THE REPORT

OF

THE CAUVERY WATER DISPUTES TRIBUNAL

WITH THE DECISION

IN THE MATTER OF WATER DISPUTES REGARDING THE INTER-STATE RIVER CAUVERY AND THE RIVER VALLEY THEREOF

BETWEEN

1. **The State of Tamil Nadu**
2. **The State of Karnataka**
3. **The State of Kerala**
4. **The Union Territory of Pondicherry**

VOLUME II

AGREEMENTS OF 1892 AND 1924

NEW DELHI
2007

VOLUME II

Agreements of 1892 and 1924

(ISSUES UNDER GROUP I)

I N D E X

Chapter 1

The Agreements entered into between the then Govt. of Mysore and the State of Madras in the years 1892 and 1924 - whether arbitrary and invalid

It appears that upto the nineteenth century, irrigation was based on the run of the river and constructions on it were only of a regulatory or diversionary character because the water flowing from the river Cauvery along with water supplied by tributaries were sufficient to irrigate the lands under cultivation in the then State of Mysore and the state of Madras who were mainly utilizing the water of river Cauvery. However, with an extension of areas put under cultivation by the aforesaid two States, dispute relating to sharing of the water of Cauvery arose and took a serious turn. It may be mentioned that the then State of Mysore was a Princely State.

2. In the late nineteenth century the Mysore Government while purporting to restore their old irrigation works wanted to build a number of irrigation works for the benefit of new areas. These constructions were to be made on the rivers and streams emanating and passing through their State. Apprehending that such constructions by the Government of Mysore will diminish the water flowing into the State of Madras, the State of Madras took up the matter with the Government of India. In the letter dated 11th June 1890 the Acting Secretary to the Government of Madras, Public Works Department forwarded notes of discussion at the Conference, between the officers of the Government of Mysore and the State of Madras, held on 10th May 1890 and requested the Government of India to consider as to whether some general

principles should be arrived at as to the extent to which Mysore Government may divert to its own purposes water which flows to Madras territory (Exh.1, TN Vol. I, p 1). From the notes of discussion which had been enclosed with the aforesaid letter, it appears that the then Mysore Government was asserting its natural right to full use of all the water in its territory subject to the condition that Mysore should not injuriously affect the enjoyment of the acquired rights by Madras or materially diminish the supply to Madras works. On behalf of the State of Madras a stand had been taken that the right of Madras to the flow in the rivers was not limited to the amount actually turned to account for irrigation; the Madras was entitled by prescription to whole flow which was allowed to pass the frontier. There was also a controversy as to what shall be the meaning of the expression “materially” diminishing the supply to Madras works as was being asserted on behalf of the Government of Mysore.

3. It may be stated here that in the notes of discussions at the Conference held in Ootacamund on 10-5-1890, the Dewan of Mysore stated the case of Mysore as follows:-

> *"Mysore has a natural right to the full use of all the water in its territory, but such natural right is limited by the rights to supply which have been acquired by prescription on behalf of works in Madras. In exercising its natural right, Mysore may do anything which does not injuriously affect the enjoyment of its acquired rights by Madras, or materially diminish the supply to Madras works. The Madras rights extend only to the supply which has been actually turned to account for irrigation. All the rivers flowing from Mysore*

into Madras pour an unused surplus into the sea. Mysore may intercept and take measures to utilize such surplus, and in view to its interest in it and to preventing the growth or enlargement of the Madras prescriptive rights may as well claim to be informed of and object to new works constructed in Madras for utilizing the river flow as Madras may in regard to what is being done in Mysore".

4. In the Conference, the Dewan of Mysore categorically stated that the works of irrigation till then undertaken, or under projection for future by the Durbar, would not, he believed, materially affect the existing irrigation works beyond the frontier. The objections from Madras authorities had always received, and would always continue to receive, due and respectful consideration from the Durbar; but it was desirable that some definite rules should be prescribed by the Government of India for the guidance of both the parties. On 12-11-1890, the Government of Madras wrote to the Durbar of Mysore clearly stating therein that the proposed rules 1 to 3 are more favourable to the State of Mysore. The rules proposed by the State of Mysore and the counter suggestions made by the Government of Madras were discussed threadbare between the two States as is clear from the correspondence filed on the record viz. letter dated 12-5-1891 (TN Vol.I/ Exh.4)*;* letter dated 29.6.1891 (TN Vol.I/Exh.5); letter dated 7-7-1891 (TN Vol.I/ Exh.6).

5. On 7th July 1891 the Government of Madras, Public Works Department, after examining the proposed rules by the Government of Mysore suggested alterations and additions which according to the State of

Madras were necessary for regulating the flow of river Cauvery (Exh.6 TN.Vol.I, p.34). In reply thereto on 20th July 1891 the Government of Mysore expressed its views on the modifications suggested by State of Madras (Exh.7, TN Vol.I, p.34). The State of Madras expressed its views by communication dated 27th July 1891 (Exh.8, TN Vol.I, p.36). Thereafter the relevant correspondence between two States are dated 6.8.1891 (Exh.9, TN Vol.I, p.37), dated 11.8.1891 (Exh.10, TN Vol.I, p.39), dated 4.1.1892 (Exh.11, TN Vol.I, p.41). Ultimately by letter dated 17th March 1892 (Exh.13, TN Vol.I, p.52) the State of Madras accepted the rules and schedules in connection with the restoration and construction of irrigation works in Mysore forwarded to them on behalf of the Government of Mysore. By letter dated 22nd March 1892 (Exh.14, TN Vol.I, p.52) the Secretary to the Government of Madras, Public Works Department forwarded to the Secretary, Government of India the proceeding from which it appeared that an agreement had been arrived at between the Madras Government and that of Mysore as regards the irrigation question which had been under discussion for some time past. The agreement between Mysore Government and Madras Government was entered into on 18.2.1892 in the form of Rules known 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 relevant clauses of the said Agreement/Rules are reproduced.

I. In these rules –

(1) “New Irrigation Reservoirs” shall mean and include such irrigation reservoirs or tanks as have not before existed, or, having once existed, have been abandoned and been in disuse for more than 30 years past.

(2) A “new Irrigation Reservoir” fed by an anicut across a stream shall be regarded as a “New Irrigation Reservoir across” that stream.

(3) “Repair of Irrigation Reservoirs” shall include (a) increase of the level of waste weirs and other improvements of existing irrigation reservoirs or tanks, provided that either the quantity of water to be impounded, or the area previously irrigated, is not more than the quantity previously impounded, or the area previously irrigated by them; and (b) the substitution of a new irrigation reservoir for and in supersession of an existing irrigation reservoir but in a different situation or for and in supersession of a group of existing irrigation reservoirs provided that the new work either impounds not more than the total quantity of water previously impounded by the superseded works, or irrigates not more than the total area previously irrigated by the superseded works.

(4) Any increase of capacity other than what falls under “Repair of Irrigation Reservoirs” as defined above shall be regarded as a “New Irrigation Reservoir”.

II. 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:

Across1.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.

[Emphasis supplied]

IV Should there arise a difference of opinion between the Madras and Mysore Government in any case in which the consent of the former is applied for under the last preceding rule, the same

shall be referred to the final decision either of arbitrators appointed by both Governments, or of the Government of India.

V ……

VI the foregoing rules shall apply as far as may be to the Madras Government as regards streams flowing through British territory into Mysore."

Schedule A was annexed giving the details of the rivers and tributaries passing through the territory of Government of Mysore including Cauvery and its tributaries Hemavathi, Laxmanthirtha, Kabini, Honhole (or Suvarnavathy) and Yagachi (tributary of Hemavathy), upto the Belur bridge.

Note:- It has been stated that there was no mention of Tributary Harangi in the said Schedule because then it was outside the territory of Mysore and was in Coorg State.

6. In view of the aforesaid clauses of the Agreement the Mysore Government was to have previous consent from the Madras Government in respect of any construction proposed to be made including any new irrigation reservoirs across the 15 main rivers named in Schedule A to the said Agreement or across any stream named in Schedule B below the point specified therein. Before any such project is executed full information regarding the same had to be furnished to the State of Madras for the purpose of consent. The Madras Government was not to refuse such consent except (1) when Mysore Government had not furnished full information regarding the proposed work to the Madras Government; (2) The grant of any such consent by the Madras Government would deprive its inhabitants of the protection of prescriptive rights already acquired and

existing in accordance with the law on the subject to use water of an inter-State river. This had to be examined in respect of individual cases, whether the proposed construction shall be fair and reasonable.

7. After the Agreement aforesaid again dispute arose between the two States, as both the States formulated proposals for construction of reservoirs on river Cauvery. On 15-10-1910, Mr. M. Visvesvaraya, Chief Engineer, P.W.D., Mysore submitted a Note on the Cauvery Reservoir Project, with special reference to its effect on the river supply in the Madras Presidency (Annexure I to TN-Vol.1/ Exh.No..16). In this Note, the Chief Engineer stated in detail as to the urgent demand for storage for the Kolar Gold mines and the consequent need of the Cauvery River Project. In this note, the object of the scheme and its effect on the river discharges below Power Station have been stated; in addition to the fair weather supply of the river in the British Territory has been stated as well as the effect on future river supply in the British Territory and the effect it will have on the river supply during the monsoon months. It had also been stated that the project will materially improve the fair weather supply in the British Territory and cultivators there will reap the benefits of the Reservoir without any pecuniary sacrifice on the part of the Madras Government.

8. Relevant paragraphs 2, 3, 7, 8, 9, & 10 and the conclusion of the Chief Engineer are quoted below:-

1. -------

2. Urgent demand for storage for the Kolar gold mines – Government have to spend annually Rs. 40,000 to 50,000 including establishment charges, for conserving the river supply to the power station at Sivasamudram. At present, 10,000 to 11,000 H.P. is generated, of which about 9,000 H.P. is supplied to the Kolar gold mines. For two or three months in the hot weather, the river supply is liable to fall short of the demand. The requisite supply is, however, maintained partly by restricting the consumption along existing irrigation channels and partly by storing water at the several anicuts by temporary barrage works. It is in order to do away with these make shift that a storage reservoir is primarily needed.

The Mining Companies have recently notified to this Government their intentions to erect reserve steam or oil plant of their own unless immediate steps are taken to provide the necessary storage. A London representative of the Companies is coming out here towards the end of this month and an immediate decision is important.

3**. Object of the Scheme** – The smaller valleys in the Cauvery catchment have been examined, but no suitable site for impounding water with a masonry dam has been discovered. A small storage reservoir on the main river will be expensive to construct and maintain and, when constructed, it is liable to silt up rapidly. A large reservoir is contemplated because there is already a demand for additional power at the Kolar gold mines and further demands are sure to arise in course of time for other purposes.

A high dam is also necessary because the natural features of the country require that the irrigation canal should start at a level of not less than 60 feet above river-bed. Storage is badly needed for productive irrigation and for the protection of the country during years of extreme drought.

As the existing irrigation in the State is dependent on uncertain rainfall or on a precarious river supply, valuable crops like sugarcane which require water in the hot weather also cannot be cultivated on a large scale from year to year. It is proposed to provide storage for irrigating about 125,000 acres annually and for generating, at or near Sivasamudram, about 5,000 additional H.P. immediately and further supplies when demand arises for the same.

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7. **River discharges below power station** – The power works at Sivasamudram have already led to an increase in the fair weather discharges of the river. Formerly for three or four months of the hot weather, the river discharge was liable to fall below a minimum of 500 cubic feet per second, the supply maintained at present. In one year, as low as 91 cubic feet per second was recorded.

8. The construction of the reservoir will lead to a further large addition to the fair weather supply of the river in British territory. The whole of the water used for power generation and a portion of that used for irrigation will ultimately find its way back into the river. In future, every increase in power supply at Sivasamudram – the tendency will be always for such increase – will add to the hot weather flow and the ultimate gain to the river in the British territory will be very considerable.

9. **Effect on future river supply in British territory –** The annexed statement shows the effect of the construction of a reservoir with full supply at 110 feet, on the river discharges at Sivasamudram. The net effect of the proposed reservoir and subsidiary works will be the abstraction of about 31,000 millions cubic feet from the river in a year

of average rainfall, representing about one-ninth of the total discharge at the dam site and less than one-twelfth of that at Sivasamudram.

The figures given in the annexed statement of the lowest discharges on record for each calendar month of the year as a result of gaugings extending over nine years are also suggestive. During the past nine years, the minimum discharge at Sivasamudram in an year fell below 280,000 millions cubic feet. The quantity abstracted for storage under the present proposals will therefore represent about one-ninth of the discharge at that point in the worst year on record.

10. There will, of course, be some diminution in the river-supply during the monsoon months, chiefly in June and July; but the total volume contributed to the river from the Mysore territory in this period will be so enormous that the abstraction of the supply needed for filling the reservoir is not likely to have any appreciable effect on the river discharge required for irrigation in the Madras Presidency.

The bulk of the irrigation in the Cauvery delta is situated over 200 miles below the proposed reservoir site. Should any difficulty be apprehended from the interception of the river supply in June or September, special arrangements may be made to reduce the quantities intercepted in those months. This point may be settled by exchange of views and discussion between the Chief Irrigation authorities of Madras and the Engineer officers of the Mysore State.

11. ----------

12. **Conclusion** – The figures and information given above go to show that the reservoir will store a portion of the surplus water of the river when it is not wanted and when it would otherwise run to waste into the sea. The whole of the storage used for power generation and quite one-fourth of that drawn for irrigation will return to the river and add to its supply at a time when such supply will be most appreciated by the Madras cultivators.

> As far as can be foreseen, the project will materially improve the fair weather supply in British territory and the cultivators there will reap the benefits of our works without any corresponding pecuniary sacrifice on the part of the Madras Government.

9. On 31st October, 1910, the Dewan of Mysore wrote to the Resident in Mysore (KR Vol.1/ Exh.19) bringing out to the notice of the Resident that his Highness Maharaja of Mysore wanted the construction of a reservoir on the Cauvery river within the Mysore State and requested him to approach the Madras Government in the matter. In the letter, it was specifically stated that according to the 1892 Rules, the consent of the Madras had to be obtained before the new Reservoir is constructed within the Mysore State; and in the event of disagreement between two Governments, the matter had to be settled by arbitration.

10. The main reason for submitting the proposal for the construction of a reservoir was that the British Mining Companies on the Kolar Gold Fields had long been asking the State of Mysore for a storage reservoir for generating electricity and they had asked the State of Mysore to take steps immediately, otherwise, they would be compelled to make other arrangements and erect additional steam or oil plant of their own as a stand-by. The Mining Companies had put pressure on the State of Mysore to decide the question finally by the end of November.

11. The Government of Madras vide letter dated 13-11-1910 (KR-Vol.1/Exh.20) wrote to the Resident of Mysore that before the Madras

Government can agree to the construction of the proposed reservoir in Mysore, they required some further details as to its scope and conditions of working to ascertain its probable effect upon the existing wet cultivation under the Cauvery. In the said letter, it was suggested that the Chief Engineer of Mysore be deputed to come to Madras and discuss the details of both projects with the Chief Engineer for Irrigation, Madras. The Chief Engineer of Mysore at that time was Mr. M. Visvesvaraya. Mr. M. Visvesvaraya went to Madras and had a conference with Mr. C.A. Smith, Chief Engineer and Secretary to the Government of Madras, Public Works Department. After discussions with the Chief Engineer of the Government of Madras, Mr. M. Visvesvaraya submitted a report to the State of Mysore; and in the said report (KR-Vol.1/Exh.21), the objections of the Madras Government to the Mysore scheme were detailed. They were:-

The Madras view:-

- They had over one million acres under irrigation in the lower reaches of the Cauvery.
- The supply of the Cauvery is a very intermittent one. It has been the standing rule, therefore, for many years past, to pass into the delta the equivalent of 7 feet on the Cauvery dam whenever available.
- A gauge reading of 7 feet connotes a normal discharge of 2,300 m.c.ft. daily.
- Any scheme for a reservoir higher up the valley which reduces the supply without giving it back just at the time requiring cannot but interfere materially with the existing irrigation.
- The Mysore reservoir should not be allowed to impound whenever the gauge reading at the Cauvery dam falls below 7 feet.

- If this restriction is enforced, the Mysore reservoir will not fill for three years in every 20.

12. On 6-12-1910 (*KR-Vol.1/Exh.22),* the Joint Secretary to the Government of Madras wrote to the Resident in Mysore in regard to the proposed construction by the Mysore Durbar of a reservoir on the Cauvery river. It was stated in the said letter that existing interests vested in the very large area of land in British Territory irrigated by the Cauvery are of a great magnitude and very careful consideration by the Madras Government will be necessary before they can agree to the construction of a reservoir which must necessarily affect the supply of water to that territory. His Excellency the Governor in Council was accordingly quite unable to express any opinion on the Durbar's project until he had an adequate opportunity for the examination of the complete scheme for construction of the reservoir with full details of the design of the reservoir itself, as also of the design and scope of the irrigation system and of the rules for working it.

13. The Joint Secretary to the Government of Madras wrote letter dated 23-12-1910 to the Secretary to the Government of India, Public Works Department in regard to reservoir at Kannambadi (TN-Vol.1 / Exh.16). It was specifically written in the communication to the Government of India that under the Rules drawn up by the Durbar in 1892, without the approval of the Madras Government, the Durbar should not construct new irrigation works on rivers like Cauvery which flow through both the Mysore State and the Madras Presidency and such consent can be withheld if the proposal affects

prejudicially the prescriptive and actually existing rights to the use of water vested in the Government of Madras. It was also stated in the letter that the Durbar has also been informed that the scheme as proposed by Chief Engineer could not be accepted since the proposals involved very serious and detrimental interference with existing interests in British territory; and that it would be necessary for Durbar to frame Code of Rules for the working of the system without injuring the existing irrigation in British Territory and that they should be able to satisfy this Government that such rules could at all times be enforced.

14. On 27-12-1910, the Dewan of Mysore wrote to the Resident in Mysore (KR-Vol.1/ Exh.23). In this letter, it was stated by the Dewan of Mysore that the catchment area intercepted by the proposed reservoir is only about one-seventh of the entire catchment above the Upper Anicut at the head of the delta. The urgency for the construction of the reservoir was again stressed by the Dewan of Mysore saying that the representative of Messrs John Taylor & Sons had come to Mysore, and was anxious for an immediate assurance that the reservoir will be constructed for the benefit of the Kolar Gold Mines.

15. The above letter dated 27-12-1910 was forwarded to the Madras Government and in reply, the Joint Secretary to the Government of Madras, Public Works Department, wrote to the Resident in Mysore (KR-1 Exh.25). In this letter, the Madras Government categorically stated that the reading of 7-feet on the Cauvery Dam Gauge had for many years been recognized as the

quantity required for the supply to the Delta. The Resident was informed that the Madras Government was not prepared to modify the terms on which they would be prepared to allow the work to proceed. Paragraph-3 of the letter is quoted below:-

> "The reading of 7-feet on the Cauvery Dam Gauge has for many years past been recognized as indicating the amount necessary to give full supply to the delta. This high gauge is necessary on account of the intermittent nature of the supply and although it is not always possible to maintain that level, this Government are of the opinion that it can not be deliberately reduced without affecting the existing interest in the Tanjore delta. Were a constant supply guaranteed, it might be possible to reduce this level; but, in the absence of any such assurance and of any more convincing arguments than those now put forward, I am to say that the Madras Government regret their inability to modify the terms on which they would be prepared to allow the work to proceed as set forth in D.O. letter No. R.O.C.386-1-10 of the 6th December, 1910."

