has considered the crop water requirement, namely, crop duration, ET crop, puddling requirements, percolation losses, effective rainfall and system efficiency. Keeping in view the accepted principles, we find that neither the analysis undertaken by the Tribunal nor the findings relatable thereto can be regarded as implausible by any standard. Certain parameters have been exhaustively examined by

the Tribunal on the basis of the materials brought on record with supporting reasons and, therefore, the conclusion on this score cannot be termed as untenable warranting interference in the exercise of this Court's jurisdiction under Article 136 of the Constitution of India. We may pause here to clarify. In our first verdict that pertained to the delineation of the maintainability of appeals by special leave while holding the appeals to be maintainable, we had kept it open for advertence at a later stage the issue whether there should be broad approach or a narrow one. After hearing all the sides at length, at this juncture, we are inclined to say that while adjudicating a matter of such a nature we cannot be totally guided exclusively either by "broad" or extraordinary discretionary or "narrow" or restrictive approach but think it appropriate to have an intermediary approach as the controversy covers a span of more than 100 years involving change in boundaries, population growth and subsequent events. We may hasten to add that though the parameters of applicability of Article 136 can be broad to appreciate the materials and scrutinize the manner of appreciation by the Court/Tribunal depending upon the *lis* raised. In the present appeals preferred by special leave, we

think it condign to adopt an approach which is neither broad nor narrow but an "intermediary one", especially having regard to the nature of the dispute that involves the inhabitants of three States and a Union Territory.

383. In the realm of determination of irrigated area, the assessment by the Tribunal, as we find, encapsules the factual and characteristically complex situation. Lands have already been irrigated. It is an issue of sustenance at the ground reality level. To reduce the allocation of water on this core would be inequitable. Therefore, in the obtaining fact situation, in our comprehension, no interference is warranted. That apart, having regard to the degree of wiredrawn complexities involved, requiring in-depth expertise to dislodge the otherwise well-reasoned findings of the Tribunal founded on an exhaustive appreciation of the materials on record, we are not inclined to upset the determination made by it in this regard. On an overall scrutiny of the materials to which our attention had been drawn, we are in general agreement with the approach and assessment made by the Tribunal and the deductions made by it on the basis thereof. Sans rhetoric and emotionally appealing submissions, we find that the rival contentions are

equally balanced and to reiterate, on an overall consideration of the materials on record, we do not feel persuaded to differ with the Tribunal's adjudication.

X.4 Water allocation for the State of Kerala:

384. In respect of the claim of Kerala, it is a matter of record that rainfall is evenly distributed over the months of May to November so much so that occasional support by artificial irrigation is required in the instances of shortfall in rains and that too during small periods. Against its demand of 99.8 TMC under different heads, it had demanded 35 TMC for transbasin diversion to generate hydro-electrical power. The Tribunal rejected the State's request for transbasin diversion for hydro-power projects which, in terms of the National Water Policy of 2002, was even otherwise lower in preference to drinking water and irrigation. The Tribunal in adjudging the State's share did notice that it had been unsuccessful in furthering its projects so much so that pending the completion and utilization thereof, the unutilized water allocated to it subject to the mechanism set up by the Cauvery Management

Board/Regulatory Authority, would be received by Tamil Nadu. The Tribunal examined the information furnished by it in the common format and adjudged 29.76 TMC which was rounded upto 30 TMC as its share after due regard to its demand, amongst others, pertaining to different projects in Kabani, Bhavani, and Pambar basins having regard to their individual features and corresponding crop water requirement. This allocation included the share for domestic and industrial water purposes as well with the population projection for 2011. The findings of the Tribunal are not belied by the materials in support thereof and, therefore, we are inclined to accept the same.

X.5 Water allocation for the Union Territory of Puducherry:

385. With regard to the claim of Union Territory of Puducherry for Karaikal region, it is a matter of record that because of its close proximity to the sea, the ground water by its nature is unsuitable for drinking and irrigation purposes and, thus, the Tribunal having regard to its irrigated area of 43000 acres allowed its second crop in departure from the yardstick applied for Karnataka and Tamil Nadu and granted 6.35 TMC by way of crop water requirement. It also

relieved the Union Territory of the application of 20% consumptive utility formula while assessing its domestic and industrial water requirements. In the absence of any convincing reason to determine otherwise, the adjudication of the Tribunal on this count does not deserve any interference.