16. After the receipt of the above letter, the Durbar further considered the matter in the light of the observations made by the Madras Government; and then on 27-3-1911, the Dewan of Mysore wrote to the Resident in Mysore (*KR-1 Exh.28).* In paragraph 10 of this communication, it was conceded by the Durbar that a smaller reservoir with 80-feet dam be immediately permitted. Paragraph-10 of this letter makes the specific modified proposal in the following terms:-

> " The specific requests of the Durbar are:-

(1) That the construction of the smaller reservoir with an 80-feet dam be at once permitted;

(2) That, if the Government of India desire further enquiry before sanctioning the full size reservoir, the Madras Government may be requested to furnish particulars of the volume for water actually used for irrigation purposes in the Cauvery delta for the past twenty years, as required under the agreement cited in paragraph 3 above; and

(3) That the Government of India will be pleased to withhold their consent to the construction of any reservoir in the Madras Presidency for filling which the Madras Government may hereafter claim a prescriptive right not hitherto possessed by them."

17. On 12-5-1911, Sir John Benton, Inspector General of Irrigation, Government of India submitted a note on the proposal of the Mysore Durbar to construct a storage reservoir on the Cauvery river in the Mysore Territory (TN-II Exh.40). Sir John Benton stated his conclusion in paragraph 32 of the note; but the two most important relevant conclusions (I) & (II) are quoted below:-

"Conclusions - the conclusions which I have arrived at are as follows:-

(i) That the existing Madras irrigation requires the supplies of water as actually diverted over the Cauvery Dam for irrigation in the past, - that no curtailment of these supplies is possible without inflicting very serious loss on the cultivators of the delta, - and that no reduction is compatible with the Agreement of 1892.

(ii) That the scheme for the proposed Mysore reservoir should be based on the surplus waters left over after operating the Madras Delta irrigation system as in (i) above; this is the proposal of the Madras Government – it appears reasonable, - and the impounding rules which they propose may be accepted."

18. On 3-7-1911 (KR-I Exh.30), the Resident in Mysore wrote to the Dewan of Mysore enclosing a copy of the note dated 12-5-1911 by Sir John Benton to the Dewan of Mysore. The Resident in Mysore further asked the Durbar that the complete project should be amended in accordance with Sir John Benton's suggestions.

19. In reply to the letter of the Resident in Mysore, the Dewan of Mysore on 7-7-1911 *(KR-I Exh.31)* stated in detail after considering the report of Sir John Benton and giving his own views in the matter to ultimately request that the first stage of the reservoir may be permitted to be constructed as had been suggested in the letter dated 27-3-1911 *(KR-I Exh.28)* mentioned above.

20. On the receipt of information from the State of Mysore, Sir John Benton, Inspector General of Irrigation, Government of India examined the matter again and submitted another note of 28-7-1911 (Appendix VIII to TN Vol..II/ Exh.40) and recommended as follows:-

(i) That copies of the papers mentioned in paragraph I above along with copies of my note of 12th May, 1911 may be sent to the Madras Government for report.

(ii) That the measures necessary for the protection of Madras interests as proposed by that Government may be accepted, or that any amendments of same may be agreed to by Madras – vide paragraph (i) above.

(iii) That the working conditions of the proposed Mysore reservoir and irrigation scheme may be clearly laid down and agreed to by the Governments of Madras and Mysore. The proposed working rules were asked from the Mysore Government by the Government of Madras some months ago, but they do not appear to have been furnished in a very definite form up to now.

(iv) That fully detailed working tables for the Mysore reservoir, such as advanced by Colonel Ellis, may be prepared for the conditions (iii) above and for the following two cases:-

(a) For a reservoir of sufficient capacity to comply with the conditions (ii) above while fully meeting Mysore requirements.

(b) For a reservoir restricted to 11,000 million cubic feet as the ultimate capacity.

The Madras Government will, I trust, be willing to prepare these working tables provided that they are furnished with the requisite additional data which may be found to be necessary – vide paragraph 3 above.

21. The Note of Sir John Benton dated 28-7-1911 was communicated by the Resident in Mysore to the Dewan of Mysore vide its letter dated 31-8-1911 *(KR-I Exh.32).* He informed the Dewan of Mysore that on the information which was then available with the Government of India, they were not satisfied that the proposal of the Durbar could be accepted without the risk of prejudicing seriously existing irrigation interests in Madras; and further

that they were not satisfied that the Government of Madras had yet been provided with all the information that was required to enable them to express any opinion on the Durbar's proposal. The Resident in Mysore was also informed by this communication that the questions at issue may now be fully discussed between the Government of Madras and the Durbar; and thereafter, the proposal be submitted for the consideration of the Government of India. If an agreement is arrived at, then the said proposal may be forwarded for the confirmation of the Government of India.

22. On the receipt of the letter dated 31-8-1911 mentioned above, the Dewan of Mysore wrote to the Resident in Mysore on 10th September, 1911 (KR-I Exh.33) that in view of the amended proposal of the Dewan of Mysore for the construction of a reservoir, at present only of 11,030 million cubic feet capacity; with a dam of height 80- feet, the Resident of Mysore should move the Government of Madras to give their consent to the construction of a smaller reservoir. This request was made in view of the fact that Messrs John Taylor & Sons of London had given an ultimatum that the Mining Companies may withdraw their offer unless an immediate assurance was given about the construction of a reservoir.

23. On 23-9-1911, the Joint Secretary to the Government of Madras wrote to the Resident in Mysore (KR-I Exh.35) that the Government of Madras had no objection to the immediate commencement of a smaller reservoir limited to a storage capacity of 11,030 million cubic feet on the understanding that the irrigation under it is limited to 25,000 acres and that

the position of that area is defined to the satisfaction of the Madras Government. The Government of Madras sought an undertaking from the Mysore Durbar in the following terms:-

> "But if the Mysore Durbar choose to build the foundations for a dam of greater height than that necessary to give a storage of 11,030 million cubic feet, this Government, in order to avoid misunderstandings hereafter, consider that they should obtain from the Durbar a definite undertaking that the fact of the Mysore Government having built a dam of wider foundations than are necessary for the small reservoir of 11,030 million cubic feet shall not be brought forward in any future discussion as an argument for the construction of a larger reservoir. I am directed to request that this guarantee shall be given before the work is commenced."

24. On the receipt of the letter dated 23-9-1911, the Dewan of Mysore wrote to the Resident in Mysore vide letter dated 29.9.1911 (KR Vol.I/Exh.36) giving a reply on behalf of His Highness, the Maharaja of Mysore. He summed up the four conditions laid down by the Government of Madras in the following terms:-

1. That the extension of irrigation due to the reservoir is not allowed to exceed 25,000 acres;
2. that the position of such extension is defined to the satisfaction of the Madras Government;
3. that the arrangement made for passing down the supplies required for Madras and for the disposal of the surplus shall be approved by the Madras Government; and
4. that a guarantee shall be given before the work is commenced that the fact of the Durbar having built a dam of wider foundations than necessary for the smaller reservoir of

11,030 million cubic feet shall not be brought forward in any future discussion as an argument for the construction of a larger reservoir.

25. The Government of India confirmed the agreement arrived at between the Government of Madras and the Mysore Durbar under the stipulations stated in the letter from the Madras Government dated 23-9-1911. This was conveyed to the Dewan of Mysore by the Resident in Mysore vide his letter dated 8-10-1911 (KR-I Exh.37).

26. On the receipt of the above communication about the sanction of the limited project by the Government of India, His Highness the Maharaja of Mysore passed an order sanctioning the construction of the first stage of the Reservoir scheme.

27. After sanctioning of the first stage of the project, the question of raising the height of the dam to 124 feet was taken up by the Mysore Government. The Madras Government insisted to frame Rules defining the method of passing down the supplies required for irrigation in the Madras Presidency. The Dewan of Mysore vide his letter dated 3.11.1911 suggested some provisional rules.

28. On receipt of the letter dated 3-11-1911, the Government of Madras vide letter dated 23.11.1911 (KAR Vol.I/Exh.43) suggested amendments to the proposed Rules.

29. These suggestions were not acceptable to His Highness the Maharaja of Mysore, and this fact was communicated by letter dated 10-5-

1912 (KR-I Exh.44) to the Government of Madras in regard to the draft Rules regulating the Mysore-Cauvery Project.

30. The Government of Madras in its letter dated 30-8-1912 (KR-I Exh.46) wrote to the Resident in Mysore clearly stating therein the reason why the Madras Government could not accept the proposal of measuring the discharges required for Madras irrigation at the Cauvery Dam instead of at Sivasamudram as proposed by Colonel Ellis because the effect of impounding or letting out water from the reservoir at Kannambadi will not be felt at the Cauvery Dam till about four days afterwards and that owing to the irregular nature of the floods, the effect of this would be that Madras interests would often suffer severely. In conclusion, the Madras Government categorically stated that it was altogether unable to accept the contention of the Dewan of Mysore contained in para-8 of his letter under reference.

31. On the same day i.e. 30-8-1912, the Government of Madras wrote to the Secretary to the Government of India (KR-1 Exh.45) clearly stating that the working tables prepared by the Chief Engineer, Mysore cannot be accepted. It was clearly stated by the Government of Madras that His Excellency the Governor in Council was unable to give his assent to the construction of the larger reservoir in Mysore. Under the agreements of 1892, the Mysore Durbar could claim that the matter in dispute may be referred to arbitration, but His Excellency the Governor in Council believed that the decision of the Government of India would be accepted by the Government of His Highness the Maharaja as a conclusive settlement.

32. In another letter dated 11-9-1912 by the Secretary to the Government of Madras to the Resident in Mysore *(KR-1 Exh.47),* it was categorically stated as to why Sivasamudram anicut can not be accepted as the site for the measurement of the discharges because there was a large area of catchment which brings appreciable supplies during the north-east monsoon below Sivasamudram.

33. On 6-1-1913, the First Assistant to the Resident in Mysore wrote to the Dewan of Mysore (KR Vol.1 / Exh.48) in relation to the construction of a reservoir on the Cauvery river at Kannambadi. In this letter, he specifically stated that the Madras & Mysore Governments having failed to come to agreement on questions relating to the storage of Cauvery waters, the Government of India proposes to submit the case to an Arbitrator to be a High Court Judge assisted by an Irrigation Expert, as Assessor.

34. In reply to the letter of the Resident dated 6-1-1913 (KR-Vol.1/Exh.49) referred to above, the Dewan of Mysore wrote to the Resident in Mysore, agreed that a High Court Judge to be appointed as an Arbitrator assisted by the Irrigation Expert as Assessor. By this letter, the Durbar also agreed that it will bear half the cost of salaries and other expenses of the arbitration. This acceptance of the Arbitrator was subject to the reservation that the Award given by the Arbitrator is not to be treated as final but it should be open to the Durbar to place their case before the Government of India after the opinion of the Arbitrator is recorded.

35. Since both the State of Mysore and the Government of Madras agreed for the appointment of the Arbitrator, the Government of India appointed Sir H.D. Griffin, Judge, High Court, Allahabad, as Arbitrator; and Mr. N.M. Nethersole, Inspector General of Irrigation, as the Assessor.

36. The Arbitration proceedings on the dispute between the Madras and Mysore regarding the respective rights of the two Governments as to the water of the river Cauvery commenced on 16th July, 1913 at Ootacamund. The proceedings of the arbitration are in the *T.N. Vol.IV Exh.227.*

37. On 12-5-1914, the Arbitrator Sir H.D. Griffin delivered his Award. The award is at TN Vol.IV - Exh.228. The findings of the Arbitrator on the various terms of reference are as follows:-

Issue No.1 was what is the true interpretation of the Agreement of 1892	It was found that as a matter of law, the user must be a reasonable one. What constitutes reasonable user depends on the circumstances of each particular case. Not only does the law lay down that the user must be reasonable one; but the Agreement must be fair and reasonable in nature and extent. When any matter is open to doubt, the benefit of such doubt will be given to Madras in view of the existent and extensive interests of Madras in the delta irrigation as compared with the prospective and relatively unimportant interests of Mysore, affected by the Mysore project.

Issue No.2 (a) was what is the extent of the prescriptive rights of Madras as against Mysore under that interpretation?	The finding was that the extent of the prescriptive right of Madras may be measured by gauge reading at the Cauvery Dam (Upper Anicut) which connotes a full and ample supply for the reasonable requirements of Madras Irrigation according to the season.
Issue No. 2 (b) was what volume of water measured at the Upper Anicut is necessary to conserve these rights unimpaired ?	The finding was that Madras was entitled to 22,750 cusecs for the requirements of their existing irrigation equivalent to a present gauge-reading of 6.5 feet at the Cauvery Dam.
Issue No. 3 (a) was what principles and rules for regulation of the discharges in connection with the Kannambadi reservoir can best be formulated which will ensure to Madras full	The finding was that the daily gauges at the Cauvery Dam and details of flow and gauges at Kannambadi such as will clearly show the working of the reservoir both as to inflow and outflow should be telegraphed daily by each party respectively to the other party. It is not necessary, at present, to state the details mentioned in the findings.

protection of their prescriptive rights ?	
Issue No. 3 (b) was whether the rules at first formulated should not be tentative, and, if so, for what period and to what extent?	In regard to this issue, it was recorded by the Arbitrator that the parties are in agreement that the rules should be tentative and subject to revision any time by consent of parties. In case of disagreement, the question is to be decided on a reference to the Government of India.
Issue No.4 - Will the construction and working of the Kannambadi reservoir necessarily prevent the passing on to Madras of the quantity of water due to Madras ?	The finding was that an examination of the evidence does not support the contention of Madras.

38. On 21-4-1915, the Secretary to the Government of Madras, Public Works Department (Irrigation Branch) wrote to the Secretary to Government of India, Public Works Department *(TN-V Exh.229)* challenging the findings of Sir H.D. Griffins, the Arbitrator in the dispute between the Madras Government and Mysore Durbar on the question of constructing a dam

across the river Cauvery with the reservoir at Kannambadi. In this letter, detailed reasons were given as to why the Government of Madras was challenging the award given by Sir H.D. Griffins.

39. On 6-7-1915, (KAR Vol.I/Exh.52) Sir M.Visvesvaraya, Dewan of Mysore wrote to the Resident in Mysore challenging the award and pointing out in the said representation certain special points in the award, which in the opinion of the Durbar, required modification.

40. On 30-3-1916 *(TN-V/Exh.230),* the Secretary to the Govt. of India, Public Works Department wrote to the Secretary to the Government of Madras, Public Works Department, Irrigation Branch about the decision of the Government of India in regard to the appeal made by the Government of Madras. He intimated the Government of Madras that the Government of India had given their most careful consideration to the representation by the Government of Madras in regard to the Arbitrator's findings in the Madras-Mysore Cauvery Arbitration Proceedings and that they saw no reason to alter or amend the Arbitrator's award on the several terms of reference in any respect and that Government of India had been pleased hereby to ratify it.

41. On 26-7-1916, the Secretary to the Government of Madras wrote to the Secretary to the Government of India, Public Works Department (TN-V Exh.233) saying that the Governor in Council regretted that he was unable to acquiesce to the decision of the Government of India and desired to submit the matter for the final orders of His Majesty's Government and accordingly made a request that under paragraph 2 of Home Department

letter No.2546 dated 17th June, 1872 the matter under issue may be referred to the Secretary of State for India.

42. His Majesty the Secretary of State for India did not approve the award. The decision was communicated to the Resident in Mysore by letter dated 8-11-1919 *(TN-V Ex.234)* from the Deputy Secretary to the Government of India in the Foreign and Political Department.

43. The decision was given in the following terms:-

> "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 of 1892 was varied in the Arbitration Proceedings and, secondly, because, while the Agreement of 1892 was and is valid as between the Governments of Madras and Mysore, this does not relieve him of his general 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 the rule IV."

44. Detailed reasons why the award of the Arbitrator was not approved has been stated in the memorandum which is an enclosure of this letter. It is not necessary to give in detail the reasons given by the Secretary of State for India. The Government of India, however, said to Government of Mysore that it was open to either enter into negotiations with the Government of Madras with a view to a decision being reached, out of court, or to submit the main questions to arbitration by a new tribunal without further delay.

45. After the receipt of the decision by the Secretary of State for India, an attempt was made by the State of Mysore and the Government of Madras to discuss the technical side of the Cauvery question in order that both the State of Mysore and Government of Madras may be able to settle their differences without further outside intervention. This step of the Government of Madras was communicated to the Inspector General of Irrigation in India vide letter dated 26-3-1920 (KR-II – Exh.56). In this letter, it was communicated that the Madras Government was hoping to arrange a conference between W.J. Howley, Chief Engineer Irrigation, Madras, the representative of Madras and S. Cadambi Chief Engineer Mysore, the technical representative to the State of Mysore.

46. On 1st – 2nd April, 1920, S. Cadambi wrote to Mr. Howley informing him that the Mysore Government was agreeable to an informal conference of Madras and Mysore engineers with a view to come to an amicable settlement in regard to the Cauvery Arbitration case. It was specifically stated in this letter that the conference will be confined to purely technical matters.

47. Informal conferences between the two Chief Engineers accordingly were held at intervals from April, 1920 and resulted in the drafting of a fresh set of rules for the regulation of the Krishnarajasagara which these officers recommend should be substituted for those laid down by the Arbitrator (TNDC V Exh.235,P 27). In this letter dated 31.8.1921, it was further stated that the proposed rules of regulation were in themselves incomplete and inoperative in the absence of a covering agreement, and consequently, the Govt. of

Madras sent a draft agreement calculated to make these rules of regulation operative and embodying the principles enunciated in the Conference of the Engineers. The Resident was asked to ascertain and communicate views of the Durbar to the Government of Madras. The draft Agreement as well as the rules of regulation as agreed upon by the two Chief Engineers on 26.7.1921 were also enclosed. Ultimately the agreement was executed by the two States on 18th February, 1924.

48. The whole agreement has already been reproduced in the earlier volume. In respect of the terms of the agreement, it may be mentioned that Clause 10 (i), (ii) and (iii) are in respect of the construction and operation of the Krishnarajasagara reservoir. Clause 10 (ii) requires the Mysore Government to regulate the discharge through and from the said reservoir 'strictly in accordance with the Rules of Regulation set forth in the Annexure I' to the said Agreement. Clause 10 (iv), (v), (vi) and (vii) relate to the future extensions of the irrigation in Mysore and Madras as well as future constructions of reservoirs on the Cauvery and its tributaries mentioned in Schedule A of 1892 agreement and how those reservoirs shall be operated so as 'not to make any material diminution in supplies connoted by the gauges accepted in the Rules of Regulation for the Krishnarajasagara forming Annexure l' to the said agreement. The next important Clause is 10 (xi) provides for re-consideration of the limitations and arrangements embodied in Clauses (iv) to (viii) at the expiry of 50 years from the date of execution of the said agreement for purposes of further extension of irrigation and

modification and additions as may be mutually agreed upon as a result of such re-consideration. Clause 10 (xiv) provided that should Madras Government construct irrigation works on Bhavani, Amaravathy or Noyyil rivers in Madras as new storage reservoirs in Madras, the Mysore Government shall be at liberty 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 reservoir in Madras. Clause 10 (xv) provided for reference to arbitration, if any dispute between the Madras Government and the Mysore Government arose 'touching the interpretation or operation or carrying out of this agreement'.

49. Rule 7 of the aforesaid Rules of Regulations of the Krishnarajasagara, which in a sense, is the bed rock of the agreement of 1924 needs to be reproduced. It is as follows:-

> "II. LIMIT GAUGES AND DISCHARGES AT THE UPPER ANICUT
>
> 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.”

50. It has already been stated in earlier volume as to how after expiry of the period of 50 years in the year 1974, the State of Tamil Nadu and the State of Karnataka (the erstwhile State of Mysore) started giving their own interpretation in respect of the life of the agreement of 1924. According to the State of Karnataka, after the expiry of the period of 50 years from the date of its execution, the agreement expired and none of the clauses therein are enforceable in respect of discharges to be made from Krishnarajasagara and other reservoirs on the tributaries of Cauvery, which were then under construction in Karnataka. On the other hand, Tamil Nadu has been asserting that the agreement is permanent in nature and all the terms therein are binding on Mysore, now on the State of Karnataka in respect of operation of Krishnarajasagara and other reservoirs which have been constructed on the tributaries of river Cauvery. The State of Karnataka has not only taken the stand that the agreement of 1924 has expired in the year 1974, but also the stand that 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 as such part of British territory and the State of Mysore, which was under the Ruler.

51. It cannot be disputed that the question of storage and release from ‘KRS’ with the raised height up to 124 feet was discussed between the officers and engineers of the two States in detail. The then Hon’ble Member

of the Council and the Dewan of Mysore met and discussed the different aspects of the dispute several times between June 1922 and November 1923. His Highness the Maharaja of Mysore and His Excellency the Governor of Madras had also met twice and the draft agreement had been finalized and then the agreement was entered into between the State of Madras and the Government of Mysore on 18-2-1924. From the different correspondence and notes exchanged between the State of Madras and Government of Mysore referred to above, it shall appear that before the Agreement of 18.2.1924 was entered into, the terms of the agreement between the two States were fully examined by them including as to how the new irrigation reservoir was likely to diminish in any manner the flow of river Cauvery to the territory of Madras State.

52. It was submitted on behalf of the State of Karnataka that from the correspondence between the State of Madras and the then State of Mysore, which preceded before the execution of the agreement in the year 1892 and the agreement of 1924 indicate that the then State of Mysore had to enter into those agreements under some compulsions. It was also pointed out that this is apparent from the fact that when no reservoir or embankment had been contemplated by the State of Mysore and only some repairs of old anicuts and irrigation channels were being carried out, a protest was lodged on behalf of the State of Madras, being a lower riparian State, asking the details of such constructions. Although we have referred only from the letter dated 11th June, 1890 by the Acting Secretary to the Government of Madras forwarding

therewith a note of discussions between the officers of the Government of Mysore and State of Madras held on 10th May, 1890 requesting the Government of India to consider as to whether some general principles should be arrived at as to the extent to which the Mysore Government may divert to its own purposes water, which flows to Madras territory; but really the Madras Government started protesting since the middle of the 19th century . All those letters and replies thereto have been brought on the records. The contention on behalf of the State of Karnataka is that the Rules defining the limits under which no new irrigation works were to be constructed by the Mysore State without previous consent by the Madras Government were harsh on the Mysore Government.

53. The extent of the right, which was being asserted by the then State of Madras in respect of the water of river Cauvery, is demonstrated from a communication dated 13th June, 1889 to the Minister from the Assistant to the Resident in Mysore quoting the stand of the State of Madras, as follows:-

> "In acknowledging the receipt of letter No.60-8, of the 9th April from your Secretary for the Public Works Department, I am directed to inform you that it has been forwarded to the Government of Madras.
>
> 2. Sir Oliver St. John also desires me to point out that he cannot accept the contention that"under the law and custom of all nations, Mysore has the right to utilize to the fullest extent the natural water courses flowing through its territory." It is presumed that by the law and custom of all nations, international law is meant. 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 towards, northern and western Europe, and it could hardly be contended that the Swiss republic would be permitted by international law to divert the waters of the Rhine into the Rhone or vice versa and so destroy the main artery of inland navigation of Germany or France. Yet this is no more than is claimed for Mysore by your Secretary's letter. 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." (Ref: Page 6 of KR-Volume-62 - Exhibit No.515)

54. It is contended on behalf of Karnataka that in the agreement of 1924, the State of Madras as a lower riparian State, had put several restrictions in respect of impounding of water in Krishnarajasagara as well as the other reservoirs to be constructed on the tributaries of the river Cauvery in different clauses of the said agreement and that by rule 7 to Annexure I, which contained the rule regarding regulation of discharges from the Krishnarajasagara, prescribed minimum flow of Cauvery at the Upper Anicut from seven and a half feet to three feet during the month of June to January before any impounding was to be made in the Krishnarajasagara by Mysore, caused hardship.

55. The reason for fixing the gauges have been stated in the letter dated 6th May, 1920 addressed by the Chief Engineer, Madras to the Chief Engineer, Mysore, the relevant part is as under:-

> "Although I am anxious to facilitate a satisfactory settlement, I am really unable to advise my Government that the interests of the Madras cultivators would be sufficiently safeguarded by anything less than the limit gauges that I have proposed to you in my letter of yesterday morning. It is only if these gauges are accepted by you that it would be worth while considering what rules of regulation can be devised to give effect to an agreement on this question. Unless the modified Madras system is adopted, it will apparently be a matter of extreme difficulty to decide upon suitable proportion factors under which we would be free from liability to great loss at times, owing to excessive variation of actual proportion of flow, if the Kannambadi catchment alone is considered. At the same time, if we are sufficiently protected, we shall not object to your having full impounding above a certain limit, as you have at present under Table I.
>
> I must again repeat that we cannot afford to take risks in this matter or to endanger our enormous existing interests merely in order to assist Mysore to evolve a financially attractive project. We do not desire to waste water into the sea, if it can possibly be avoided; but on the other hand we cannot afford to give up existing rights, merely because in the exercise of those rights there must occasionally, under present conditions, be waste of water. If we had a large storage reservoir-which we have not-the case would of course be different and we would be able to manage with a much smaller total discharge at the Cauvery Dam."
>
> (Emphasis supplied)
>
> (Ref: Page 295-296 of KR Volume No.II Exhibit No.KR-64)

56. It may be pointed out that before 1924 agreement was executed and entered into between the State of Mysore and the State of Madras, it had been decided that a clause was to be put in the said agreement in respect of construction of the Mettur reservoir in Madras and a specific mention was made regarding construction of Mettur dam in Clause 10 (v) of the agreement, and gauge limits upto 7.5 ft. were prescribed in Annexure l to the said agreement. In the letter dated 6th May, 1920 aforesaid, it had been said that higher gauge limits were being fixed in absence of a storage reservoir in Madras.

57. It is relevant to mention the background of the relationship between the State of Madras, a presidency State, and the State of Mysore, a Ruling State in which the first agreement of 1892 was entered into and then the agreement of 1924 was executed. After fall of Tipu Sultan, the Treaty of 1799 was entered into between the then East India Company and the then Maharaja of Mysore. Maharaja was installed to throne, under the above Treaty. From the instrument of Treaty of the year 1799 and Instrument of Transfer of the year 1881 (KR Volume I Exh.2, Pages 7 to 13 and Exh.11 pages 96 to 101), it is apparent that the East India Company and the British Government while handing over the possession of the Mysore State to the then Maharaja had put several conditions. It shall be relevant to refer to Article 6 and 14 of the Treaty of 1799:-

"ARTICLE 6

His Highness Maharajah Mysore Krishna Rajah Oodiaver Bahadoor engages that he will be guided by a sincere and cordial attention to the relations of peace and amity now established between the English Company Bahadoor and their allies, and that he will carefully abstain from any interference in the affairs of any State in alliance with the said English Company Bahadoor, or any State whatever. And for securing the object of this stipulation it is further stipulated and agreed that no communication or correspondence with any foreign State whatever shall be holden by His said Highness without the previous knowledge and sanction of the said English Company Bahadoor.

ARTICLE 14

His Highness Maharajah Mysore Krishna Rajah Oodiaver Bahadoor hereby promises to pay at all times the utmost attention to such advice as the Company's government shall occasionally judge it necessary to offer to him, with a view to the economy of his finances, the better collection of his revenues, the administration of justice, the extension of commerce, the encouragement of trade, agriculture, and industry, or any other objects connected with the advancement of His Highness's interests, the happiness of his people and the mutual welfare of both States."

58. Similarly in Instrument of Transfer of 1881 by which again possession was handed over to the then Maharaja, several restrictions and conditions had been put. Paragraphs 4, 11, 12 and 23 are as under:-

"(4) The Maharaja Chamarajendra Wadiar Bhadur and his successors (hereinafter called the Maharja of Mysore) shall at all times remain faithful in allegiance and subordination to her Majesty the Queen of Great Britain and Ireland and Empress of India, her heirs and successors, and perform all the duties which,

in virtue of such allegiance and subordination, may be demanded of them.

(11) The Maharaja of Mysore shall abstain from interference in the affairs of any other State or power, and shall have no communication or correspondence with any other State power, or the agents or officers of any other State or power except with the previous sanction, and through the medium of the Governor-General in Council.

(12) The Maharaja of Mysore shall not employ in his service any person not a native of India without the previous sanction of the Governor-General in Council, and shall, on being so required by the Governor-General in Council, dismiss from his service any person so employed.

(23) In the event of breach or non-observance by the Maharaja of Mysore of any of the foregoing conditions, the Governor-General in Council may resume possession of the said territories and assume the direct administration thereof, or make such other arrangements as he may think necessary to provide adequately for the good Government of the people of Mysore, or for the security of British rights and interests within the province."

(emphasis supplied)

The aforesaid Instrument of Transfer, on face of it vested several powers in the Governor General in Council, including to resume possession of the said territories and to assume direct administration thereof.

59. After 32 years of the Treaty of 1799 the administration of Mysore had been taken away by the East India Company, later on after about 50 years, in 1881 by the aforesaid Instrument of Transfer, the possession of the State was again handed over to the then Maharaja on 25.3.1881. On the

basis of these clauses, it can be said that British Crown was exercising its paramount power over the ruling State of Mysore and the latter had to act within the constraints prescribed under this instrument.

60. But it is well known that International agreements as well as inter-State agreements cannot be examined at a later stage, on the touch stone of as to whether the terms were just and proper keeping the interest of both Nations or the States at the time of the execution of those agreements. Sometime, the compulsions existing at the time of the execution of the agreement may be the factor for adopting the spirit of give and take on the part of one Nation or the State. In any case, those agreements can not be challenged now on behalf of the State of Karnataka being a successor to the interest of the State of Mysore, after a lapse of more than 100 years so far the agreement of the year 1892 is concerned, and after a lapse of about 80 years so far the agreement of 1924 is concerned. It has not been in dispute that the State of Mysore/Karnataka complied with the terms of the agreement scrupulously and religiously upto 1974. The dispute arose only after expiry of the period of 50 years contemplated in clause 10 (xi) of the agreement of 1924.

61. In this connection, it is proper to mention that on the basis of the agreement of the year 1924, the State of Mysore/Karnataka not only constructed the KRS but also reservoirs on the tributaries of Cauvery within the Karnataka State for a total capacity of 45,000 million cubic feet. Now having derived the benefit of construction of those reservoirs on the river

Cauvery and its tributaries, they cannot be allowed to repudiate on the principle of "*qui approbat non reprobat*" (one who approbates cannot reprobate). Reference can be made in this connection to the judgment of the Supreme Court – New Bihar Biri Leaves Vs State of Bihar 1981 (1) SCC 537:

> "48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scot Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., *Verschures Creameries Ltd. V. Hull & Netherlands Steamship Co8*.; see *Douglas Menzies v. Umphelby* 9; see also STROUD'S JUDICIAL DICTIONARY, Vol.I, page 169, 3rd Edn.).
>
> 8. (1921) 2 KB 608. 9. 1908 AC 224, 232
>
> 49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition (13) on the ground that this condition is violative of Articles 19(1) (g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character, also. It is true that a person cannot be debarred from

enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver."

62. Further an agreement can be challenged in view of Sections 19 and 19-A of the Indian Contract Act on the grounds mentioned therein saying that the contract was voidable. But the party concerned at the appropriate stage has to satisfy the court that his consent was obtained by coercion, fraud, misrepresentation or undue influence. During the period of more than fifty years since 18.2.1924 after which according to the State of Karnataka the said agreement came to an end, State of Karnataka never alleged before any court of law that the said agreement was voidable and the State of Karnataka was not bound by it for anyone of the infirmities mentioned in Sections 19 and 19-A of the Indian Contract Act.

63. Competent authorities on behalf of both the States after proper application of mind and discussion and consultation entered into those agreements. In this background none of the agreements can be ignored as agreements, which were not void in the eye of law. The question whether because of any of the articles of the Constitution of India those agreements have become unenforceable or after the year 1974, the terms of agreements cannot be enforced by the State of Tamil Nadu in its existing form, have to be examined later under the Chapters relating to those questions.

Chapter 2

Construction and review of Agreements of 1892 and 1924

So far the issue regarding the construction and review of the terms of the agreement of 1924 is concerned it will be proper to reproduce the relevant part of the aforesaid agreement of the year 1924:

> "10(i) The Mysore Government shall be entitled to construct and 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 as 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 m.c. feet, measured from the sill of the irrigation sluices constructed at 60 feet level above the bed of the river up to the maximum height of the124 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, Lakhmanathirtha 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., 125,000 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 to1910.

(v) The Madras Government on their part agree to limit the new area of irrigation under their Cauvery Mettur Project to 301,000 acres, and the capacity of the new reservoir at Mettur, above the lowest irrigation sluice, to ninety-three thousand five hundred million cubic feet.

Provided that, should scouring sluices be 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 months as may be convenient.

(vii) The Mysore Government on their part agree that extension 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 m.c. 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 Krishnarajasagara 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 per cent 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.

[Emphasis supplied]

(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 Krishnarajasagara 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 Krishnarajasagara 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 Krishnarajasagara, 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 reconsiderations.

[Emphasis supplied]

(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 of 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, Amaravathi or Noyil rivers in Madras, any new storage reservoir, the

Mysore Government shall be at liberty to construct as an off-set, 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)."

[Emphasis supplied]

(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."

2. Clause 10(ii) provided for regulating the discharge of different quantities of waters from Krishnarajasagar reservoir then under construction as specified in Annexure I. Rule 7 of the Rules of Regulation is as follows:

" II. *Limit Gauges and Discharges at the Upper Anicut*

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."

Rule 10 containing the impounding formula is as follows:

"III. Impounding formula

10. Impounding in Krishnarajasagara during the irrigation season shall be regulated in accordance with the following formula:-

$$I = \frac{Kn}{P} - C, \text{ where}$$

I = Quantity that may be impounded.

Kn. = Inflow at Krishnarajasagara, that is, the measured flow at the three 'standard' gauging stations at Chunchanakatte on the Cauvery, Akkihebbal on the Hemavathi, and Unduvadi on the Lakshmanthirtha, to which shall be added allowances for –

(i) The yield from the catchment between the 'standard' gauging stations and the Krishnarajasagara calculated in accordance with paragraphs 61 and 62 of Colonel Ellis' Manual of irrigation (1920 edition) less the quantity of water required for tank irrigation in the tract in question. In the catchment, the discharges of the major streams shall be deduced, if feasible, from gauge readings by mutual agreement. The duty of water for the area irrigated under tanks shall be taken as 40.

(ii) The drainage from the ayacut of channel which drain back into rivers below the 'standard' gauging stations, the quantity in cusecs of such drainage for a particular channel being taken to be 3/16 of the area irrigated in acres divided by 40.

C = Flow connoted by the gauge reading for the particular month concerned given in rule 7 above. The month at Krishnarajasagara corresponding to that at the Upper Anicut is to be taken as commencing and ending four days earlier than at the Upper Anicut.

P = The proportion which the natural flow in the Cauvery at the Krishnarajasagara bear to the corresponding natural flow at the Upper Anicut.

I, Kn and C to be expressed in the same units."

3. As there was some controversy regarding the interpretation of Rules 7 and 8 of the aforesaid Rules and Regulation (Annexure I) to the Agreement of the year 1924, another Agreement was entered into on 17th June 1929 to clarify the quantity of the waters of river Cauvery which was to be discharged in different months to the then State of Madras. The relevant part is as follows:-

"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 $6^1/_2$ feet gauge …	29,800	cusecs.
July and August for $7^1/_2$ 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 $3^1/_2$ 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 Govt. Public Works and Labour Departments, Madras."

4. Under the agreements of 1924 and 1929 a particular gauge level in feet converted into the discharge in cusecs was to be maintained by the then State of Mysore at upper anicut before any impounding was made in the KRS Reservoir. This level or discharge obviously was to be maintained on the basis of -

(a) the waters released from KRS;

(b) from Kabini, Suvarnavathy, Shimsha and Arkavathy which join Cauvery within the State of Mysore/Karnataka below KRS;

(c) four tributaries of Cauvery in Madras/Tamil Nadu

(i) Chinnar

(ii) Noyyil

(iii) Bhavani

(iv) Amaravathy

5. From a bare reference to the agreement of the year 1924, it shall appear that in the beginning, the background in which the said agreement was being entered into between the Government of Mysore and the Government of Madras has been set out saying that the Mysore Government had asked for the consent of the Madras Government under clause III of the

Agreement/Rules of 1892 for construction of a dam across the river Cauvery at Kannambadi (now known as 'Krishnarajasagar Dam') and as to how a dispute arose which was referred to arbitration in which an award was given in the year 1914, but ultimately there was an amicable settlement of the dispute after negotiations. As a result of such negotiations, Rules of Regulation of the Krishnarajasagar were framed on 26th July 1921 which has been made Annexure I to the said Agreement.

6. A special feature of the agreement of the year 1924 is that whereas agreement of 1892 laid much stress in respect of ‘protection of prescriptive right already acquired and actually existing’ there is no reference of existing prescriptive right of the State of Madras or its cultivators in respect of the water to be released to the State of Madras under the terms of the agreement of the year 1924. It appears that the Government of Mysore and the State of Madras while entering into the agreement of the year 1924 recognised 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 part or whole of the areas under irrigation. It only contemplated and provided for future extension of irrigation in new areas on terms and conditions mentioned in the said agreement. As such, it can be said that after the execution of the agreement of the year 1924 there was no nexus or link between the discharge of water of river Cauvery to the State of Madras within the areas over which any prescriptive right had already been acquired or was actually existing. The formula was worked out

taking the total area which was under irrigation by the Cauvery system before the execution of the said agreement.

7. It will be advisable to deal with the different sub-clauses of Clause 10 of the agreement. In clause 10(i) it has been stated that the Mysore Government was entitled to construct and Madras Government was assenting to such construction under clause III of 1892 Agreement, a dam and reservoir i.e. K.R.S., the height of the dam above bed of the river being 124 feet and effective capacity of the reservoir being 44,827 m.c. feet. Clause 10(ii) which is the sheet anchor of the claim of Tamil Nadu, provided that the Mysore Government had to regulate the discharge through and from the said reservoir K.R.S. strictly in accordance with Rules of Regulation set forth in Annexure I which formed the part of the agreement. Clause 10(iii) contained the other details which had to be complied with. Clause 10(iv) prescribed that Mysore Government was at liberty to carry out future extensions of irrigation in Mysore under the Cauvery and its tributaries to an extent of 110,000 acres. This was to be in addition to and irrespective of the extent of irrigation permissible under the Rules of Regulation prescribed in Annexure I i.e. 1,25,000 acres. Under clause 10(v) the Madras Government on their part agreed to limit the new area of irrigation under their Cauvery Mettur project to 301,000 acres. It was also mentioned that the capacity of the new reservoir at Mettur shall be of 93,500 million cubic feet. Under clause 10(vi) each Government had to notify regarding the areas newly brought under irrigation including the average monthly discharges at the main canal heads, as soon

after the close of each month as may be convenient. Clause 10(vii) enjoined the Mysore Government that extension of irrigation in Mysore was to be carried out only by means of reservoir constructed on the Cauvery and its tributaries mentioned in Schedule A of the 1892 Agreement. The most important part of this clause is that such reservoirs were to have an effective capacity of 45,000 m.c. 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 Krishnarajasagara forming Annexure I to this agreement…..' This clause put a strict condition on the Government of Mysore regarding impounding of water in the reservoirs to be built so as not to make any material diminution in supplies as envisaged in Annexure I to the agreement. Clause 10(viii) required details of the reservoir schemes and impounding to be furnished by Mysore Government to Madras Government to satisfy that conditions prescribed in clause 10(vii) were being fulfilled. It also prescribed that if there was any difference of opinion between Mysore and Madras Government in respect of such conditions, such difference shall be settled in the manner provided in clause 10(xv) i.e. by referring the dispute for settlement to arbitration or if the parties so agreed to be submitted to the Government of India as provided in clause 10(xv).