X.6 Recognition of ground water as an additional source in Tamil Nadu:

386. While exploring the possibility of ground water as an additional source to be conjunctively used along with the surface flow of river Cauvery, the factual matrix reveals, based on empirical data, that the contributions thereto are from surface water through infiltration into the ground by way of natural recharge, stream flow, lakes and reservoirs. The recharge of ground water is principally from rainfall as well as artificial modes, namely, application of water to irrigate crops, flooding of areas caused by overflowing of streams to their sites and seepage from unlined canals, tanks and other sources. Ground water, as the study by the Central Ground Water Board, Ministry of Water Resources, Government of India attests, caters to more than 45% of irrigation in the country. As against the stand of Tamil Nadu that the ground water within its Delta areas is

mainly by way of recharge from the supplies of Mettur Dam which really is a component of the surface flow of river Cauvery and further that the same is utilized by the farmers for raising of early nurseries ahead of releases from Mettur and for irrigating belated crops after stoppage of Mettur releases, exhaustive studies undertaken, amongst others, by the Central Ground Water Board, Ministry of Water Resources, Government of India, Irrigation Commission, 1972 and United Nations Development Programme evidenced availability of replenishable ground water in Tamil Nadu. The United Nations Development Programme in its report, amongst others, mentioned that yearly quantity of ground water that can be extracted by using centrifugal pumps in the Cauvery sub-basin, Vennar sub-basin and in the new Delta was 33.7 TMC, 5.4 TMC and 32.5 TMC respectively and in addition 56.5 TMC of ground water per year can also be made available in the Cauvery sub-basin by lowering seasonally ground water level to 10 meters depth below the regional ground water level. Other studies made by the team of the Central Ground Water Board indicated ground water potential in the Delta area of Tamil Nadu to the extent of 64 TMC. The report of Mr. W. Berber, Consultant, World Bank on Ground Water

Resources of Cauvery Delta estimated the available ground water in Cauvery Delta at 51.56 TMC. Apart from the above, Tamil Nadu, in its pleadings, admitted that the total ground water extraction during the year 1989 was approximately 28.4 TMC in the Cauvery sub-basin, 7.3 TMC in the Vennar sub-basin and 11.3 TMC in the Grand Anicut Canal area (new Delta area) totaling 47 TMC. Tamil Nadu, in its pleadings, also mentioned that in the old Delta, there was a scope of conjunctive use of ground water to the extent of 30 TMC. On the basis of these recorded and empirical inputs, the Tribunal returned a finding that in a normal year when there would be regular releases of water from Mettur, the bulk of contribution to ground water in the Cauvery sub-basin would be from such releases, but in any case, the contribution from surface irrigation and rainfall could by no means be overlooked. On weighing the pros and cons and having regard to the severe limitations in the mechanism for assessment of ground water resource, the Tribunal made an extremely safe estimate of 20 TMC of ground water which, in its view, could be used by Tamil Nadu conjunctively with surface water. In categorical terms, the Tribunal clarified that this quantum was arrived at after excluding the component of ground water

recharge from river water bilateral infiltration. In other words, the Tribunal estimated 20 TMC of ground water available in the State of Tamil Nadu which was independent of any contribution from the surface flow of the river Cauvery and, thus, could be construed to be a stock available with it unconnected with the yield of 740 TMC otherwise quantified for allocation. It is in this context that the assertion made on behalf of Karnataka that ground water being a renewable resource, if not extracted regularly, would reduce the absorption capacity of the underlying aquifer resulting in rain water/surface water turning into wastage as run-off and that the admission of Tamil Nadu in its pleadings of availability of 30/47 TMC as ground water warranted reduction of at least 20 TMC, as estimated by the Tribunal, from the final allocated share of Tamil Nadu with proportionate reduction in the quantum of water to be provided by Karnataka at the inter-state border, assumes significance. In our view, having regard to the overwhelming empirical data following multiple research studies by different authorities authenticating beyond doubt availability of replenishable ground water in the Delta areas of Tamil Nadu, 20 TMC of ground water quantified by the Tribunal is an eminently

safe quantity to be accounted for in finally allocating/apportioning the share of Cauvery water. While expressing this view, we are not unmindful of the stand of Tamil Nadu and the aspect that over-extraction of ground water in the absence of adequate replenishment and further in the areas proximate to the coastal zone is generally avoidable. However, in the attendant facts and circumstances, in view of the studied scrutiny of all pertinent facets of the issue by balancing all factors, we are of the unhesitant opinion that at least 10 TMC of ground water available in the Delta areas of Tamil Nadu can be accounted for in finally determining the apportionment of the share of the otherwise deficit Cauvery basin without touching the yield of 740 TMC.