8. Thereafter comes clause 10(xi) which is the subject matter of controversy. Under this both Governments had agreed that the limitations and arrangements embodied in clauses (iv) to (viii) of paragraph 10 '<u>shall at</u>

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.' The stand of the State of Karnataka is that after expiry of fifty years from the execution of the agreement in the year 1924, there has been no reconsideration between the two States in respect of the terms of the agreement or in respect of modifications and additions which were to be mutually agreed upon as a result of such reconsideration, the agreement of 1924 is no more in force and the State of Karnataka is not bound by any of the terms prescribed in the said agreement.

[Emphasis supplied]

9. There is no dispute that after expiry of fifty years, there has been no reconsideration on the question of modification or addition in respect of different terms and conditions mentioned in the agreement of the year 1924 between the two States. But on behalf of the State of Tamil Nadu it was pointed out that this clause 10 (xi) which prescribed the time limit of fifty years for reconsideration was applicable only to clauses 10(iv) to 10(viii) and not in respect of clause 10(ii) which enjoined 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.' In other words, even if there was dispute between the two States regarding extension of the irrigation, State of

Karnataka is bound by clause (ii) aforesaid of paragraph 10 of the agreement; it has to release water from time to time to the State of Tamil Nadu in terms of Rule 7 of the Rules of Regulation of Krishnarajasagar (Annexure I to the agreement).

10. As a first impression this argument on behalf of the State of Tamil Nadu is attractive because there is no mention of clause (ii) of paragraph 10 in clause (xi) of paragraph 10 referred to above. But it has to be examined as to whether clause (ii) which enjoins the State of Mysore now the State of Karnataka to regulate the discharge through and from the Krishnarajasagar reservoir, has to be read in isolation or by necessary implication it is linked and connected with clauses (iv) to (viii). In Rule 7 of the Rules of Regulation of Krishnarajasagar reservoir (Annexure I to the agreement), a strict condition was prescribed that any impounding shall be made in the Krishnarajasagar only after the minimum flow prescribed therein in different months were ensured at the Upper Anicut. But clauses (iv) to (viii) contain the conditions regarding future extension of irrigation in the Mysore State. Clause 10(iv) provides that 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 fixed at 1,10,000 acres. This was to be in addition to and irrespective of the extent of irrigation permissible under the Rules of Regulation forming Annexure I to the said agreement which was 1,25,000 acres. It was also permissible to the Mysore Government to extend irrigation from the existing channels to the extent of one-third of the area actually

irrigated under such channels in or prior to 1910. The total shall be as follows:-

(i)	Irrigation permitted under the Rules of Regulation relating to KRS (Annexure I)	1,25,000 Acres
(ii)	Future extension of irrigation under the Cauvery and its tributaries	1,10,000 "
(iii)	Extension permissible under each of the existing channels to the extent of one-third of the area actually irrigated under such channels in or prior to 1910. It appears from the records that the extent of the area actually irrigated in or prior to 1910 by different channels was 89,029 one-third of the same shall be 29,675, the total being 1,18,704	1,18,704 "
	Total:	3,53,704 Acres

11. The Madras Government in clause 10(v) agreed to limit the new areas of irrigation under the Cauvery Mettur project at 3,01,000 acres. It appears that the area already under irrigation was about 1326,233 acres (Ref. TNDC Vol. II, Appendix V, Page 230). During the argument there was some controversy as to what was the actual total area under irrigation within the then State of Madras before the aforesaid agreement of the year 1924 was executed. However, our attention was drawn on behalf of the State of Tamil Nadu to a communication dated 6th July 1915 addressed by the well known Shri M. Visvesvaraya, the then Dewan of Mysore to the Resident of Mysore where apart from other details he stated:

> "In this connection, the Durbar particularly desire to invite reference to certain important considerations of a general character which have been repeatedly urged in the course of the Arbitration

proceedings, as well as in the correspondence preceding the Arbitration. These are:-

(i) The whole area irrigated under the Cauvery system in Mysore at present is about 1,15,000 acres only, against a corresponding area of 12,25,500 acres in Madras. The area of Cauvery irrigation in Mysore is thus only about 8 per cent of the whole. But it is roughly computed that the average total quantity of water which passes through Mysore territory is about three-fourths of the total yield of the catchment above the Cauvery dam at the Upper anicut, and Mysore can therefore legitimately claim to irrigate much larger area than at present from the waters of the Cauvery. (Karnataka Vol.I page 266 at 267)"

In view of the aforesaid statement made by the then Dewan Shri Visvesvaraya that in 1915 the area under irrigation from the Cauvery system in Madras was 12,25,500 acres, then we can accept the stand taken on behalf of the State of Tamil Nadu that the area prior to the execution of the agreement of the year 1924 which was under irrigation by Cauvery system was 13,26,233 acres. Our attention was drawn to some other documents and statistics also in this respect. As such we can proceed on the assumption that before the execution of the agreement of the year 1924 - 13,26,233 acres were under irrigation through the Cauvery system and clause 10(v) allowed the limit of new areas of irrigation under the Cauvery Mettur project to be increased by another 3,01,000 acres.

12. It may be mentioned that clause 10(vii) of the agreement is very important. It says (a) Mysore Government on their part agreed that extension of irrigation in Mysore as specified in clause (iv) shall be carried out 'only by

means of reservoirs constructed on the Cauvery and its tributaries mentioned in Schedule A of the 1892 agreement.' (b) Such reservoirs were to be of 'an effective capacity of 45,000 million cubic feet, in aggregate.' (c) Impounding therein was to be so regulated 'as not to make any material diminution in supplies connoted by the gauges accepted in the Rules of Regulation for the Krishnarajasagar forming Annexure I to the said agreement.' (d) The rules for working such reservoirs were to be so framed as 'to reduce to within 5 percent any loss during any impounding period, by adoption of suitable proportion factors, impounding formula or such other means' as was to be settled at the time. In view of the conditions put in clause 10(vii) can it be said that it had no nexus or connection with clause 10(ii) read with Annexure I of the agreement regarding Rules and Regulation for the Krishnarajasagar? When clause 10(vii) while permitting Government of Mysore to construct reservoirs on Cauvery and its tributaries for extension of irrigation had put a condition that impounding in such reservoirs were to be so regulated as not to make any material diminution in supplies as stipulated in Rules of Regulation for Krishnarajasagar, then clauses 10(iv) and 10(vii) were certainly connected and linked with clause 10(ii). If after 50 years because of clause 10(xi), the limitation and arrangements specified in clauses 10(iv) to 10(viii)) were to be reconsidered in the light of experience gained for such modifications and additions as may be mutually agreed upon, then the limitation prescribed in Rules of Regulation for Krishnarajasagar forming Annexure I of the agreement and put in clause 10(vii) has also to be reconsidered. Thus

clause 10(ii) and clause 10(vii) are inter-linked and cannot be read in isolation.

13. On behalf of the State of Tamil Nadu during the course of the argument, notes of arguments have been filed on different topics and issues. Tamil Nadu Note–6 relates to interpretation of 1924 agreement. In the said note a chart has been enclosed at page 14 under the heading FLOWS RECEIVED AT METTUR RESERVOIR FROM KRS RELEASES, KABINI ARM & INTERMEDIATE CATCHMENT. It is advisable to reproduce the said chart omitting the details given in the statement annexed thereto.

> "As per Tamil Nadu Statement of Case (TN-1, Page 63)
> the average inflow into Mettur for 38 years from 1934-35
> to 1971-72 (vide Statement-1 enclosed) 377.1 TMC
>
> This inflow of 377.1 TMC comprises of 3 components viz.
>
> 1. Issues from KRS as per Rules of Regulation of KRS in Annexure-1 of 1924 Agreement i.e. based on the impounding formula applied at KRS;
> 2. Contribution from Kabini arm;
> 3. Contribution from the intermediate catchment below KRS and below Hullahalli Anicut in Kabini (including the contribution from Tamil Nadu catchment area above Mettur drained by Chinnar and other small streams estimated as 25 TMC).
>
> From the records disclosed by Karnataka, the position emerges as follows:-
>
KRS Arm contributes	159.780 TMC
Kabini Arm contributes	112.615 TMC
Intermediate Catchment contributes	104.746 TMC
Total:	**377.141 TMC**"

14. Year-wise details of the inflow into Mettur reservoir from year 1934-35 to 1971-72 in different months have been given in the Statements-I & II, (pages 15 and 16) of the said note. At page 16-A, a statement has been given saying that if exceptionally good and bad years are not excluded, then the average shall be 159.780 TMC from K.R.S. But if calculation is made on Trimmed Mean at 10% it shall be 151.273 TMC. If calculation is made at 20% Trimmed Mean, then it shall be 147.922 TMC. On aforesaid calculation made the total average annual inflow into Mettur comes to 377.141 TMC. This inflow of 377.141 TMC comprises of 3 components:

(1)	From KRS as per Rules of Regulation of KRS Annexure I of 1924 agreement	159.780 TMC
(2)	Contribution from Kabini Arm	112.615 TMC
(3)	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

15. If the stand of Tamil Nadu that only the dispute relating to clauses 10(iv) to 10(viii) are liable to be re-examined after expiry of fifty years, then the logical sequence will be that in the event of modifications it shall not be possible for State of Karnataka to comply with the requirement of clause 10(ii) read with Rules 7 and 10 of the Rules of Regulation (Annexure I to the agreement of 1924), only on basis of discharges from KRS. If as per clause 10(xi), clause 10(vii) is modified then the original agreement cannot be worked out in respect of the Rules of Regulation for Krishnarajasagar

reservoir (Annexure I to the agreement). The restriction on impounding by the Mysore Government as provided in Rules 7 and 10 of Annexure I of the agreement regarding ensuring the flow of the Cauvery at upper anicut has been linked not only from the releases from KRS but from the other tributaries of Cauvery within the territories of Mysore. As such whenever a dispute is raised, the dispute has 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 and Regulation for Krishnarajasagar as contained in clause 10(ii).

16. On behalf of the State of Karnataka in support of the contention that after expiry of the period of fifty years the whole agreement expired, our attention was drawn to paragraphs 4 and 11 of the opinion expressed by the Supreme Court on reference made by the President of India in respect of validity of the aforesaid Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 {1993 Supp (1) SCC 96}. Hon'ble Mr. Justice Sawant after having extracted the questions referred for opinion of the Supreme Court has proceeded to give some factual background of the dispute. In paragraph 4 it has been stated as follows:

> "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……."
>
> [Emphasis supplied]

17. Similarly, narrating the further development in paragraph 11 again it has been stated:

> "Hence, in July 1986, the State of Tamil Nadu lodged a Letter of Request under Section 3 of the Act with the Central Government for the constitution of a Tribunal and for reference of the water dispute for adjudication to it. 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."
>
> [Emphasis supplied]

18. It is difficult for us to ascertain as to how the aforesaid statements have been made while expressing the opinion by the Supreme Court saying that the agreement of 1924 had expired in 1974. It appears that while giving the background of the dispute, it has been said at two places that the agreement of the year 1924 had expired in 1974. But if the aforesaid observations are read in the context in which they have been made, it will appear that they cannot be construed as findings of the Supreme Court on the aforesaid question. That question was not in issue before the Supreme Court. In this connection, our attention was drawn to the written submission filed on behalf of the State of Tamil Nadu in aforesaid Special Reference No.1

of 1991. While justifying the power of the Tribunal to pass an interim order in the nature of an interim award in paragraph 42 it was said as follows:

> "42. Karnataka has contended that the Tribunal's orders take away the rights of the existing uses and jeopardize committed uses imposing a new regime of water utilization without any assurance of protection to the State of Karnataka. As already stated the Tribunal has not gone into the question of the rights and entitlements of the States, leaving such matters to be considered in the final adjudication. It is also relevant to note that in the unilateral violation of the provisions of the 1924 Agreement, Karnataka had been prejudicing the rights of the established uses and trying to impose a new regime of water utilization depriving protection to Tamil Nadu's established irrigation and went into the extent of refusing to release waters even on humanitarian grounds to save the withering crops in Tamil Nadu. It is now not open to Karnataka to complain that its rights of existing uses, substantial part of which is unauthorized, is jeopardized by the Tribunal's orders."
>
> [Emphasis supplied]

19. In this background, there was no question of State of Tamil Nadu conceding in the reference aforesaid which was before a Constitution Bench that the agreement of the year 1924 had expired in the year 1974. It has been rightly pointed out that the complaint petition which was filed in the year 1986 containing the grievance of the State of Tamil Nadu in respect of discharge of the water of river Cauvery from KRS the main grievance is in respect of contravention and violation of the terms of the agreement of the year 1924 which according to the State of Tamil Nadu was subsisting and was in force.

20. On behalf of the State of Karnataka it was pointed out that if the aforesaid statements regarding the agreement of 1924 having expired in the year 1974 appearing in the opinion of the Supreme Court was by mistake, then the State of Tamil Nadu should have filed a review petition for correction of those statements. A review petition can be filed before the Supreme Court for correction of any judgment or order under Article 137 of the Constitution which is as follows:

> "137. **Review of judgments or orders by the Supreme Court.** – Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

21. It has rightly been pointed out that the opinion expressed by the Supreme Court on reference being made under Article 143 of the Constitution by the President shall neither deemed to be a judgment pronounced by the Supreme Court nor an order passed by the Supreme Court so as to attract the provisions of Article 137 of the Constitution. The opinion which is expressed by the Supreme Court on the questions framed by the President is a very special jurisdiction and it cannot be equated with any dispute and litigation between parties coming to the Supreme Court for a judgment or order. In the aforesaid Special Reference No.1 of 1991 Supreme Court negatived the contention raised on behalf of the State of Karnataka that Supreme Court in exercise of its jurisdiction under Article 143 could reconsider an earlier decision of the same court in State of Tamil Nadu vs. State of Karnataka, (1991) Supp. (1) SCC 240 in which the Supreme Court

had directed the Tribunal to entertain the application filed on behalf of State of Tamil Nadu for an interim direction in respect of release of the waters of Cauvery to the State of Tamil Nadu. In that connection, it was said:

> "Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143. To accept Shri Nariman's contention would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary."

22. Apart from Article 137, Order XL Rule 1 of the Supreme Court Rules, 1966 provides that Supreme Court may review 'a judgment or order' passed by it. 'Judgment' has been defined under Section 2(9) of the Code of Civil Procedure as the statement given by the Judge on the grounds of a decree or order. Similarly, an 'order' has been defined under Section 2(14) CPC to mean the formal expression of any decision of a Civil Court which is not a decree. In our view, no application for review under Article 137 or under the Supreme Court Rules aforesaid could have been filed on behalf of the State of Tamil Nadu.

23. On behalf of the State of Karnataka reference was also made to the note of discussion regarding Cauvery held at New Delhi on 29th May 1972 in which the Union Minister for Irrigation and Power, Chief Minister of Tamil Nadu, Chief Minister of Mysore, Chief Minister of Kerala and others participated. It will be advisable to reproduce the same:

"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 differences 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. 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 the States as early 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 utilising water of Cauvery beyond what it is at present."

[Emphasis supplied]

24. It was urged on behalf of Karnataka that in the said proceeding of the discussion relating to Cauvery there is specific mention that the earlier agreement of 1924 was to come up for review after 50 years as provided in the agreement (emphasis added). The learned counsel pointed out that in the proceeding it has not been mentioned that only some of the clauses of the agreement of 1924 were only to be reviewed after 50 years, a stand which has been taken before this Tribunal on behalf of the Tamil Nadu. The then Chief Minister of Tamil Nadu signed the proceeding on 31.5.1972. The contention of Karnataka is that the note of discussion gives an impression that all the Chief Ministers along with the Union Minister for Irrigation and Power were of the view that whole agreement of 1924 was to be reviewed after 50 years. But at the same time, another aspect in the said proceeding cannot be ignored, wherein it was not mentioned that the 1924 agreement according to State of Mysore was to expire after 50 years. The Chief Minister of Mysore on the other hand agreed that the agreement of 1924 was only to be reviewed after expiry of 50 years. The then Chief Minister of Mysore signed this note of discussion. It can be said that at that stage no stand was taken on behalf of the Mysore State that after fifty years the agreement was to

expire and as such there was no question of reviewing the terms of the said agreement.

25. The agreement of 1924 contemplated three types of reservoirs and irrigation works to be constructed by Mysore Government:-

(a) Krishnarajasagar Dam as contemplated by clause 10(i) and discharge to be regulated as provided in clause 10(ii).

(b) Extension of future irrigation by construction of reservoirs on Cauvery and its tributaries as mentioned in clause 10(iv) and the limitation regarding impounding in such reservoirs as contemplated by 10(vii).

(c) The Mysore Government was at liberty to construct a storage reservoir in addition to those referred in clause (vii) of the agreement on one of the tributaries of Cauvery in Mysore of a capacity not exceeding 60% of the new irrigation works on the tributaries of Cauvery in Madras as provided in Clause 10(xiv).

26. The proviso to clause 10(xiv) is relevant for purpose of a determination as to whether after expiry of fifty years the whole agreement shall be deemed to have been terminated. Clause 10(xiv) with proviso is reproduced again:

> "(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 percent 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).”
>
> [Emphasis supplied]

27. On behalf of Karnataka reliance was placed on the proviso to clause 10(xiv) in support of their stand that the agreement of 1924 expired after fifty years because the said proviso speaks about termination of the agreement. The proviso puts a restriction on impounding in such reservoirs to be constructed by State of Mysore so as not to diminish or affect in any way the supplies to which the Madras Government and the Mysore Government respectively were entitled under the said agreement. In this clause while speaking about the division of the surplus water it was said “on termination of this agreement as provided in clause 10(xi).” The proviso speaks of the termination of the agreement as provided in clause 10(xi) aforesaid. But clause 10(xi) does not contemplate automatic termination of the agreement after the period of fifty years. The scope of clause 10(xi) cannot be interpreted only on basis of proviso to clause 10(xiv) which speaks about termination of the said agreement as provided in clause 10(xi). Clause 10(xi) only contemplates and speaks about reconsideration and review of the terms of the agreement after expiry of the period of fifty years. In this background, it is difficult to record a finding that the whole agreement of 1924 automatically came to an end after expiry of fifty years from the date

of its execution. But at the same time it has to be held that after the expiry of the period of fifty years from the date of the execution of the agreement, all the terms of the said agreement had to be reconsidered in the light of the experience gained and on examination of the possibilities of further extension of irrigation within the territories of the respective Governments with such modifications and additions as were to be mutually agreed upon as a result of such reconsideration. As the State of Mysore/Karnataka took the stand that the said agreement had expired and came to an end on the expiry of the period of fifty years in the year 1974, they were not willing to examine the terms of the said agreement along with the State of Tamil Nadu for reconsideration/modification or addition, as the case may be. The State of Mysore/Karnataka is an upper riparian State through which the river Cauvery passes to the State of Tamil Nadu and the observance and compliance of the terms of the agreement or reconsideration thereof was not of much importance for the State of Karnataka. On the other hand, the State of Tamil Nadu which had taken the stand that the terms of the 1924 agreement were continuing was insisting that water of river Cauvery should be released in terms of the said agreement and the State of Mysore/Karnataka were not complying with the terms aforesaid after the year 1974. In this background, a dispute arose and attempts were made at several levels including by the then Union Minister for Irrigation and Power along with the Chief Ministers of the four States for an amicable settlement. Under clause 10(xv) of the agreement of the year 1924 any such dispute

could have been referred for settlement to arbitration. But before the expiry of the period of fifty years the Inter-State Water Disputes Act, 1956 came in force enlarging the scope of the adjudication of inter-State water disputes. Sections 3, 4 and 5 of the Act as amended by Act 14 of 2002 are as follows:

> "3. 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.
>
> 4. (1) When any request under Section 3 is received from any State Government in respect of any water dispute and the Central Government is of opinion that the water dispute cannot be settled by negotiations, the Central Government shall, within a period not exceeding one year from the date of receipt of such request, by notification in the Official Gazette, constitute a Water Disputes Tribunal for the adjudication of the water dispute:

Provided that any dispute settled by a Tribunal before the commencement of Inter-State Water Disputes (Amendment) Act, 2002 shall not be re-opened;

(2) The Tribunal shall consist of a Chairman and two other members nominated in this behalf by the Chief Justice of India from among persons who at the time of such nomination are Judges of the Supreme Court or of a High Court.