387. To recall, the national policies discussed above, do not, as such, debar the conjunctive use of ground water, the only caveat being periodical assessment on a scientific basis thereof and to guard against exploitation of the said resource so as not to exceed the recharging possibilities. The series of research studies made by different authorities and the range of availability of ground water as indicated by the experimental data, in our view, not only demonstrate availability of ground water in the Deltas in the State

of Tamil Nadu but also that adjustment of 10 TMC thereof, as proposed, would be safely permissible. Noticeably, the kind of experiment and research that had been made in the realm of ground water availability in the Deltas of Tamil Nadu has not been undertaken in Karnataka and there is no reliable empirical data with regard thereto vis-a-vis that State.

X.7 Water allocation for Domestic and Industrial purposes in Tamil Nadu:

388. With regard to the computation and allotment of water for domestic and industrial purposes in Tamil Nadu and Karnataka, we are in agreement with the formulae noted and applied by the Tribunal in working out the per capita daily requirements of the urban and rural population. There is also no reason to differ from the postulation with regard to the percentage of actual utilization qua various heads of uses, namely, irrigation, power, domestic and municipal water supply, industrial use, etc., as referred to in the Report of the Cauvery Fact Finding Committee which, for our immediate purposes, indicate that whereas 20% of the quantity of water supplied would be actually consumed in domestic use, only 2.5% would be effectively utilized for industrial use within the basin

and the rest would return to the source, i.e., river or its tributaries or the reservoir, storage and canal, as the case may be.

X.8 Water allocation for Domestic and Industrial purposes of State of Karnataka:

389. As regards the grievance of the State of Karnataka that while quantifying the allocation of water for domestic purposes, the Tribunal had accounted for only 1/3rd of the city of Bengaluru to be falling within the river basin and had, as a result, drastically cut down its overall share under this head. It is significant to notice that in its statement of case, Karnataka had registered its claim for water for domestic and industrial uses as hereunder:-

Bangalore water supply – 30 TMC
Urban water supply (other than Bangalore) – 10 TMC
Rural water supply – 6 TMC
Industrial uses – 4 TMC

This along with its claim for irrigation - 408 TMC and for power projects (reservoir losses 6 TMC and Thermal Power Project - 1 TMC) – totals to 465 TMC. Karnataka, therefore, registered a claim of 30 TMC only for the city of Bengaluru. The Tribunal, at the

first instance, presumed that 50% of drinking water requirement would be met from the ground water sources as it is generally seen that wells and tube-wells in urban and rural areas cater to substantial requirement of drinking water. While noting that it had called for information in the common format whereby the States had been required to project their population for the year 2000 and 2025 for working out drinking water requirement, the Tribunal, however, decided to assess the drinking water requirement as in the year 2011. On the basis of the information available, it held that only 1/3rd of the Bengaluru city lay within the Cauvery basin as was urged in the course of the arguments. It, therefore, limited its consideration of drinking water requirement of Bengaluru to that area only which was located within the Cauvery basin. It noticed that Karnataka had stated that the existing and ongoing drinking water schemes for the city were for 14.52 TMC in all as in June 1990 and also that it had claimed 30 TMC for Bengaluru city in its projection for 2025. The Tribunal, as is perceptible, was disposed to work out the water requirement for urban and rural population on the basis of population projection of the basin for the year 2011 by adopting the percentage decennial growth for the year 1981-1991

census, district-wise and the area of each district falling within the Cauvery basin as furnished by Karnataka. The population projection of Bengaluru city on the Census Report of 2011, as furnished by Tamil Nadu, was taken note of as well. The Tribunal next quantified the water requirement of urban population to be 8.70 TMC and for rural population at 8.52 TMC. The Tribunal, as a consequence, proceeded to quantify the total drinking water requirement for urban and rural population to be 17.22 TMC (8.70 TMC + 8.52 TMC). It next assumed that 50% of the drinking water requirement would be met from ground water and the remaining 50% from the surface water. Thus, segregating 8.75 TMC to be catered to by the surface water, it worked out the consumptive use, i.e., 20% of the total for the human population including live stock to be 1.75 TMC (20% of 8.75 TMC).