(3) The Central Government may, in consultation with the Tribunal, appoint two or more persons as assessors to advise it in the proceedings before it.

5.(1) When a Tribunal has been constituted under section 4, the Central Government shall, subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the Tribunal for adjudication.

(2)The Tribunal shall investigate the matters referred to it and forward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it within a period of three years:

Provided that if the decision cannot be given for unavoidable reasons, within a period of three years, the Central Government may extend the period for a further period not exceeding two years .

(3)…….

(4) ……”

While examining a dispute between two or more States in respect of inter-State river or river valley the power extends not only to examine the validity of any executive action, but also any ‘legislation taken or passed, or proposed to be taken or passed by the other State.’

28. Section 3(c) clearly provides and contemplates a dispute regarding interpretation of the terms of any agreement relating to the use, distribution or control of water of any inter-State river in respect of which such State may request the Central Government to refer to a Tribunal for adjudication.

29. Article 262 provides for creating a special forum for adjudication of disputes relating to waters of inter-State rivers or river valley. It says:

> "262. **Adjudication of disputes relating to waters of inter-State rivers or river valleys**. – (1) Parliament may by law provide for the 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.
>
> (2) Notwithstanding anything in this 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 to in clause (1)."

30. The Supreme Court while answering the reference made by the President of India under Article 143 relating to this very Cauvery river dispute said about the scope of Inter-State Water Disputes Act 1956 and about the powers of this Tribunal in paragraphs 56, 57, 77 of the opinion after referring to Articles 131and 262 of the Constitution:

> "56. It is clear from the article that this Court has original jurisdiction, among other things, in any dispute between two or more States where the dispute involves any question whether of law or fact on which the existence and extent of a legal right depends except those matters which are specifically excluded from the said jurisdiction by the proviso. However, the Parliament has

also been given power by Article 262 of the Constitution to provide by law that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any dispute or complaint with respect to the use, distribution or control of the water of, or in, any inter-State river or river valley. Section 11 of the Act, namely, the Inter-State Water Disputes Act, 1956 has in terms provided for such exclusion of the jurisdiction of the courts. It reads as follows:-

'11. Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.'

57. This provision of the Act read with Article 262 thus excludes original cognizance or jurisdiction of the inter-State water dispute which may be referred to the Tribunal established under the Act, from the purview of any court including the Supreme Court under Article 131.

77. The effect of the provisions of Section 11 of the present Act, viz., the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act……."

{1993 Supp(1) SCC 96}

31. The Supreme Court has not only indicated the nature of the scope and the object of Article 262 and Section 11 of the Inter-State Water Disputes Act, but also has clarified as to what are the rights of different riparian States

in relation to an inter-state river like Cauvery. It will be proper to quote paragraph 72 thereof:-

> "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 contention of the parties."
>
> [Emphasis supplied]
>
> (Ref: 1993 Supp (1) SCC Page 96)

The Supreme Court expressed the aforesaid opinion in respect of equitable share of each state in connection with this very dispute.

32. If the contention on behalf of the State of Tamil Nadu that while exercising the power of Review, only some cosmetic changes and minor adjustments have to be made in respect of the terms of the agreement is accepted then the necessary corollary shall be that an agreement which was executed in the year 1924, shall continue to infinity; there being no power in any authority or tribunal to modify the same even if the circumstances have changed after the expiry of fifty years.

33. When the Supreme Court in its opinion aforesaid after examining the scope of the Article 262 along with different provisions of the Inter-State Water Disputes Act, 1956 and being conscious about the earlier agreements executed between the then State of Madras and the then State of Mysore, observed that although waters of an inter-State river pass through the territories of the different riparian States but such waters cannot be said to be located in any one State. -- the distribution and allocation of such waters between the riparian States has to be done on the basis of the equitable share of each State, then it is difficult to accept the contention on behalf of the State of Tamil Nadu that the allocation and apportionment of the waters of the river Cauvery should be made strictly in the terms of the agreements of 1892 and 1924. Of course, the terms of the agreement have only to be kept in view while considering the developments made in different States vis-à-vis the equitable share of the each riparian State.

Chapter 3

Prescriptive rights and other claims

The State of Tamil Nadu has asserted that the construction of reservoirs over Kabini, Hemavathy, Harangi, Suvarnavathy has materially affected the prescriptive rights of Tamil Nadu and Pondicherry over the waters of river Cauvery. This controversy arose primarily because of the Rules of the year 1892. Clause III of the said rules required the Mysore Government before constructing any new irrigation reservoir or any new anicut to take previous consent of the Madras Government. It further said that 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.' (emphasis supplied) Thereafter in several correspondence between the Mysore Government and the State of Madras in connection with construction of KRS the question of protecting the prescriptive right already acquired or existing in Madras has been given due importance. The State of Madras was resisting the request of the Government of Mysore for construction of the said reservoir on the plea that it was likely to affect the prescriptive right acquired within the territory of Madras. This situation continued till the execution of the agreement of 1924 on 18.2.1924. It is remarkable that when

the Rules of Regulation of KRS were finalized in the year 1921 by the chief engineers of the two States and were duly approved by the two States and Government of India, no reference was made in respect of any prescriptive right acquired in the State of Madras over any particular area then under irrigation by Cauvery System.

2. From a bare reading of the agreement of 1924 along with the Rules of Regulation of the KRS (Annexure I to the agreement) it shall appear that no note has been taken or any provision has been made in the said agreement with reference to areas over which any prescriptive rights had been acquired or were existing. A special feature of the agreement of the year 1924 is that whereas agreement of 1892 laid much stress in respect of 'protection of prescriptive right already acquired and actually existing' there is no reference of any existing prescriptive right of the State of Madras or its cultivators in respect of the water to be released to the State of Madras under the terms of the agreement of the year 1924. It appears that the Government of Mysore and the State of Madras while entering into the agreement of the year 1924 recognised 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 part or whole of the areas under irrigation. It also contemplated and provided for future extension of irrigation in new areas on terms and conditions mentioned in the said agreement. As such, it can be said that the agreement of the year 1924 was not solely based on prescriptive rights. The formula as incorporated in Rules

7 and 10 of Rules of Regulation of K.R.S. appears to have been worked out taking into consideration the total area which was under irrigation by the Cauvery system in the State of Madras before the execution of the said agreement and also for future extension. The Rules 7 and 10 of Rules of Regulation of KRS prescribe maintenance of limit gauges at upper anicut before any impounding was to be made in KRS. This provision amply took care of the water requirement for irrigation in the areas down stream of Upper Anicut.

3. During the argument there was some controversy as to what was the actual total area under irrigation within the then State of Madras before the aforesaid agreement of the year 1924 was executed. However, our attention was drawn on behalf of the State of Tamil Nadu to a communication dated 6th July 1915 addressed by the well known Shri M. Visvesvaraya, the then Dewan of Mysore to the Resident of Mysore where apart from other details he stated:

> "These are:-
> (i) The whole area irrigated under the Cauvery system in Mysore at present is about 1,15,000 acres only, against a corresponding area of 12,25,500 acres in Madras. The area of Cauvery irrigation in Mysore is thus only about 8 per cent of the whole. But it is roughly computed that the average total quantity of water which passes through Mysore territory is about three-fourths of the total yield of the catchment above the Cauvery dam at the Upper anicut, and Mysore can therefore legitimately claim to irrigation a much larger area than at present from the waters of the Cauvery. (Karnataka Vol. I page 266 at 267)"

4. In view of the aforesaid statement made by the then Dewan Shri Visvesvaraya that in 1915 the area under irrigation from the Cauvery system in Madras was 12,25,500 acres then we can accept the stand taken on behalf of the State of Tamil Nadu that the area prior to the execution of the agreement of the year 1924 which was under irrigation by Cauvery system was 13,26,233 acres. Reference was made to some other documents and statistics in this respect. As such we can proceed on the assumption that before the execution of the agreement of the year 1924 - 13,26,233 acres were under irrigation through the Cauvery system and clause 10(v) allowed the limit of new areas of irrigation under the Cauvery Mettur project to be increased by another 3,01,000 acres as first crop. In this background, it shall be a futile attempt now to examine as to what was the total area in the then State of Madras over which prescriptive rights had been acquired or were existing for the purpose of allocating the quantity of water to the State of Tamil Nadu. Details of the different clauses of the agreement have been reproduced earlier and discussed under Chapter “Construction and Review of Agreements of 1892 and 1924”. None of the clauses of the agreement or the Rules of Regulation of K.R.S. (Annexure I) have taken note of any prescriptive right of Madras over any specified area. As such after the agreement of the year 1924, the issue regarding the prescriptive right of Madras in our view has become academic.

5. Faced with this situation, a stand was taken that the prescriptive right claimed on behalf of the State of Tamil Nadu is linked with the minimum

flow of Cauvery that was to be ensured at the Upper Anicut before any impounding was to be made in Krishnarajasagara – as provided in Rule 7 of Annexure I to the agreement of 1924. It has been asserted on behalf of Tamil Nadu that the State of Mysore/Karnataka are bound to maintain the minimum flow specified in feets in the agreement of 1924, which was converted into cusecs by the agreement of the year 1929, details whereof have already been mentioned earlier. It is difficult to appreciate as to how a prescriptive right shall accrue after the execution of the agreement in the year 1924. The condition regarding prescriptive right, as mentioned in Clause III of the Rules of 1892, does not prescribe any limit flow at Upper Anicut and it could not have prescribed any such restriction, as there was no reservoir then over river Cauvery. How much water of river Cauvery is required for those areas, which were under irrigation of the Cauvery system, shall be examined when question of apportionment of just and equitable share of Tamil Nadu shall be considered.

Chapter 4

Constitutional and legal validity of the agreement of the year 1924

Whether the agreements of the years 1892 and 1924 entered into between the Government of Mysore and the then State of Madras are arbitrary and invalid has already been considered earlier. It has been held that the said agreements cannot be held to be invalid and void so as to be ignored. Now it has to be examined as to whether that agreement has become constitutionally invalid, and is no more enforceable against Karnataka.

2. From a bare reference to the statement of the case filed before this Tribunal on behalf of the Government of Tamil Nadu it shall appear that their stand is that both the agreements of the years 1892 and 1924 were permanent in nature as no time limit had been fixed, and only reconsideration of some of the clauses of the Agreement of 1924 was contemplated. When 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. According to the State of Tamil Nadu by reason of the provisions contained in Section 177 of the Government of India Act, 1935, the 1924 Agreement continued to be in force. 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. Because of the proviso to Section 7(1) aforesaid they continued to be in force in the absence of denunciation of those agreements by either party or by superseding them by any fresh agreement. As Mysore which was a princely State at the time of its accession to the Dominion of India, executed both the "Instrument of Accession" and the "Standstill Agreement" under which the agreements continued between the then State of Madras and the then State of Mysore. It is further the case of Tamil Nadu that when the Constitution of India came into force on 26th January 1950, all rights, liabilities and obligations arising out of these agreements have under Articles 294(b) and 295(2) devolved on the two States. After the re-organisation of the States in November, 1956 the terms of the agreement made earlier shall be deemed to be binding on the successor State or States under Section 87(1) of the States Reorganisation Act, 1956. It may be mentioned that part of the Cauvery catchment area in the erstwhile Malabar district which was part of Madras came under the Kerala State on account of the States' re-organisation. As such Kerala has now become a Cauvery Basin State.

3. On the other hand, according to State of Karnataka the Agreement of 1924 is not covered by Section 177 of the Government of India Act 1935, as such it lapsed after coming into force of the said Act with effect from the appointed date. Sub-section (1) of Section 177 which is relevant is as follows:

> "177(1) Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, 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 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 in behalf of that Province; and
>
> (b) in any other case have effect as if it had been made on behalf of the Federation,
>
> and references in any such contract to the Secretary of State in Council shall be construed accordingly, and any such contract may be enforced in accordance with the provisions of the next but one succeeding section."

4. Any contract made before the commencement of Part III of the said Act by or on behalf of the Secretary of State in Council shall as from that date shall have effect as if it had been made on behalf of that Province. It was urged by Mr. Nariman, the learned senior counsel appearing on behalf of the State of Karnataka that 1924 Agreement was entered into between the then State of Madras and the Government of Mysore. It was pointed out that there is nothing in the said Agreement to show that the Governor had executed the said agreement on behalf of the Secretary of the State in Council. The result whereof shall be that the said agreement shall not survive after commencement of Part III of the 1935 Act. According to him only such

agreement shall survive and shall remain in force which have been entered into by or on behalf of the Secretary of State in Council.

5. A copy of the agreement dated 18th February 1924 was filed along with some other documents on behalf of the State of Karnataka giving rise to CMP No.2/2002 on 24.7.2002. The said petition was allowed and a photo copy of the original agreement was taken on record along with other documents as Annexed to the application. From a bare reference to the said photo copy of the agreement it shall appear that on 18th February 1924 the Dewan of Mysore and Secretary to Government, PWD (Irrigation) Madras signed the said agreement. Thereafter the Maharaja of Mysore and Governor of Madras signed the said agreement. A note has been made by the Political Secretary on 11th July 1924 that the said agreement had been approved and confirmed by the Government of India. In the application which is on affidavit, it has been stated on behalf of the State of Karnataka that from inquiries made with the Oriental and India Office collections of the British Library, London and with the National Archives, New Delhi in respect of process of ratification of the Agreement of 18th February 1924 it has transpired that a copy of the said agreement had been forwarded to His Majesty's Secretary of State by Government of India by letter dated 1st May 1924. The contents of the said letter dated 1st May 1924 had been reproduced. It appears to have been signed by the then Viceroy along with the members of the Council. It has been further stated that pursuant to the said letter the Secretary of State by a telegram dated 18th June 1924 to the

Viceroy of India communicated his approval to the Agreement of 18lth February 1924 in the following terms:

> "Telegram dated 18th June, 1924, from S/S Viceroy of India
> Your dispatch No. 1-P.W. dated 1st May Cauvery Agreement.
> I approve."

6. It has been further stated that a copy of the said telegram is in the Oriental and India office collections of the British Library, London and had been inspected by the Superintending Engineer, Inter-State Water Disputes, Water Resources Development Organization, Government of Karnataka. In this connection, our attention was also drawn to a Press Communique issued from Fort, St. George dated 3rd July, 1924 saying that on 18th February 1924 the Agreement had been executed on behalf of the Government of Madras and Mysore Darbar which finally settled the long standing dispute relating to the utilization of the waters of the river Cauvery in Madras and Mysore respectively; this agreement had just been ratified by the Right Honourable the Secretary of the State. The Press Communique aforesaid bore the signature of P. Hawkins, the then Joint Secretary to the Government, PWD (Irrigation), Madras who had signed the Agreement on 18th February 1924 on behalf of the State of Madras.

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

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

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.

8. We have already referred to the different correspondence earlier that the then State of Mysore was anxious for sanction from the then State of Madras for raising the height of the reservoir KRS upto 124 ft. Because of the agreement it was possible for the State of Mysore to raise the height of KRS and to construct reservoirs over the tributaries of Cauvery like Hemavathy etc. for a total capacity of 45,000 million cubic feet and also to put further areas under Cauvery system of irrigation in terms of the said agreement. In this background, it is no more open to the State of Mysore/Karnataka to repudiate the execution of the said agreement now after lapse of about 80 years when the said agreement has been worked out for 50 years till 1974 by the State of Madras as well as the State of Karnataka.

9. In the case of M/s. New Bihar Biri Leaves Co. and others vs. State of Bihar and others, (1981) 1 SCC 537 at 558 it was said by the Supreme Court:

> "It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui *approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now

firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., *Vserschures Creameries Ltd.* v. *Hull & Netherlands Steamship Co.*, (1921) 2 KB 608; see *Douglas Menzies* v. *Umphelby* 1908 AC 224, 232; see also Stroud's Judicial Dictionary, Vol.I, page 169, 3rd Edn.).

------- It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver." (emphasis supplied)

10. It was then urged on behalf of the State of Karnataka that because of Section 7(1) of the Indian Independence Act 1947 the said agreement lapsed, as it amounted to a Treaty between a British Province and a Ruling State. Reference in this connection was made to Section 7(1) of the Indian Independence Act, 1947, the relevant part of which is reproduced:

"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……..."
>
> [Emphasis supplied]

It was said that as from the appointed date in view of Section 7(1) (b) the suzerainty of His Majesty over the Indian States lapsed and with it all Treaties and Agreements.

11. It may be pointed out that on promulgation of the Indian Independence Act, 1947, the princely States adjoining the Dominion of India merged with the Dominion of India. The instruments of merger provided for the integration of the States and guaranteed to the rulers the Privy Purse. The States integrated with the Union of India under the Constitution of India and the rulers abandoned all authority in regard to their territories. Special provisions were enacted regarding Privy Purse and the rights and privileges of the erstwhile rulers. Such princely States became 'Indian State' under Dominion of India.

12. After coming into force of Section 7(1) of the Indian Independence Act 1947, all the Agreements or Treaties which had been entered into earlier did not lapse automatically; they continued to be in force on basis of 'standstill agreements'. Mysore at the time of its accession to the Dominion of India executed both the "Instrument of Accession" and the "Standstill Agreement"

under which the Agreement of the year 1924 continued between the State of Madras and the State of Mysore.

13. According to Mr. Nariman, the learned senior counsel appearing on behalf of the State of Karnataka the agreement did not survive because "Standstill Agreements" entered into by the Government of India with 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 and the Standstill Agreements were superseded by Instruments of Accession executed by the rulers of those States. In this connection, he placed reliance on a Constitution Bench decision of six Hon'ble Judges of the Supreme Court {Shri Hari Lal Kania, C.J., Saiyid Fazl Ali,J, Patanjali Sastri,J, Mehr Chand Mahajan, J, Mukherjea,J. and Das, J} in the case of *Dr. Babu Ram Saksena* v. *The State* 1950 SCR 573. It appears that in that case the accused had taken a plea that the warrant issued under Section 7 of the Indian Extradition Act, 1903 had no application to the case in question in view of a Treaty entered into between the British Government and the Tonk State on 28th January 1869. It was further the case of the accused that the said Treaty although declared by Section 7 of the Indian Independence Act 1947 to have lapsed as from the 15lth August 1947 but it was continued in force by the "Standstill Agreement" entered into on the 8th August 1947.

14. From the aforesaid judgment of the Supreme Court it shall appear that the Attorney General appearing for the Government of India advanced

three arguments in alternatives. Firstly, 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 rulers of those States. As Tonk having acceded to the Dominion on 16th August 1947, the Standstill Agreement relied on by the accused must be taken to have lapsed as from that date. The second stand taken by the Attorney General was that the Treaty was no longer subsisting and its execution had become impossible as the Tonk State ceased to exist politically and such sovereignty as it possessed was extinguished when it covenanted with certain other States, with the concurrence of the Indian Government "to unite and integrate their territories in one State, with a common executive, legislature and judiciary, by the name of the United State of Rajasthan," The third line of argument of Attorney General was that even if it was assumed that the Treaty was still in operation as a binding executory contract, its provisions were in no way derogated from the application of Section 7 of the Indian Extradition Act to the present case, as such the extradition warrant issued under that Section and arrest made in pursuance thereof were legal and valid and could not be called in question under Section 491 of the Criminal Procedure Code. Hon'ble Justice Patanjali Sastri delivered his opinion as well as of Hon'ble Justice Kania, the then Chief Justice in a separate judgment and dismissed the appeal on the third objection taken by

the Attorney General that even if the Treaty was still in operation, its provisions were in no way derogative from the application of Section 7 of the Indian Extradition Act, as such the arrest was legal and valid and could not be called in question. A separate judgment was delivered by Hon'ble Justice Mukherjea. He went into the question as to whether the treaty entered into between the British Government and the Tonk State on 28th January 1869 had lapsed or abrogated. He referred to sub-Section (1) of Section 7 of the Indian Independence Act 1947 and other provisions, in the judgment to examine as to whether the Treaty between Tonk and the British Government was deemed to have lapsed with effect from 15th August 1947. In that connection, he pointed out that as there was a Standstill Agreement entered into by the Indian Dominion with the Indian States saying that until new agreements in this behalf are made, all agreements and administrative arrangements between the Crown and the Indian State 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. It was further said:

> "The Schedule does mention "extradition" as one of the matters to which the Standstill Agreement is applicable. This was certainly intended to be a temporary arrangement and Mr. Setalvad argues that as there was no `Treaty in the proper sense of the term but only a substitute for it in the shape of a temporary arrangement, section 18 of the Extradition Act which expressly mentions a Treaty cannot be applicable. While conceding that *prima facie* there is force in the contention, I think that this would be taking a too narrow view of the matter and I should assume for the purposes of this case that under the Standstill Agreement the provisions of the Treaty of 1869 still

> continued to regulate matters of extradition of criminals as between the Tonk State on the one hand and the Indian Dominion on the other till any new agreement was arrived at between them."
>
> [Emphasis supplied]

To the argument of Attorney General that in any case even such Standstill Agreement ipso *facto* abrogated by the Instrument of Accession it was said:

> "Whether the existing Extradition Treaty was *ipso facto* abrogated by this Instrument of Accession is not so clear….."

Further it was said:

> "It is somewhat unusual that an Extradition Treaty would be subsisting even after the State had acceded to India but we have no materials before us upon which we could definitely hold that the treaty has been expressly superseded or abrogated by the Indian Legislature."

15. The appeal was however dismissed on the special facts and circumstances of that particular case by Hon'ble Justice Mukherjea. It was pointed out that in April 1948 there was a covenant entered into by the rulers of 9 States including Tonk by which it was agreed between the covenanting parties that the territories of these 9 States should be integrated into one State by the name of United State of Rajasthan. This was done with the concurrence of the Dominion of India. As the very existence of Tonk State vanished and merged with other States into the United State of Rajasthan, it was said that in this background any Treaty by Tonk State which relinquished its life by reason of merger with other States could not be enforced. In this connection it was said:

> "The question now is how far was the Extradition Treaty between the Tonk State and the British Government affected by reason of the merger of the State into the United State of Rajasthan. When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the general opinion of International Jurists is that the treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of State life….."
>
> [Emphasis supplied]

The view taken was that as a result of amalgamation or merger of the State with other States and formation of a new State, subject matter of the Treaty previously concluded, must necessarily lapse because Tonk completely lost its personality consequent on extinction of State life.

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

17. The facts of the present case are different. The Mysore which was a ruling State, after accession became a Group B State under the Constitution of India. At no stage there has been any merger of the said

State with any other State by which the life of the erstwhile ruling State Mysore was extinguished or relinquished as was the case of Tonk. 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. Article 295(2) will govern thereafter all rights, liabilities and obligations of the Government of an Indian State arising out of any contract or otherwise. Article 295 is as follows:

> "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 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)."

In view of Article 295(2) the State of Mysore which was initially specified as a Part B State in the First Schedule of the Constitution became successor to the erstwhile Government of Mysore a Ruling State before accession. After coming into force of the Constitution, because of Article 295(2) State of Mysore became a successor of the rights, liabilities and obligations whether arising out of any contract or otherwise of the then Ruling State of Mysore. In this background there is no escape from conclusion that Mysore/Karnataka is bound by the terms of the Agreement of the year 1924 subject to the review and reconsideration of the terms of the said agreement after a lapse of fifty years since the date of the execution.

18. Then an alternative stand was taken on behalf of the State of Karnataka that even assuming that the agreement of the year 1924 survived

after coming into force of the Constitution of India, terms of those agreements cannot be looked into in any dispute by the Supreme Court or any other court including this Tribunal because of Article 363 of the Constitution. According to the State of Karnataka that agreement had been executed by the then ruler of the princely State of Mysore and because of the bar prescribed in Article 363 of the Constitution, the terms of such agreements cannot be examined in any dispute, even arising between the successor State of such ruling State with another State as in the present case Tamil Nadu. Article 363 is as follows:

> "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 of the Dominion of India or any of its predecessor 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."

19. In the well-known Privy Purse case *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & Ors.* Vs. *Union of India, (*1971) 3 SCR 9 which was heard by the then 11 Hon'ble Judges of the Supreme Court to examine as to whether the order of the President in exercise of his power under Article 366 (22) of the Constitution osteriors ng the rulers and repudiation of liability to pay Privy Purse and other privileges was legal and valid. In that case Article 363 of the Constitution was examined in detail because the stand of the Union of India was that any such right or privilege guaranteed to the ex-rulers was beyond the purview of any court including the Supreme Court.

20. Regarding the plea taken on behalf of the Union of India that Article 363 shall be a bar on the part of the Supreme Court while examining the grievance and claim in respect of the Privy Purse guaranteed under the Constitution itself; it was said at page 184 in the judgment of Justice Hegde who had given a separate concurring judgment with majority of the Judges:

> "From the above passage, it is clear that according to the Government's understanding of Art.363, that article merely deals with matters coming under Art.362. That is also the contention of

the petitioners. But according to the learned Attorney General that article excludes from the jurisdiction of all courts including this Court not merely those matters that fall within the scope of Art.362 but also the right arising from Art.291. It was urged by him that Art.291 also protects only a personal right. Therefore, it is a matter that falls within the scope of Art.362. Consequently any dispute relating thereto is excluded from the jurisdiction of this Court under Art.363. Privy purse was taken out for special treatment by the Constitution under Art.291. Therefore it is excluded from the general provision in Art.362. Arts.291 and 362 have to be construed harmoniously. It is a well known rule of construction that a special provision excludes the general provision. Hence I have to reject the contention that Art.363 includes the right to get privy purses because it also comes within the scope of Art.362. If it is otherwise, there was no need to enact Art.291. Further there was no purpose in guaranteeing the payment of privy purses under Art.291 and then taking away the right to recover them under Art.363.....

It is not proper to say that the Constitution is speaking in two voices, as the learned Attorney General wants us to do or that it takes away by the right hand what is given by the left hand. Therefore we have to read Art.363 harmoniously with Art.291. That is equally true of Arts.363 and 366(22). The rule of harmonious construction is a well known rule. If the aforementioned articles are harmoniously interpreted then the position becomes clear. The purpose of Art.363 is made clear in the White Paper.

.... But the Constituent Assembly did not want to open up the Pandora's Box. Without Art.363, Art.362 would have opened the flood gates of litigation. The Constituent Assembly evidently wanted to avoid that situation. That

appears to have been the main reason for enacting Art.363. Evidently there were other reasons also for enacting Art.363. Some of the Rulers who had entered into Merger Agreements were challenging the validity of those agreements, even before the draft of the Constitution was finalised. Some of them were contending that the agreements were taken from them by intimidation; some others were contending that there were blanks in the agreements signed by them and those blanks had been filled in without their knowledge and to their prejudice. The merger process went on hurriedly. The Constitution makers could not have ignored the possibility of future challenge to the validity of the Merger Agreements. Naturally they would have been anxious to avoid challenge to various provisions in the Constitution which are directly linked with the Merger Agreements."

[Emphasis supplied]

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 an 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.

22. In the Privy Purse case reference was made to the well-known rule of construction that a special provision excludes the general provision. The same was reiterated by a Constitution Bench in the case of *Ashoka Marketing Ltd. and Another* Vs. *Punjab National Bank and Others*, (1990) 4 SCC 406 which is as follows:

> "One such principle of statutory interpretation which is applied is contained in the latin maxim: *leges posteriors priores conterarias abrogant* (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: *generalia*

specialibus non derogant (a general provision does not derogate from a special one.) This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Bennion, *Statutory Interpretation* pp. 433-34)."

23. In the *J.K. Cotton Spinning & Weaving Mills Co. Ltd.* v. *State of Uttar Pradesh* , (1961) 3 SCR 185, it was said:

"The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions should have effect."

24. In *U.P. State Electricity Board* v. *Hari Shanker Jain*, (1978) 4 SCC 16 Supreme Court has observed:

"In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament.":

25. In *Life Insurance Corporation* v. *D.J. Bahadur*, 1981(1) SCC 315 Krishna Iyer, J. has pointed out:

"In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular

perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law."

26. It cannot be disputed that Article 262 of the Constitution is a special provision in respect of adjudication of disputes relating to waters of inter-State rivers or river valleys and read with Section 11 of the Inter-State Water Disputes Act, 1956 excludes the jurisdiction of all courts including the Supreme Court in respect of complaint regarding the water dispute.

27. The Supreme Court while answering the reference made by the President of India under Article 143 relating to this very Cauvery river dispute said about the scope of Inter-State Water Disputes Act 1956 and about the powers of this Tribunal after referring to Articles 131and 262 of the Constitution:

"56. It is clear from the article that this Court has original jurisdiction, among other things, in any dispute between two or more States where the dispute involves any question whether of law or fact on which the existence and extent of a legal right depends except those matters which are specifically excluded from the said jurisdiction by the proviso. However, the Parliament has also been given power by Article 262 of the Constitution to provide by law that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any dispute or complaint with respect to the use, distribution or control of the water of, or in, any inter-State river or river valley. Section 11 of the Act, namely, the Inter-State Water Disputes Act, 1956 has in terms provided for such exclusion of the jurisdiction of the courts. It reads as follows:-

'11. Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.'

57. This provision of the Act read with Article 262 thus excludes original cognizance or jurisdiction of the inter-State water dispute which may be referred to the Tribunal established under the Act, from the purview of any court including the Supreme Court under Article 131.

77. The effect of the provisions of Section 11 of the present Act, viz., the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act....."

{1993 Supp(1) SCC 96}

28. Supreme Court pointed out that Article 262 of the Constitution has an over-riding effect to Article 131 of the Constitution in as much as it vests power in the Parliament by an Act to exclude the jurisdiction of the Supreme Court or any other court from exercising power in respect of any water dispute which may be referred to a Tribunal under that Act. Article 262 provides for creating a special forum for adjudication of disputes relating to waters of inter-State rivers or river valley. It says:

"262. Adjudication of disputes relating to waters of inter-State rivers or river valleys – (1) Parliament may by law provide for the

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.

(2) Notwithstanding anything in this 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 to in clause (1)."

29. 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. If there is an agreement relating to sharing of the waters of inter-State river, the Tribunal has to examine the claim of the different riparian States in the background of such agreement. Such inquiry cannot be barred by Article 363 of the Constitution.

30. It may be mentioned that Section 2(c) of the Inter-State Water Disputes Act, 1956 defines "water disputes" as follows:

"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."

[Emphasis supplied]

31. Again Section 3 under which a State Government can request the Central Government to refer 'water dispute' to a Tribunal for adjudication says: If it appears to the Government of any State that a water dispute with Government of another State has arisen which is 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;'

[Emphasis supplied]

Such State may request the Central Government to refer the water dispute to a Tribunal for adjudication. Not only Section 2(c)(ii) but also Section 3(c) clearly provide and contemplate a dispute regarding interpretation of the terms of any agreement relating to the use, distribution or control of water of any inter-State river in respect of which such State may request the Central Government to refer the water dispute to a Tribunal for adjudication. Under Section 4 of the Act, the Central Government if being of the opinion that such water dispute cannot be settled by negotiation, it shall refer the dispute to

Water Disputes Tribunal for adjudication. 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.

Chapter 5

Breach of agreements and consequences

The States of Karnataka and Tamil Nadu have also made grievances against each other in respect of breaches committed of the terms of the agreements of 1892 and 1924. Because of that issues have been framed as to whether the executive action taken by Karnataka in constructing reservoirs on Kabini, Hemavathy, Harangi, Suvarnavathy and other projects and expanding its ayacuts has prejudicially affected the interest of Tamil Nadu and Pondicherry, materially diminishing the supply of the waters to the Tamil Nadu and Pondicherry. According to the State of Tamil Nadu the aforesaid action on the part of the State of Karnataka is in violation of the agreements of 1892 and 1924. Similarly, according to the State of Karnataka, the then State of Madras and thereafter the State of Tamil Nadu have been committing the breaches of the terms of the agreements and the understanding arrived at between the then State of Madras and the then State of Mysore.

2. The stand of the Karnataka is that each of the aforesaid projects in respect of which grievances have been made on behalf of the State of Tamil Nadu had been contemplated under the agreement of 1924, and for starting the construction of those projects no separate consent was required. Reference in this connection was made to clauses 10(iv) and 10(vii) of the agreement of 1924 under which the Mysore Government was at liberty to carry out future extension of irrigation in Mysore under the Cauvery and its

tributaries to an extent at 1,10,000 acres. This was in addition to the permissible area of 1,25,000 acres as mentioned in Rules of Regulation of KRS (Annexure I to the agreement). The same has been reiterated in clause 10(vii) saying Mysore Government on their part agreed that extension of irrigation in Mysore as specified in clause 10(iv) shall be carried out only by means of reservoirs constructed on Cauvery and its tributaries mentioned in Schedule A of 1892 agreement. Such reservoirs were to have an effective capacity of 45000 million cubic feet in aggregate.

3. According to the Tamil Nadu, the then Mysore Government did not furnish the full particulars and details of such reservoir schemes and of impounding therein as required by clause 10(viii). According to Tamil Nadu the Rules of Regulation in respect of such reservoirs had to be settled first before the construction was to start. The apprehension on the part of the then State of Madras was that impounding in such reservoirs was bound to effect the flow at Upper Anicut as stipulated in clauses 7 and 10 of the Rules of Regulation of KRS (Annexure I to the agreement of 1924). On the other hand, the case of Karnataka is that attitude of the then State of Mysore was not indifferent. The then Madras Government always objected whenever Mysore State purported to exercise its power under clauses 10(iv) to 10(vii) i.e. constructing reservoirs on the tributaries like Kabini, Hemavathy and others. In this connection, reference was made to a letter dated 28.6.1933 (Tamil Nadu Vol. VII /Exh.436 page 114) by which the project proposals on Kabini, Hemavathy, and Lakshmanathirtha were forwarded to Madras for joint

verification in terms of the agreement aforesaid. Correspondence continued from 28.6.1933 to 21.5.1945. Such correspondence are on the record (Tamil Nadu Vol.VII/Exh.436, pages 114-149). It was urged by Karnataka that from the aforesaid correspondence it shall appear that Madras initially took objections to the proposals of Hemavathy and Lakshmanathirtha on the ground that the data given was meager and Madras was unable to make any useful suggestions or criticism. 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 clause 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 Vol.VII/Exh.445 page 148) it appears that the two Chief Engineers of Madras and Mysore 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.

4. The Madras Government had taken up the construction of a reservoir on Bhavani in 1948. When no approval of the State Government in respect of reservoir on Kabini in terms of clause 10(iv) was received by the Mysore Government, after the construction on Bhavani started, an attempt was made by Mysore to get the project on Kabini sanctioned under clause 10(xiv) i.e. as an off-set reservoir to Bhavani reservoir as provided in clause 10(xiv) of the agreement of 1924. In this connection, a letter was addressed on 21.5.1953 from the Government of Mysore to the Madras pointing out that in view of construction of the reservoir on Bhavani which was nearing completion, in terms of clause 10(xiv) of the 1924 agreement, the Government of Mysore could construct a reservoir on Kabini which will be within the permissible limit of 60% of the capacity of the reservoir built by Madras Government on Bhavani, Amaravathy, and Noyyil rivers in Madras. Then by a letter dated 17..3.1954 (Tamil Nadu Vol. VIII/ page 97) the Madras conveyed its objection to the said proposal saying that taking up the project of

Kabini under clause 10(xiv) was not proper because it had to be taken up under clause 10(iv). Some other objections were also raised in the said letter. By a letter dated 24.2.1955 (Tamil Nadu Vol.VIII/Exh.503, page 98) the Mysore asserted that it was at liberty to take up the work under clause 10(xiv) and reminded the Madras Government that it had already constructed Bhavani reservoir utilizing the provision of clause 10(xiv) without furnishing the details of the project to Mysore Government. As such the Mysore was justified in taking up Kabini project under clause 10(xiv) of the agreement. Madras Government objected by its letter dated 28.9.1955 (Tamil Nadu Vol.VIII/Exh.504 page 99) that it was not necessary for the State of Madras to inform Mysore before construction of Bhavani reservoir in terms of the agreement. It was also asserted that Bhavani reservoir was not likely to effect the flow of river Cauvery, but reservoir at Kabini which was situated at a higher level was likely to effect the supply to which the Madras was entitled. By a letter dated 30th May 1956, Government of Mysore stated that there was no reason to modify the project as had already been stated in their earlier letter.

5. From perusal of the correspondence referred to above between 1933 to 1956 it was contended by Karnataka that the then States of Madras and Mysore had agreed in clear and specific terms in respect of construction of reservoirs on different tributaries in the then State of Mysore and the State of Madras including as an off-set reservoir as contemplated by clause 10(xiv).

6. After the year 1974, when according to the State of Karnataka the agreement of the year 1924 came to an end, the State started impounding waters in different reservoirs, constructed over the tributaries of Cauvery within the State of Karnataka without following any Rules or any of the terms of Agreement of 1924. The areas which were to be put under irrigation, from such reservoirs and other diversion works like anicuts were increased every year. It has been pointed out that Rules of Regulation of KRS were observed upto 1973-74 by Karnataka, but thereafter the areas under irrigation were increased from 1,25,000 acres to 2,35,616 acres in 1973-74 and 267743 acres in 1993-94 (Exh.E-52 at page 14 and Exh.E-99 at page 28 - Tamil Nadu Note-8). Charts have also been filed in respect of different reservoirs on Hemavathi, Kabini, Suvarnavathy and Harangi as to how the impounding of water in such reservoirs increased. It appears to be an admitted position that the reservoirs on the aforesaid tributaries of the Cauvery within Karnataka became functional after 1974. This obviously led to the dispute which ultimately has been referred before this Tribunal for adjudication.

7. It was urged on behalf of both the States that the terms and conditions of the agreement of 1924 were violated. After 1956 the Mysore Government took a decision to make construction on different tributaries mentioned in the agreement of 1924 of its own without waiting for any sanction from the Planning Commission. It is not necessary to go into those details because any finding as to who is at fault and responsible for such

breaches or violations shall be now academic and of no practical use. But one thing is clear that Mysore State observed the Rules of Regulation of KRS till the expiry of the period of fifty years from the date of the execution of the agreement of 1924. Thereafter the State of Mysore/Karnataka started asserting its territorial right over the water flowing from Cauvery within the territory of Mysore (Karnataka). It had the same attitude in respect of the tributaries referred to above on the plea that the agreement of 1924 had come to an end. But now the clock cannot be put anti-clockwise to punish or penalize anyone of them. 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. It is not easy to assess for any injury in an irrigation dispute. How the damages caused year-wise to one State or other can be computed or calculated? No concrete material has been brought on record by either side on the basis of which any such attempt can be made.

8. During the hearing of the dispute it was more or less an admitted position that even the State of Tamil Nadu had increased its acreage under the Cauvery Irrigation System from about 16 lakhs to 28 lakhs. Similarly, the State of Karnataka increased the areas under irrigation from Cauvery System including from the tributaries of Cauvery. In this background the issue regarding non-compliance and violation of the terms of the agreement of the year 1924 by two States does not require to be examined any further.

Chapter 6

The claim of Kerala in respect of sharing of the water within the Cauvery basin.

The Kerala State came into existence comprising of the territories of the then State of Travancore-Cochin and the Malabar district which was transferred to the State of Kerala from the existing State of Madras under the provisions of the States Reorganisation Act 1956, hereinafter referred to as the Act.