390. Apart from the fact that there is no basis whatsoever for the Tribunal for having quantified the water requirement for urban population to be 8.70 TMC as well as for rural population to be 8.52 TMC, its assumption that 50% thereof would be met from ground water only in view of its perception that wells and tube-wells in urban and rural areas cater to the substantial requirement of

drinking water, in our view, is unacceptable and cannot be sustained. That apart, in the context of Bengaluru city, especially in view of the growth and rise of population in space and time, the Tribunal's approach of confining the entitlement of its population in general to only 1/3rd of their requirement only in view of the location of 1/3rd of its physical entity within the Cauvery basin demands scrutiny. True it is, the concept of a basin and the beneficial uses of the water thereof ought to be traced generally to the sites and population thereof located in the basin, nevertheless, the principles of apportionment and the conception of reasonable and equitable share perceived for such uses comprehend a basin State addressing the social and economic needs of its community as a whole. Territorial or geographical demarcation for extension of beneficial uses of an inter-state river basin cannot always be strictly construed. We are inclined to think so as the perception of a basin State inheres in it a degree of flexibility in approach in a unique fact situation to justify a warrantable flexibility and departure from such rigoristic approach. We are disposed to think so, for the city of Bengaluru, as an evident phenomenon, has burgeoned over the years and has grown today into a progressively sophisticated,

sprawling, vibrant and a much aspired seat of intellectual excellence particularly in information technology and commercial flourish. It has transformed into a nerve centre of contemporaneous significance and its population is daily on the rise, thus, registering an ever enhancing demand for all civic amenities. Having regard to its exclusive attributes, it is incomparable in many ways not only to other urban areas in the State, but also beyond. The requirements of its dependent population as a whole for drinking and other domestic purposes, therefore, cannot justifiably, in the prevailing circumstances, be truncated to their prejudice only for consideration of its physical location in the context of the river basin. We think so since the city of Bengaluru cannot be segregated having an extricable composition and integrated whole for the purposes of the requirements of its inhabitants, more particularly when the same relates to allocation of water for domestic purposes to meet their daily errands. It will be inconceivable to have an artificial boundary and deny the population the primary need of drinking water. We hold so in the special features of the case keeping in view the global status the city has attained and further

appreciating the doctrine of equitable proportionality on the bedrock of pressing human needs.

391. At this juncture, we need to recount that as per the national water policies, not only drinking water has been placed at the top of the other requirements in the order of priority, but it has also been predicated that adequate drinking water facilitates should be provided to the entire population, both in urban and rural areas and that drinking water should be made a primary consideration. It was declared as well that drinking water needs of human beings and animals should be the first charge on any available water. Article 14 of the Berlin Rules also mandates that in determining an equitable and reasonable use, the States shall first allocate water to satisfy vital human needs.

392. In view of the above, we are constrained to observe that the approach of the Tribunal cannot be approved in the facts and circumstances indicated hereinabove. We are, thus, of the considered opinion that the allocation of water for drinking and domestic purposes for the entire city of Bengaluru has to be accounted for. Noticeably, Karnataka had claimed 14.52 TMC, i.e.,

6.52 TMC for existing water schemes for Bengaluru and 8.00 TMC for the ongoing drinking water schemes for the city as in June, 1990. It had demanded 30 TMC as drinking water requirement for the city with the projection of 2025. Having regard to the percentage of decennial growth, as has been adopted by the Tribunal, in 2011, the demand of Karnataka for drinking water requirement for Bengaluru city would be in the vicinity of 24 TMC. Even excluding the computation for urban population of the State to be 8.70 TMC as arrived at by the Tribunal and that too without any basis and accepting the water requirement of rural population to be 8.52 TMC though also without any basis, the total figure representing drinking and domestic water requirement of the urban and rural population would be 32.5 TMC rounded upto 33 TMC in comparison to 46 TMC as claimed by Karnataka in its statement. Having rejected the assumption that 50% of the drinking water requirement would be met from ground water, this 33 TMC would, in our estimate, be a safe and acceptable figure qua drinking and domestic water requirement of the State of Karnataka for its urban and rural population. By applying the consumptive percentage of 20%, the volume of water to be allocated to Karnataka on this count

would be 6.5 TMC in lieu of 1.75 awarded by the Tribunal, i.e., an increase by 4.75 TMC.

393. Qua the view against transbasin diversion, suffice it to state that not only in the context of Bengaluru city, for the reasons cited hereinabove, a digression from the confines of the concept of in-river basin would be justified, since the National Water Policy of 1987, in categorical terms, enjoined that water should be made available to water short areas by transfer from other areas including transfers from one river basin to another. This very conspicuously emphasizes on an inclusive comprehension and in a deserving case like Bengaluru city, it would not be incompatible with the letter and spirit of the factors that ought to inform the determination of reasonable and equitable share of water in an interstate river as well as of the national policies formulated for planning and development of the precious natural resource involved.