2. The claim of the State of Kerala regarding sharing of the waters of river Cauvery has been made primarily because of the areas transferred to the said State from Madras. The Malabar district which was transferred from Madras State not only included a part of the Cauvery basin but also part of the two important tributaries of Cauvery, namely, Kabini and Bhavani. The Kabini and Bhavani, after the aforesaid transfer of the Malabar district flows through the State of Kerala. Kabini later enters into the then State of Mysore now Karnataka; Bhavani enters into the then State of Madras now Tamil Nadu and they (Kabini and Bhavani) join the river Cauvery in Karnataka and Tamil Nadu respectively. There is another tributary of Cauvery known as Pambar which was within the erstwhile State of Travancore-Cochin, but the catchment area of the same was very small about 384 sq. km. As such, the Cauvery basin was then not of much importance to the then State of Travancore -Cochin. But after the catchment area of Kabini and Bhavani

became part of the State of Kerala, the total area of Cauvery basin in the State of Kerala increased to 2866 sq. km.

3. The State of Kerala started examining the possibility of utilising the waters of Kabini and Bhavani for purposes of irrigation and hydro-electricity. The erstwhile State of Travancore-Cochin was not a party to the agreement of the year 1924 entered into between the then State of Madras and the State of Mysore on basis of which the States of Madras and Mysore were sharing the waters of inter-State river Cauvery. State of Kerala after 1956 started claiming apportionment of the waters of river Cauvery, saying that the agreement of the year 1924 aforesaid between the then States of Madras and Mysore was not binding, and as such should be ignored so far sharing of the water of river Cauvery was concerned. In this connection our attention was drawn to the different correspondence and proceedings. By a letter dated 21.3.1959 addressed by the Government of Kerala to the Government of Madras, Kerala objected to the project of Madras for diverting the water to the Kundah basin and requested for full details of the said project, because the land in Attappady valley was likely to be affected. The next letter is dated 19.7.1961 to the State of Mysore saying that the completion of Kabini dam by Mysore was likely to submerge the areas in Wynad in Kerala. The same was reiterated by letter dated 8.9.1961 pointing out that the State of Kerala was interested in the implementation of project in such a manner as not to affect any part of its territory. A reminder was sent on 26.10.1961. Thereafter on 24.3.1962 Kerala addressed a letter to the Ministry of Irrigation and Power,

Central Government giving its concurrence for setting up a River Board for Cauvery river basin as it was admittedly an inter-State river. It also requested to be consulted before nomination or appointment of the Members on the Board are made. In the letter dated 9.5.1962 addressed to the Secretary, Government of India, Ministry of Irrigation and Power, a specific claim was made for sharing of water of the river Cauvery and its tributaries for irrigation and hydro-electric schemes. In the said letter it was stated:

> "2. Three main tributaries of the inter-State river Cauvery which flow through the Kerala State are the Bhavani, the Kabini and the Pambar. The Bhavani takes its origin in the Kundah Reserve forest in the Madras State and after flowing a few miles enters the Kerala State. Thereafter, it flows due south for about 11 miles and then after running for another 14 miles in the State in a north-easterly direction, it re-enters the Madras State. The Bhavani with its tributaries Siruvani and Varagar has a catchment area of 220 square miles in the Kerala State with a run off of 40,000 M. cft. The Kabini river which originates in the Wynad area of this State, has a drainage of 762 square miles in this State with a run off of 1,45,000 M. cft. The Pambar river arising in the Kottayam district has a drainage of 148 square miles in this State with a run off of 24,000 M. cft. Thus the total run off of these rivers within the Kerala State is 2,09,000 M. cft. A study of these rivers has revealed their great irrigation and power potential which can be beneficially exploited for the development of the river valleys. Accordingly, this Government proposed to set up a Hydro Electric Project for the Bhavani River valley and moved the Government of Madras for their concurrence for the detailed investigation of the Project. But unfortunately, the scheme had to be dropped as the Madras Government objected to it on the ground that it would adversely affect their own projects

lower down. Similarly, when this Government proposed the setting up of a Hydro Electric Project on the Manantoddy river, a tributary of the Kabini, and sought the concurrence of the Mysore and the Madras Governments, the Mysore Government objected to it on the ground that the scheme would adversely affect the irrigation interests of the Cauvery basin and more particularly their Kabini Dam Project. The reply of the Madras Government is still awaited."

A request was made to issue instructions to all States concerned not only to desist from undertaking any schemes or projects effecting the waters of the Cauvery system but from proceeding with any such schemes or projects already started.

4. On 12th July 1962 the Mysore Government pointed out to the State of Kerala that the catchment areas of Kabini and Wynad area of Kerala State was part of ex-Madras State; the ex-Madras State had entered into an agreement in the year 1924 according to which no irrigation was contemplated in Wynad. It was pointed out that till that date the Kerala Government had not informed as to whether any project was contemplated for the benefit of Wynad. It was made clear on behalf of the Mysore State that it was against diverting any water for power generation. By yet another letter dated 22.8.1962 the Mysore Government informed the Kerala State that Kabini project had been sanctioned in the Second Five Year Plan and was under execution for some years past. The Kerala Government also informed the Government of India by letter dated 22.10.1962 regarding the Kundah project of the Madras Government and requested the Government of India to direct the Madras Government to forward a copy of the project report of

Kundah scheme. The same thing was repeated by letter dated 7.12.1964 to Government of India.

5. The Minister for Irrigation and Power, Government of India on 5th August 1968 addressed a communication to the then Chief Minister of Kerala informing that upper Bhavani project of the Government of Madras had not yet been received by Central Water Commission and assured that the Government of Kerala shall be consulted when any project was received. The Chief Minister on 23.8.1968 again informed the Central Minister for Irrigation and Power, Dr. K.L. Rao regarding Kundah project saying that the Government of Madras was going ahead with the construction of the dam without the concurrence of the Kerala Government. Such acts should have been prevented by Government of India. The same was reiterated by another communication dated 21.1.1969 by the Chief Minister of Kerala in a communication to Dr. Rao, the Minister for Irrigation and Power.

6. On 11th February 1970 Dr. Rao, the Irrigation and Power Minister, Government of India while addressing a letter to the then Chief Minister of Kerala enclosed a note suggesting further line of action in respect of different projects in Mysore after a meeting of the Ministers of Tamil Nadu, Mysore and representative of the Government of Kerala regarding Cauvery waters. In respect of Kabini project in the note it was said that a Committee was to be appointed to consider the requirement of Kerala from Kabini apart from other questions mentioned therein. It was also said in the said communication that Government of India shall be writing to all State Governments reiterating that

construction of new projects should not be taken up or proceeded with without the clearance of the Planning Commission. On 12.2.1970 the Kerala Government informed the Joint Secretary to the Government of India that the Tamil Nadu was considering modernisation scheme which had to be examined in order to ensure that interests of the upper riparian State of Kerala in Kabini and Bhavani rivers which are tributaries of Cauvery were not jeoparadised. It was again asserted that Kerala had right to utilize the waters of Kabini and Bhavani which had to be protected.

7. When nothing positive came out the Chief Minister, Kerala by his letter dated 19.3.1970 to Dr. Rao, the Minister for Irrigation suggested that the dispute regarding the sharing of the water of an inter-State river Cauvery should be treated, with regard to the entire Cauvery basin, as such, it was necessary to have accurate data, for which a Fact Finding Commission should be constituted. On 17th April 1970 a discussion was held on the Cauvery waters which was attended to by Dr. K.L. Rao, Union Minister for Irrigation and Power, the Chief Minister of Kerala, the Chief Minister of Mysore, the Chief Minister of Tamil Nadu and others. A summary record of the discussion was forwarded by Dr. Rao to the Chief Minister Kerala and the same is at page 92 of Kerala Compilation-1. The proceeding mentioned that after discussion the consensus emerged on different questions enumerated in the said note. The relevant part with which Kerala State was concerned was under para-4 saying that without prejudice to the rights of the parties to their respective contentions the parties had agreed to the clearance of (i)

Hemavathy Project; (ii) Harangi Project and (iii) Kabini Project. The Chief Minister of Kerala by a communication dated 14.5.1970 pointed out that there was no agreement in the aforesaid discussion on the point mentioned in item No. (4) of the summary record. In other words, the Kerala had never agreed for clearance of the three projects mentioned in the said paragraph (4).

8. It appears another meeting was held by the Union Minister for Irrigation and Power with the Chief Ministers of Kerala, Mysore and Tamil Nadu along with other Ministers of the States on 16.5.1970. The general trend of discussion was summarised in the summary note of the discussions on Cauvery water. It will be proper to reproduce a part of it.

> "3. The general trend of the discussions can be summarised as follows:-
>
> (a) The three State Governments have expressed their respective view-points with regard to the Cauvery waters. These views are to be given in the enclosures to the agreement.
>
> (b) It has been agreed that the details of the Hemavathi and Kabini Projects should be in accordance with the provisions of 1924 agreement and that the rules and regulations and the method of impounding of waters in the proposed reservoirs, should be worked out by the Chairman, Central Water and Power Commission, within three months in consultation with the concerned Chief Engineers of the three States.
>
> (c) It has also been agreed that this settlement is without prejudice to the contentions of the respective parties that may be raised in a dispute regarding sharing of Cauvery waters. The limit flows prescribed in the 1924 agreement will be maintained till the

sharing of the waters by the three states is resettled later on, either by mutual agreement or by a decision of a tribunal under the Inter-State Water Disputes Act, 1956, as amended in 1968.

(d) Kerala wanted that their requirements in the Kabini and Bhavani basins estimated at 63 TMC and 23 TMC should be settled by making a comprehensive study of the waters of Cauvery. If, however, it is felt that the present settlement may be delayed on this account, allotment of some quantity of water may be made in the waters of the Kabini basin and in the Bhavani basin to Kerala so as to be in accordance with the Provisions of the 1924 agreement. Dr. K.L. Rao suggested ad hoc allocation of 1 or 2 TMC. In Bhavani and 15 TMC. In Kabini to Kerala.

4. The Chief Ministers felt that it would be better if the above mentioned details relating to the Hemavathi and Kabini Projects were worked out by the Chairman, Central Water and Power Commission, before an agreement on the above lines was finally signed."

9. Again the Chief Minister in his communication dated 11.6.1970 to Dr. Rao, the Minister for Irrigation and Power, said that he was making it clear that the Kerala did not accept the summary note of the discussion as it was. On 19.10.1970 the Chief Minister requested by a communication addressed to Dr. Rao to deal with the dispute regarding the Cauvery waters as a whole 'the legitimate share of each of the State settled first, before attempting to give clearance to individual projects.' The Chief Minister requested the Minister for Irrigation, Govt. of India to first determine the legitimate share of each State failing which to refer the dispute to a Tribunal under Inter-State Water Disputes Act, 1956 to protect the interest of Kerala.

On 22.10.1970 the Secretary to the Government of Kerala addressed a letter to the Secretary of Ministry of Irrigation and Power in respect of allocation of waters of the inter-State river Cauvery and its tributaries and for reference to the Tribunal. Details of the transfer of catchment area of Kabini and Bhavani were given. A grievance was also made that Malabar had been completely neglected by the erstwhile Madras Government. It was also asserted that there was no valid or legal agreement which binds Kerala, with regard to the allocation of waters in Cauvery and its tributaries, as Kerala was never a party to such agreement. It was pointed out that after the transfer of the catchment area of Kabini and Bhavani, Kerala was contributing to the Cauvery basin more than 214 TMC i.e. nearly one-third of the total Cauvery waters. It was also said that Kerala required the water for development of irrigation and hydel power. In para-9 it was said that useful schemes for utilizing water of Kabini and Bhavani and Pambar had been prepared for which about 90 TMC water was required, further investigations were going on to utilize the entire water resources of the State rivers joining Cauvery for the maximum benefit of the State. In this background, it was necessary to immediately constitute a Tribunal for adjudication of various disputes including allocation of the share of Kerala which shall not be less than 200 TMC per year.

10. A letter was then written to the then Prime Minister, on 17th November 1970 making a grievance regarding the share of Cauvery waters and distribution thereof. It was again reiterated that the three tributaries Kabini, Bhavani and Amaravathy which had become part of Kerala State

contribute about 220 TMC against the total flow of 680 TMC in the entire Cauvery basin. Till then there had been practically no utilisation of these waters in Kerala State. For irrigation and power generation 86 TMC of waters was required against contribution of about 220 TMC.

11. Ultimately a suit was filed on 24.9.1971 before the Hon'ble Supreme Court of India (Original Suit No.2/71) under Article 131 of the Constitution on behalf of the State of Kerala. The Union of India, the State of Mysore; and the State of Tamil Nadu were defendants to the said suit. In the said suit more or less same grievances which had been made in different correspondence were made. The prayer inter-alia were:

> "(1) To refer the dispute to the Tribunal constituted under the Inter-State Water Disputes Act, 1956.
>
> (2) Pending the disposal of the reference to the Tribunal to restrain
>
> (a) The Union of India from giving clearance both to the States of Tamil Nadu and Mysore to construct any project on Cauvery and its tributaries or giving financial aid for the said purpose.
>
> (b) Pending the suit and the disposal of the reference by the Tribunal to restrain the State of Mysore, the 2nd defendant by an injunction from proceeding in any manner with or executing the following projects or schemes or in any manner utilising the water thereof;
>
> (1) The Kabini Reservoir Project on the river Kabini.
>
> (2) The Hemavathi reservoir project on the river Hemavathi;

(3) The Swaranavathi Reservoir Project on the river Swaranavathi;

(4) the Harangi Reservoir Project on the river Harangi; and

(5) other reservoirs across other tributaries of the river Cauvery."

12. An injunction was also sought for some projects in Tamil Nadu. It is not clear as to why the aforesaid suit filed before the Hon'ble Supreme Court on behalf of the State of Kerala was withdrawn in the year 1972. It was stated on behalf of the State of Kerala that in view of the written statement filed on behalf of Union of India, in which a stand had been taken that the dispute could be settled by negotiations and as such there was no occasion to constitute a Tribunal under the Inter-State Water Disputes Act, 1956, the said suit was withdrawn.

13. On 29.5.1972 discussions were held between the Chief Ministers of Mysore, Tamil Nadu and Kerala with Union Minister for Irrigation, the notes of discussions were signed by the three Chief Ministers and the Union Minister for Irrigation, Dr. Rao on 31st May 1972. It is as follows:

> "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 differences 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. 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 the States as early 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 utilisation 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. 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 utilising water of Cauvery beyond what it is at present.

(Sd.) K.L. Rao,
Union Minister for Irrigation
31st May 1972

(Sd.) D. DEVARAJ URS,
Chief Minister for Mysore
31st May 1972

(Sd.) M. KARUNANIDHI,
Chief Minister of Tamil Nadu,
31st May 1972

(Sd.) C. ACHUTHA MENON
Chief Minister of Kerala,
31st May 1972"

14. Pursuant to the aforesaid decision taken on 29.5.1972 a Fact Finding Committee was constituted on 12.6.1972 which submitted its report on 15.12.1972 (TNDC Vol.XV/ Exh.840, Page 3-128) after collecting various data. It also looked into the claims of the different riparian States in respect of the waters within the Cauvery basin, and as to what were the requirements of different States. It was pointed out on behalf of the State of Kerala that on 29.4.1973 a meeting of the Chief Ministers including the Chief Minister of Kerala was held along with the Minister for Irrigation, Government of India and it was said in the proceeding that the assessment of the yield in the Cauvery basin at 740 TMC by the Committee was generally agreed by all States. A direction was also given to the Chief Engineers of the States to meet and discuss with regard to contribution of Kerala portion of the Kabini sub-basin. The Chief Engineers of the three States after examining the different statistics and materials on 25.5.1973 arrived at a conclusion that the contribution from Kerala catchment area of Kabini sub-basin was 96 TMC.

15. A draft of the agreement dated 28/29-11-1974 which was to be signed by the three States was circulated mentioning the total yield in the Cauvery basin and the proposed distribution thereof. It is not necessary to examine the suggested apportionment amongst the different States here. Again on 25.8.1976 a draft of the agreement which contained the proposals for sharing of the water in the Cauvery basin by different riparian States was circulated. But none of the agreements could be signed and the matter remained pending. In the meantime, an attempt was made on behalf of the

State of Kerala to get its projects sanctioned by Central Water Commission and Central Electricity Authority. In respect of Banasurasagar Irrigation project the Central Water Commission by a letter dated 4.6.1979 advised the State of Kerala to take concurrence of Tamil Nadu and Karnataka. Similarly, in respect of Mananthvady Multipurpose Scheme the Central Electricity Authority by a letter dated 23.5.1980 asked the State of Kerala to take the concurrence from Tamil Nadu and Karnataka. Regarding Attappady Irrigation project the Central Water Commission on 6.1.1984 directed the State of Kerala to take the concurrence of Tamil Nadu and Karnataka. About Pambar Hydro-Electric project similarly on 12.3.1990 the Central Electricity Authority said that it cannot be entertained unless concurrence is given by the Tamil Nadu and Karnataka Sates.

16. The reason for referring to aforesaid correspondence from the year 1959 and notes of discussion and draft agreements in respect of sharing of the waters in the Cauvery basin is to show as to how the State of Kerala has been deprived of its share on one plea or the other. Their claim has not been entertained either on the ground that (a) the agreement between the then States of Madras and Mysore of the year 1924 was subsisting; (b) before any project of the State of Kerala is entertained by Central Water Commission or Central Electricity Authority the concurrence of the two other riparian States – Karnataka and Tamil Nadu was necessary. According to the State of Kerala all this has caused great injury because the projects have mostly remained pending. A stand was taken that the agreements of 1892 and 1924 were not

binding either on the then Travancore-Cochin or on State of Kerala as neither the erstwhile State of Travancore-Cochin nor the State of Kerala was a party to the said agreements. As such they could not have stood in the way of the State of Kerala in sharing the waters of Kabini and Bhavani which had been transferred to the territory of Kerala State under the States Reorganisation Act, 1956.

17. As State of Travancore-Cochin was admittedly not a party to the said agreements; terms of the agreements were not binding on Travancore-Cochin. But then it has to be examined whether the agreements of 1892 and 1924 were binding on the State of Kerala after a new Kerala State was formed under the provisions of the States Reorganisation Act 1956. During the formation of the Kerala State, under Section 5 of the Act the district of Malabar which was a territory of Madras was transferred to Kerala State. Section 5 of the Act is as follows:

> "5. Formation of Kerala State - (1) As from the appointed day, there shall be formed a new State to be known as the State of Kerala comprising the following territories, namely:-
>
> (a) the territories of the existing State of Travancore-Cochin, excluding the territories transferred to the State of Madras by Section 4; and
>
> (b) the territories comprised in -
>
> (i) Malabar district, excluding the islands of Laccadive and Minicoy, and
>
> (ii) Kasaragod taluk of South Kanara district;

And thereupon the said territories shall cease to form part of the States of Travancore-Cochin and Madras, respectively.

(2) The territories specified in clause (b) of sub-section (1) shall form a separate district to be known as Malabar district in the State of Kerala."

Section 2(m) is as follows:

"2(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. "

18. In view of Section 2(m) the erstwhile Travancore-Cochin became the State of Kerala under the provisions of the Act, as Hyderabad became Andhra Pradesh and Madhya Bharat became Madhya Pradesh. Section 2(o) is as follows:

2(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."

In view of the definition of successor State, it shall mean in relation to an existing State, any State to which the whole or any part of the territories of that existing State has been transferred under the provisions of the Act.