X.9 Allocation of water towards environmental protection:

394. On the aspect of allocation qua environmental protection, the Tribunal, in order to secure the purity of environmental and ecological regime in view of the injudicious use of available

resources by human beings compounded by population explosion and distorted lifestyles and having regard to the spectre of river water pollution on account of industrial development and deforestation leading to siltation of reservoirs, etc., assigned 10 TMC to be reserved from the common pool to meet the environmental aspects.

395. We appreciate the endeavour and the initiative of the Tribunal having regard to the sustenance of purity of environment to which every individual is entitled and also simultaneously obliged to contribute to cultivate the feeling of environmental morality. That is the constant need of the present. In view of such an obtaining situation, we are not inclined to interfere in any manner in the allocation of the quantum of 10 TMC towards environmental protection. It stands affirmed.

X.10 Revised water allocation amongst competing States:

396. The river Cauvery originates in Karnataka and eventually after its full flow through the other riparian States of the basin assimilates in the Bay of Bengal. With the evolution of the principle of equitable apportionment which is really to ensure equal justice to

the basin States, the concept of prescriptive right or right to the natural flow of any inter-state river has ceased to exist. Having regard to the historical facts which demonstrate the constraints suffered by Karnataka resulting in its limited access and use of the surface flow of Cauvery in spite of being the upper riparian state, compared to Tamil Nadu, then Madras presidency, as well as severally drought conditions in its 28 districts/taluks, we are inclined to award an additional quantity of water to it in the measure of 14.75 TMC in all, i.e., 10 TMC (on account of availability of ground water in Tamil Nadu) + 4.75 TMC (for drinking and domestic purposes including such need for the whole city of Bengaluru). On these considerations, we consider Karnataka to be more deserving amongst the competing States to be entitled thereto. Out of this, 14.75 TMC would be deducted from the quantum allocated by the Tribunal in favour of Tamil Nadu. In other words, the final allocation of the shares in view of this determination would be as hereunder:-

Karnataka	:	284.75 (270 + 14.75) TMC
Tamil Nadu	:	404.25 (419 – 14.75) TMC
Kerala	:	30 TMC

UT of Pondicherry	:	7 TMC
Environmental Protection	:	10 TMC
Inevitable escapagaes into sea	:	4 TMC
Total	**:**	**740 TMC**

397. As a consequence of the aforesaid allocation, the State of Karnataka would now be required to make available at the interstate border with Tamil Nadu, i.e., at Billigundulu, 177.25 TMC of water for the basin. Apart from the modifications effected hereinabove, no interference with the determination and findings recorded by the Tribunal, in view of the scrutiny of the available materials on record, is called for.

398. At this stage, we may reproduce how the Tribunal has dealt with monthly deliveries by the State of Karnataka which is as follows:-

> "Since the major shareholders in the Cauvery waters are the States of Karnataka and Tamil Nadu, we order the tentative monthly deliveries during a normal year to be made available by the State of Karnataka at the inter-State contact point presently identified as Billigundulu gauge and discharge station located on the common border as under:
>
> | Month | TMC | Month | TMC |
> |---|---|---|---|
> | June | 10 | December | 8 |

July	34	January	3
August	50	February	2.5
September	40	March	2.5
October	22	April	2.5
November	15	May	2.5
			192 TMC

> The above quantum of 192 TMC of water comprises of 182 TMC from the allocated share of Tamil Nadu and 10 TMC of water allocated for environmental purposes."

399. The Tribunal directed appointment of a Regulatory Authority to properly monitor the working of monthly schedule with the help of the concerned States and Central Water Commission and further directed that the upper riparian State shall not take any action so as to affect the scheduled deliveries of water to the lower riparian States. The other directions which had been issued by the Tribunal, we think it appropriate to reproduce, are as under:-

> **"Clause-XIV**
>
> Use of water shall be measured by the extent of its depletion of the waters of the river Cauvery including its tributaries in any manner whatsoever; the depletion would also include the evaporation losses from the reservoirs. The storage in any reservoir across any stream of the Cauvery river system except the annual evaporation losses shall form part of the available water. The water diverted from any reservoir by a State for its

own use during any water year shall be reckoned as use by that State in that water year.

Clause-XV

In any riparian State or U.T. of Pondicherry is not able to make use of any portion of its allocated share during any month in a particular water year and requests for its storage in the designated reservoirs, it shall be at liberty to make use of its unutilized share in any other subsequent month during the same water year provided this arrangement is approved by the implementing Authority.

Clause-XVI

Inability of any State to make use of some portion of the water allocated to it during any water year shall not constitute forfeiture or abandonment of its share of water in any subsequent water year nor shall it increase the share of other State in the subsequent year if such State has used that water.

x x x x x x

Clause XVIII

Nothing in the order of this Tribunal shall impair the right or power or authority of any State to regulate within its boundaries the use of water, or to enjoy the benefit of waters within that State in a manner not inconsistent with the order of this Tribunal."

400. In view of the reduction in the quantum of water, now required to be released by Karnataka at the inter-State border with Tamil Nadu, i.e., at Billigundulu, there would be, logically, a proportionate

decrease in the monthly releases as worked out by the Tribunal. However, the same pattern therefor, as modeled by it would be maintained for the reduced releases.

Y. Interpretation of Section 6A of the 1956 Act

401. Now we shall deal with the provisions of Section 6A of 1956 Act. It reads as under:-

> **"Section 6A. Power to make schemes to implement decision of Tribunal**.
>
> (1) Without prejudice to the provisions of section 6, the Central Government may, by notification in the Official Gazette, frame a scheme or schemes whereby provision may be made for all matters necessary to give effect to the decision of a Tribunal.
>
> (2) A scheme framed under sub- section (1) may provide for--
>
> (a) the establishment of any authority (whether described as such or as a committee or other body) for the implementation of the decision or directions of the Tribunal;
>
> (b) the composition, jurisdiction, powers and functions of the authority, the term of office and other conditions of service of, the procedure to be followed by, and the manner of filling vacancies among, the members of the authority;

(c) the holding of a minimum number of meetings of the authority every year, the quorum for such meetings and the procedure thereat;

(d) the appointment of any standing, ad hoc or other committees by the authority;

(e) the employment of a Secretary and other staff by the authority, the pay and allowances and other conditions of service of such staff;

(f) the constitution of a fund by the authority, the amounts that may be credited to such fund and the expenses to which the fund may be applied;

(g) the form and the manner in which accounts shall be kept by the authority;

(h) the submission of an annual report by the authority of its activities;

(i) the decisions of the authority which shall be subject to review;

(j) the constitution of a committee for making such review and the procedure to be followed by such committee; and

(k) any other matter which may be necessary or proper for the effective implementation of the decision or directions of the Tribunal.

(3) In making provision in any scheme framed under sub-section (1) for the establishment of an authority for giving effect to the decision of a Tribunal, the Central Government may, having regard to the nature of the jurisdiction, powers and functions required to be vested in such authority in accordance with such decision and all other relevant circumstances, declare in the said scheme that such authority shall, under the name specified in the said scheme, have capacity to acquire, hold and dispose of property, enter into contracts, sue and be sued and do all such acts as may be necessary for

the proper exercise and discharge of its jurisdiction, powers and functions.

(4) A scheme may empower the authority to make, with the previous approval of the Central Government, regulations for giving effect to the purposes of the scheme.

(5) The Central Government may, by notification in the Official Gazette, add to, amend, or vary, any scheme framed under sub- section (1).

(6) Every scheme framed under this section shall have effect notwithstanding anything contained in any law for the time being in force (other than this Act) or any instrument having effect by Virtue of any law other than this Act.

(7) Every scheme and every regulation made under a scheme shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the scheme or the regulation or both Houses agree that the scheme or the regulation should not be made, the scheme or the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that scheme or regulation."

402. We have already noted the submissions of the learned Solicitor General. His submission, in essentiality, is that the Court should not issue any direction to the Central Government and allow the

discretion to be exercised by it as the provision uses the word may. The said argument, as we perceive on a first blush, may look quite attractive or for a while impressive but really cannot stand the substance test. In ***State of Karnataka*** (supra) while interpreting the said provision in the context of maintainability, we had held:-

> "….The learned Senior Counsel for the respondent has drawn a distinction between the conferment and the exclusion of the power of the Supreme Court of India by the original Constitution and any exclusion by the constitutional amendment. Be that as it may, the said aspect need not be adverted to, as we are only required to interpret Section 6(2) as it exists today on the statute book. The said provision has been inserted to provide teeth to the decision of the Tribunal after its publication in the Official Gazette by the Central Government and this has been done keeping in view the Sarkaria Commission's Report on Centre-State Relations (1980). The relevant extract of the Sarkaria Commission's Report reads as follows:
>
> > "17.4.19. The Act was amended in 1980 and Section 6-A was inserted. This section provides for framing a scheme for giving effect to a Tribunal's award. The scheme, inter alia provides for the establishment of the authority, its term of office and other conditions of service, etc. But the mere creation of such an agency will not be able to ensure implementation of a Tribunal's award. Any agency set up under Section 6-A cannot really function without the cooperation of the States concerned. Further, to make a Tribunal's award binding and effectively enforceable, it should have the same force and sanction behind

> it as an order or decree of the Supreme Court. We recommend that the Act should be suitably amended for this purpose.
>
> * * *
>
> 17.6.05. The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding."