19. Section 2(m)(ii) provides that in relation to existing States of Hyderabad, Madhya Bharat, Travancore-Cochin the States of Andhra Pradesh, Madhya Pradesh and Kerala respectively shall be the principal successor State. In other words, since the appointed day Kerala became principal successor State of Travancore-Cochin within the Union of India. Section 2(o) defines successor State to mean a State to which the whole or any part of the territories of that existing State is transferred by the provisions of part-II. From Section 5 it is apparent that State of Travancore-Cochin excluding territories transferred to the State of Madras became State of Kerala and the territories comprised in Malabar district and Ksaragod taluk of South Kanara district which were earlier part of Madras State were transferred from Madras State to Kerala State. Because of the aforesaid provisions it shall be deemed that the State of Kerala became the principal successor State to the erstwhile State of Travancore-Cochin excluding territories transferred to the State of Madras. It also became a successor State in respect of the territories which were transferred from Madras and specified in Section 5(1) (b) in view of the definition of the successor State in Section 2(o). In Section 5(2) it was further specified that the areas which had been transferred under Section 5 (1)(b) from Madras State shall form a separate district to be known as Malabar district 'in the State of Kerala'. In view of the specific provision of Section 5, the State of Kerala comprised of the territories which were part of the erstwhile State of Travancore -Cochin excluding the territories transferred to the State of Madras under the said Act,

and then the areas of Malabar district were transferred from Madras. The mandate of sub-Section (2) of Section 5 is that those areas shall form a separate district to be known as Malabar district in the State of Kerala.

20. From reading the definitions of 'principal successor State' and 'successor State' it appears that Kerala first became the principal successor State so far Travancore-Cochin was concerned and it became a successor State with effect from 1.11.1956, the appointed date, so far the district of Malabar which was transferred from existing State of Madras to Kerala State under Section 5 aforesaid. As such the agreements of the years 1892 and 1924 shall be binding on the State of Kerala after creation of a new State because the Cauvery basin including the portion of rivers Kabini and Bhavani were in Malabar district which were transferred under Section 5(2) of the Act. In this background the Kerala State shall be deemed to be a successor State to the State of Madras so far that territory is concerned. The claim on behalf of the State of Kerala has been made for apportionment of water primarily because of the transfer of Malabar district from State of Madras along with part of the Cauvery basin.

Section 87 of the Act is as follows:-

> "87. **Contracts -** (1) Where before the appointed day an existing State has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in exercise of the executive power –
>
> (a) if there be only one successor State – of that State;

(b) if there be two or more successor States and the purposes of the contract are, as from the appointed day, exclusively purposes of anyone of them, – of that State; and

(c) if there be two or more successor States and the purposes of the contract are, as from that day, not exclusively purposes of any one of them – of the principal successor State:

and all rights and liabilities which have accrued, or may accrue, under any such contract shall, to the extent to which they would have been rights or liabilities of the existing State, be rights or liabilities of the successor State or the principal successor State specified above:

Provided that in any such case as is referred to in clause (c), the initial allocation of rights and liabilities made by this sub-section shall be subject to such financial adjustment as may be agreed upon between all the successor States concerned, or in default of such agreement, as the Central Government may by order direct.

(2) For the purposes of this section, there shall be deemed to be included in the liabilities which have accrued or may accrue under any contract –

(a) any liability to satisfy an order for award made by any Court or other tribunal in proceedings relating to the contract; and

(b) any liability in respect of expenses incurred in or in connection with any such proceedings.

(3)This section shall have effect subject to the other provisions of this Part relating to the apportionment of liabilities in respect of loans, guarantees and other financial obligations; and bank balances and

securities shall notwithstanding that they partake of the nature of contractual rights, be dealt with under those provisions."

21. Section 87 provides that where before the appointed day any existing State had made any contract in exercise of its executive power that contract shall be deemed to have been made if there is only one 'successor State' of that State. If there be two or more 'successor States', and the purposes of the contract are exclusively for any one of them then – of that State. In the present case, the agreements of 1892 and 1924 entered into by Madras with the then State of Mysore shall be deemed to have been entered into on behalf of the areas which were within the territories of the State of Madras including the aforesaid district of Malabar through which river Kabini and Bhavani flow. In this background, so far the territory of Malabar is concerned Kerala State which was the 'principal successor State' of Travancore-Cochin in view of Section 2(m), shall be deemed to be a successor State to Madras so far the Malabar district is concerned. The result shall be that the rights and liabilities which had accrued to Madras as an existing State shall be the rights and liabilities of the successor State, i.e. the State of Kerala. The logical sequence shall be that the State of Kerala shall be deemed to be bound by the terms and conditions of the two agreements so far the sharing of the waters of river Cauvery is concerned. It has locus standi to claim the review of the terms of those agreements for purposes of allocation of its share of waters in the Cauvery basin. But this right could be exercised only after the expiry of period of fifty years from the

date of the execution of the agreement of the year 1924, in absence of any fresh agreement between States of Madras, Mysore and Kerala.

22. In support of the contention that Kerala State shall not be deemed to be a 'successor State' within the meaning of Section 2(o) of the Act because, in the process of re-organisation of the States, Mysore State lost its identity and as a result the agreement of 1924 came to an end. Reference was made to the judgment of the Supreme in the case of Maharaja *Shree Umaid Mills Ltd.* v.. *Union of India* , 1963 Supp(2) SCR 515. From the facts of that case it shall appear that a formal agreement had been executed in the year 1941 between the Ruler of Jodhpur and the appellant of that case. On basis of that agreement it was being contended that the appellant was not liable to any excise duty or income tax because exemption had been granted under that agreement to the appellant. Supreme Court gave several reasons to reject the said stand of the appellant including that from records it appeared that neither the United State of Rajasthan nor the Part B State of Rajasthan affirmed the said agreement so that the obligations could be binding under Article 295(1)(b) of the Constitution. It appears that more than nine ruling States in Rajasthan including Jodhpur merged during the formation of United State of Rajasthan. As such, any agreement executed by the erstwhile ruler of any one of the ruling States which merged has to be first accepted by the existing sovereign State i.e. the United State of Rajasthan. The position of Mysore State although a ruling State was different

from nine or more ruling States which merged themselves for formation of the United State of Rajasthan. The State of Mysore after coming into force of the Constitution, became a Part B State as a whole and in this process there was no question of different ruling States merging and losing their identity as was the case relating to the Jodhpur State. Question of recognition of agreements by the successor State shall arise only when the earlier ruling State has completely lost its identity while merging with the successor State along with other States. This aspect has already been discussed in connection with Tonk State in detail in Chapter under heading 'Constitutional and legal validity of the agreement of the year 1924' - in light of the judgment of the Supreme Court in the case of *Dr. Babu Ram Saksena* v. *The State,* 1950 SCR 573. Majority judgment of the Supreme Court in that case held that the life of the Treaty was extinguished by the extinction of the life of the State itself by merger with several other ruling States. That case also related to the United State of Rajasthan and Tonk was one of such ruling States like Jodhpur. Reliance was also placed on the case of *Firm Bansidhar Premsukhdas* v. *State of Rajasthan* (1966) Supp. SCR 80. In that case the former State of Bharatpur sold some plots to the appellant. Later that ruling State merged into the State of Rajasthan which never recognised the contractual obligation of the State of Bharatpur as a succeeding State. In that context it was said by the Supreme Court that contractual liability of a former State is binding on succeeding sovereign State only if it recognises that contractual liability. In the aforesaid cases there was complete loss of identity

of the ruling States because of the merger with other ruling States which is not the case in respect of the then State of Mysore. On basis of these cases it cannot be held that after coming into force of the Constitution of India, the agreements entered into by the then ruling State of Mysore were not binding on State of Mysore which came into existence under the Constitution. It need not be pointed out that in the States Reorganisation Act under Section 2(o) statutorily has defined as to who shall be the 'successor State' to an existing State if a territory is transferred from an existing State to another State. As such all the rights and liabilities of the existing State of Madras shall be the rights and liabilities of the successor State i.e. the State of Kerala.

23. Apart from that it has rightly been pointed out on behalf of the State of Tamil Nadu that all along since 1956 Kerala has been asserting its rights to the use of water of river Cauvery within the parameters of the 1924 agreement and has accepted that the agreement of 1924 was valid (See Kar Doc.II/Exh.136, page 447). Even in the statement of case filed on behalf of the State of Kerala before this Tribunal at pages 4 and 5 in paragraphs 1.3 to 1.3(3) it has been stated as follows:

> "1.3 As continuation of the 1892 agreement of the Governments of Mysore and Madras further agreed to construct some more reservoirs in the river and to enlarge the area under irrigation. This agreement, known as the 1924 agreement, has the following characteristics relating to the interest of the State of Kerala.
>
> (1) The agreement was between two Governments which were not wholly representative of the basin. The State of

Travancore and the centrally administered territory of Coorg were not parties to the agreement despite their riparian rights.

(2) The agreement was in effect for sharing the Cauvery water between the erstwhile Mysore State and the Madras Presidency. Though the Cauvery basin included in its upper reaches parts of Malabar district of Madras (which later became part of Kerala from 1-11-1956) no provision was made for meeting the water needs of this area.

(3) The agreement was subsisting in its original form on 1-11-1956 as any revision or alteration was contemplated only after the expiry of 50 years from 1924. Thus for a period of about 18 years after the State of Kerala was formed, the Mysore-Madras Cauvery agreement of 1924 stood in the way of Kerala developing water resources in the Cauvery basin areas in the State."

[Emphasis supplied]

24. Faced with the aforesaid provisions of the States Reorganisation Act, an alternative stand was taken on behalf of the State of Kerala, saying that the agreements of the years 1892 and 1924 were not contractual agreements between the two States, but were Treaties. As such in view of Article 363 of the Constitution neither the Supreme Court nor any other court including this Tribunal shall have jurisdiction, to examine the terms thereof in any dispute arising out of any provision of such Treaty entered into before the commencement of the Constitution by any ruler of an Indian State. According to the learned senior counsel, as State of Mysore was a ruling State, agreements entered on its behalf like the agreements of 1892 and 1924

cannot be looked into and examined by this Tribunal in view of Article 363 of the Constitution. Reliance was placed on the judgment of the Supreme Court in the case of *State of Seraikella* v. *Union of India & Another,* (1951) SCR 474 in support of the contention that Article 363 of the Constitution has an over-riding effect. Article 363 of the Constitution is reproduced for easy reference:

> "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 of the Dominion of India, or any of its predecessor 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.
>
> (3) 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."

25. The bar of Article 363 of the Constitution was also raised on behalf of the State of Karnataka before this Tribunal which has been dealt in detail in the Chapter with the heading 'Constitutional and legal validity of the agreement of the year 1924' earlier. All the relevant aspects have been considered and reference has been made to different judgements. It has already been pointed out that a Constitution Bench of 11 Hon'ble Judges of the Supreme Court had to examine the scope of Article 363 of the Constitution in the well-known Privy Purse case *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & Ors.* Vs. *Union of India*, (1971) 3 SCR 9. The dispute arose in connection with an order of the President issued in exercise of his power under Article 366(22) of the Constitution derecognising the rulers and repudiating the liability to pay Privy Purse and other privileges. In that case, the stand which was taken on behalf of the Union of India was that any such right or privilege guaranteed to the ex-rulers was beyond the purview of any court including the Supreme Court. In other words, the treaties or the agreements could not be looked into by the Supreme Court in view of Article 363 of the Constitution. Regarding the plea of bar of Article 363 of the Constitution taken on behalf of the Union of India it was said at page 184 in the judgment of Justice Hegde who had given a separate concurring judgment with majority of the Judges:

"From the above passage, it is clear that according to the Government's understanding of Art.363, that article merely deals

with matters coming under Art.362. That is also the contention of the petitioners. But according to the learned Attorney General that article excludes from the jurisdiction of all courts including this Court not merely those matters that fall within the scope of Art.362 but also the right arising from Art.291. It was urged by him that Art.291 also protects only a personal right. Therefore, it is a matter that falls within the scope of Art.362. Consequently any dispute relating thereto is excluded from the jurisdiction of this Court under Art.363. Privy purse was taken out for special treatment by the Constitution under Art.291. Therefore it is excluded from the general provision in Art.362. Arts.291 and 362 have to be construed harmoniously. It is a well known rule of construction that a special provision excludes the general provision. Hence I have to reject the contention that Art.363 includes the right to get privy purses because it also comes within the scope of Art.362. If it is otherwise, there was no need to enact Art.291. Further there was no purpose in guaranteeing the payment of privy purses under Art.291 and then taking away the right to recover them under Art.363.....

It is not proper to say that the Constitution is speaking in two voices, as the learned Attorney General wants us to do or that it takes away by the right hand what is given by the left hand. Therefore we have to read Art.363 harmoniously with Art.291. That is equally true of Arts.363 and 366(22). The rule of harmonious construction is a well known rule. If the aforementioned articles are harmoniously interpreted then the position becomes clear. The purpose of Art.363 is made clear in the White Paper. .... But the Constituent Assembly did not want to open up the Pandora's box. Without Art.363, Art.362 would have opened the flood gates of litigation. The

Constituent Assembly evidently wanted to avoid that situation. That appears to have been the main reason for enacting Art.363. Evidently there were other reasons also for enacting Art.363. Some of the Rulers who had entered into Merger Agreements were challenging the validity of those agreements, even before the draft of the Constitution was finalised. Some of them were contending that the agreements were taken from them by intimidation; some others were contending that there were blanks in the agreements signed by them and those blanks had been filled in without their knowledge and to their prejudice. The merger process went on hurriedly. The Constitution makers could not have ignored the possibility of future challenge to the validity of the Merger Agreements. Naturally they would have been anxious to avoid challenge to various provisions in the Constitution which are directly linked with the Merger Agreements."

(Emphasis supplied]

26. The Inter-State Water Disputes Act, 1956 has been framed by the Parliament under Article 262 of the Constitution and not under the Union List or the Concurrent List 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 earlier 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 an 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 that a special provision excludes the general provision; Article 363 cannot bar the investigation in respect 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 and later after coming into force of the Constitution, a State under First Schedule of the Constitution.

27. Section 2c(ii) by defining a water dispute says that it shall include the interpretation of the terms of any agreement relating to use, distribution or control of such waters or the implementation of such agreement. Similarly, Section 3(c) vests power in the Tribunal to examine whether one State has failed to implement the terms of any agreement relating to the use, distribution or control of waters of an inter-State river.

28. The Supreme Court while answering the reference made by the President of India under Article 143 relating to this very Cauvery river dispute

said about the scope of Inter-State Water Disputes Act 1956 and about the powers of this Tribunal after referring to Article 131 of the Constitution:

> "56. It is clear from the article that this Court has original jurisdiction, among other things, in any dispute between two or more States where the dispute involves any question whether of law or fact on which the existence and extent of a legal right depends except those matters which are specifically excluded from the said jurisdiction by the proviso. However, the Parliament has also been given power by Article 262 of the Constitution to provide by law that neither the Supreme Court nor any other court shall exercise jurisdiction in respect 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. Section 11 of the Act, namely, the Inter-State Water Disputes Act, 1956 has in terms provided for such exclusion of the jurisdiction of the courts. It reads as follows:-
>
> '11. Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.'
>
> 57. This provision of the Act read with Article 262 thus excludes original cognizance or jurisdiction of the inter-State water dispute which may be referred to the Tribunal established under the Act, from the purview of any court including the Supreme Court under Article 131.
>
> 77. The effect of the provisions of Section 11 of the present Act, viz., the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the

use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act....." {1993 Supp (1) SCC 96}

29. No doubt, the State of Kerala had been approaching different forums for its share of water in the Cauvery basin, since 1959 and has also laid its claim as a riparian State whenever there was a meeting of the Chief Ministers of the States – Madras/Tamil Nadu and Mysore/Karnataka, but for Government of India it was difficult to ignore the agreements aforesaid unilaterally without the consent of the State of Tamil Nadu and Karnataka/Mysore. Apart from pressing their demand with the Government of India, the State of Kerala in the year 1971 filed a Suit before the Supreme Court; the Suit was, however, withdrawn from the Supreme Court on the assurance given by the Union of India in the written statement filed before the Supreme Court that the dispute could be settled by negotiations and there was no necessity for Constitution of any Tribunal under the Inter-State Water Disputes Act, 1956. The negotiations did continue and every effort was made by the Minister for Irrigation, Government of India, to persuade the three States to come to an amicable settlement, but ultimately as already stated earlier on the direction of the Supreme Court in another petition, notification was issued constituting this Tribunal. Incidentally it may be mentioned that when the question of passing an interim order regarding apportionment of water during the pendency of the proceeding before the Tribunal was considered in the year 1991, for reasons best known to the State of Kerala, no claim was made on its behalf for any allotment of water in the Cauvery

basin during the pendency of the dispute before the Tribunal. The Tribunal only gave direction by its order dated 25.6.1991 in respect of Tamil Nadu and Pondicherry requiring the State of Karnataka to maintain the discharge from its reservoirs according to the schedule fixed in the said interim order.

30. This Tribunal has to consider the claim of Kerala as one of the riparian States in respect of its share of waters in the Cauvery basin. The question of apportionment of the waters in the Cauvery basin has been examined in the later portion of this report/decision on a just and equitable basis, taking into consideration the need of the State of Kerala also.

Chapter 7

The claim on behalf of the Union Territory of Pondicherry regarding apportionment of the waters of river Cauvery.

The Union Territory of Pondicherry was under the rule of French Government till 31.10.1954 when it merged within Indian Union and thereafter it became Union Territory under the Government of India. We are informed that this defacto transfer of power took place on 1.11.1954 but the dejure transfer was on 16.8.1962. The Karaikal region of the Union Territory of Pondicherry is within the Cauvery basin in the well-known delta area of the then Madras now under Tamil Nadu. Seven branches of Cauvery flow through Karaikal. The claim in respect of the waters of Cauvery has been made for the cultivation of 27,000 acres of agricultural land in Karaikal region. It is the case of Pondicherry that since time immemorial system of double cropping has been practised in the Karaikal region whereby two short crops of paddy i.e. Kuruvai and Thaladi are grown on the same land on an area of 6230 hectares, one after the other. Samba, a long duration crop is grown over an area of 4760 hectares. It has been alleged that because of the irrigation from the waters of the river Cauvery in the Karaikal region, river Cauvery was an international river before the merger of the Pondicherry in the Union of India.

2. A grievance has been made that when the agreements of 1892 and 1924 were entered into by the then States of Madras and Mysore, Pondicherry was not made a party. There being no legal machinery to

adjudicate the claims of the independent nations, a formal protest was made by the French Government to the British Government claiming protection of the equitable share in the waters of the river Cauvery for the Karaikal region. In this connection, our attention was drawn to a letter dated 10.12.1913 written by the Governor of the French Settlements to the Governor of Presidency of Madras conveying the apprehension in respect of the irrigation in Karaikal being effected by the proposed KRS Dam in Mysore about which negotiation was going on between the States of Mysore and Madras. (TNDC Vol.IV/ Exh.227, Page 149). There has been further correspondence between the French Government and the State of Madras in respect of safeguarding the interest of the cultivators of Karaikal region. By a letter dated 6.9.1926 the Governor of Madras assured the Governor of French Settlements in India, Pondicherry, that while constructing the Mettur project to improve the existing cultivation under the Cauvery basin which includes the French land in question; it will be the first concern of the Government of Madras to see that French interests do not suffer. (Pondicherry Vol.I/ Exh.22, Page 161)

3. On behalf of the Union Territory of Pondicherry the validity of the agreements of the years 1892 and 1924 has not been questioned. No grievance has been made that during the period when those agreements were admittedly in force, Pondicherry was deprived by State of Madras/Tamil Nadu of its need in respect of the waters from Cauvery. However, before the Tribunal it has been asserted that the total area under paddy cultivation was

27,000 acres, out of which over 16,000 acres double crop of the paddy was being grown. As such, the water is required for about 43,000 acres.

4. It may be mentioned that this Tribunal at the time of passing of an interim order in respect of discharge of the waters of river Cauvery by Karnataka has already ordered that out of the total amount which shall be released to Mettur dam, 6 TMC shall be utilised by Pondicherry for its irrigation in Karaikal region. After hearing the learned senior counsel on behalf of the Union Territory of Pondicherry and from perusing of the written notes of arguments, it appears that Pondicherry is only interested in allotment of its share of water in the Cauvery basin being at the tail end among the riparian States. Whatever amount of water is determined for Karaikal region has to pass through the territory of Tamil Nadu. As such what shall be the just and equitable share of the Union Territory of Pondicherry shall be considered, when question of apportionment of the water between the different States and Union Territory of Pondicherry is considered.

FOR ERRATA