> 74. The Report of the Commission as the language would suggest, was to make the final decision of the Tribunal binding on both the States and once it is treated as a decree of this Court, then it has the binding effect. It was suggested to make the award effectively enforceable. The language employed in Section 6(2) suggests that the decision of the Tribunal shall have the same force as the order or decree of this Court. There is a distinction between having the same force as an order or decree of this Court and passing of a decree by this Court after due adjudication. Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and not intended to travel beyond it. The purpose is to have the binding effect of the Tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve."

403. We have referred to the aforesaid passages as the award of the Tribunal has to be treated as decree of the Supreme Court. It is so stated in Section 6(2) to give teeth to the award passed by the Tribunal so that none of the States can raise objection to the same and be guided by the directions of the Tribunal. The purpose of

framing the scheme is exclusively for implementation of the award. The authorities cited by Mr. Ranjit Kumar, we are afraid, are of no assistance in the present context. It needs no special emphasis to state that the purpose of Section 6A is to act in the manner in which the award determines the allocation and decides the dispute with regard to allocation or sharing of water. Keeping that in view, we direct that a scheme shall be framed by the Central Government within a span of six weeks from today so that the authorities under the scheme can see to it that the present decision which has modified the award passed by the Tribunal is smoothly made functional and the rights of the States as determined by us are appositely carried out. When we say so, we also categorically convey that the need based monthly release has to be respected. It is hereby made clear that no extension shall be granted for framing of the scheme on any ground.

Z. **<u>The conclusions in seriatim</u>**

404. In view of our aforesaid analysis we record our conclusions in seriatim:-

(i) After coming into force of the 1947 Act, the doctrine of paramountcy has no room for application as the Government of India became the full sovereign authority. The two agreements of 1892 and 1924 had neither any political arrangement nor touched any facet of sovereignty of India. Per contra, the agreements cover the areas of larger public interest which do not have any political element and in this backdrop, the agreements are neither inoperative nor completely extinct.

(ii) The issues in this case have no connection, whatsoever, with the concepts of sovereignty and integrity of India and, therefore, the bar under Article 363 of the Constitution of India is not attracted.

(iii) Even if we accept the contention that the State of Karnataka did not have any bargaining power at the time of entering into the agreements, but, the State of Karnataka acquired the said bargaining power after the 1947 Act, and definitely after coming into force the Constitution of India. Regardless of the same, the State of Karnataka chose not to denounce the said agreements. Therefore, the said agreements cannot be said to be unconscionable.

(iv) The newly formed States never belied the agreements of 1892 and 1924 after the Reorganization Act, 1956. Ergo, both the agreements remained in force despite coming into effect of the Reorganization Act, 1956.

(v) A scrutinized perusal of the 1924 Agreement reveals that the said Agreement was never intended to be of permanent character. On the contrary, it contemplated a fixed term of 50 years. Therefore, the said agreement expired after 50 years in the year 1974.

(vi) The Tribunal in its approach primarily referred to Helsinki Rules, 1966 which rejected the Harmon doctrine and laid stress on equitable utilization of international rivers. We are of the opinion that the Tribunal was correct in its approach. For determining reasonable and equitable shares, relevant factors have to be considered together, in reaching a conclusion. Keeping in view the various intricacies involved in the case at hand and the duty ordained upon this Court by the Constitution of India, the matter deserved to be adjudicated on the bedrock of equal status of the states and doctrine of equitability. Resultantly, the submission that the

complaint of the State of Tamil Nadu did not warrant any adjudication, does not commend any acceptation.

(vii) This Court in ***In Re: Presidential Reference (Cauvery Water Disputes Tribunal)*** has held that waters of an inter-state river passing through corridors of the riparian states constitute a national asset and no single State can claim exclusive ownership of its water. In this context, the principle of equitable apportionment internationally recognized by the Helsinki Rules, Compione Rules and Berlin Rules which have also been incorporated in the 1987 to 2002 National Water Policies, have been regarded to be the guiding factor for resolving disputes qua apportionment of water of an inter-state river.

(viii) After considering all relevant materials brought on record, we are of the view that having regard to imperative of economy of consumption of water, the final determination of irrigated area arrived at by the Tribunal for Tamil Nadu, cannot be declared incorrect or fallacious.

(ix) We do not find any perversity of approach in the Tribunal's findings with regard to the allocation of water for domestic and industrial purposes in the State of Tamil Nadu. Hence, the same requires no interference.

(x) Drinking water requirement of the overall population of all the States has to be placed on a higher pedestal as we treat it as a hierarchically fundamental principle of equitable distribution

(xi) The rejection of the stand of Kerala seeking trans-basin diversion for hydro-power projects by the Tribunal is justified. The Tribunal has allocated a total of 30 TMC of water towards the overall needs of the State of Kerala and we concur with the said conclusion of the Tribunal.

(xii) We concur with the Tribunal's findings that the Union Territory of Puducherry is entitled for a "second crop", having regard to its unique geographical position and its irrigated area being approximately 43,000 acres.

(xiii) The allocation of water in favour of Union Territory of Puducherry does not require any further enhancement.

(xiv) The admission of facts along with the confirmatory empirical data suggests that around 20 TMC of groundwater is available

beneath the surface in Tamil Nadu which the Tribunal has not taken into account citing it as a conjecture. We, while keeping in mind the risks associated with over extraction of underground water, deem it fit that 10 TMC of the said available groundwater in Tamil Nadu can, in the facts and circumstances of the present case, be accounted for in the final determination of its share.

(xv) The Tribunal had drastically reduced the share of Karnataka towards Domestic and Industrial purpose for the reason being that only 1/3rd of the city of Bangaluru falls within the river basin and also on the presumption that 50% of the drinking water requirement would be met from ground water supply. The said view taken by the Tribunal ignores the basic principle pertaining to drinking water and is, thus unsustainable. Keeping in mind the global status that the city has attained, an addition of 4.75 TMC is awarded to Karnataka.

(xvi) The perspective of the Tribunal to assign 10 TMC of water for environmental protection does not require to be revisited, for such a revisit may result in unwarranted pollution and defeat the conception of sustained environmental purity.

(xvii) In totality, we deem it appropriate to award to the State of Karnataka an additional 14.75 TMC of water, i.e., 10 TMC (on account of availability of ground water in Tamil Nadu) + 4.75 TMC (for drinking and domestic purposes including such need for the whole city of Bengaluru).

(xviii) In view of the allocation of additional 14.75 TMC of water to Karnataka, the State of Karnataka would now be required to release 177.25 TMC of water at the inter-state border with Tamil Nadu, i.e., at Billigundulu.

(xix) The argument of the Union of India that Section 6A of the 1956 Act by employing the word "may" has left room for discretion to the Central Government for the purpose of framing a scheme does not stand to reason and further it does not meet the substance test. Accordingly, the said submission stands repelled. That apart, the framing of the scheme is exclusively meant for implementation of the award or as the same gets modified by this Court.

(xx) It is made clear that subject to the scheme to be formulated under Section 6A of the 1956 Act, in terms of the present adjudication, the recommendations/directives of the Tribunal

with regard to the monthly releases and not inconsistent with anything decided herein, are hereby endorsed for the present for a period of 15 (fifteen) years hence.

405. It is obligatory to clearly state that in view of the acute scarcity of the water resources and the intensely contested claims of the States, it is expected that the allocations hereby made would be utilized for the purposes earmarked and accepted and no deviancy is shown in carrying out the verdict of this Court.

406. Before parting with the case, we record our unreserved and uninhibited appreciation for Mr. Fali S. Nariman, Mr. S.S. Javali, Mr. A.S. Nambiar, Mr. Rakesh Dwivedi, Mr. Shekhar Naphade, Mr. Shyam Divan, Mr. Jaideep Gupta, learned senior counsel, Mr. Ranjit Kumar, learned Solicitor General of India, Mr. Mohan V. Katarki, Mr. G. Umapathy, Mr. M.R. Naik and Mr. S.C. Sharma learned counsel for their able assistance without which it would have been extremely difficult on our part to write this judgment.

407. In the ultimate analysis, Civil Appeal No. 2453 of 2007 filed by the State of Karnataka is partly allowed and all others Appeals stand disposed of accordingly. There shall be no order as to costs.

.....CJI
(Dipak Misra)

.....J.
(Amitava Roy)

.....J.
(A.M. Khanwilkar)

New Delhi;
February 16, 2018