

**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**

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**VOLUME II****Agreements of 1892 and 1924****(ISSUES UNDER GROUP I)****I N D E X**

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## 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 11<sup>th</sup> 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 10<sup>th</sup> 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 7<sup>th</sup> 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 20<sup>th</sup> 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 27<sup>th</sup> 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 17<sup>th</sup> 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 22<sup>nd</sup> 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:

Across 1. Tungabhadra - lower than the road crossing at Honhalli,

Across 10. Cauvery - lower than the Ramaswami Anicut and,

Across 13. Kabani - lower than the Rampur anicut.

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

[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.

4. -----

5. -----

6. -----

**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-foot 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 12<sup>th</sup> 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 10<sup>th</sup> 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:-

<p><u>Issue No.1 was what is the true interpretation of the Agreement of 1892</u></p>	<p>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.</p> <p>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.</p>
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<p><u>Issue No.2 (a)</u>  <u>was what is the</u>  <u>extent of the</u>  <u>prescriptive</u>  <u>rights of Madras</u>  <u>as against</u>  <u>Mysore under</u>  <u>that</u>  <u>interpretation?</u></p>	<p>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.</p>
<p><u>Issue No. 2 (b)</u>  <u>was what</u>  <u>volume of water</u>  <u>measured at the</u>  <u>Upper Anicut is</u>  <u>necessary to</u>  <u>conserve these</u>  <u>rights</u>  <u>unimpaired ?</u></p>	<p>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.</p>
<p><u>Issue No. 3 (a)</u>  <u>was what</u>  <u>principles and</u>  <u>rules for</u>  <u>regulation of the</u>  <u>discharges in</u>  <u>connection with</u>  <u>the Kannambadi</u>  <u>reservoir can</u>  <u>best be</u>  <u>formulated which</u>  <u>will ensure to</u>  <u>Madras full</u></p>	<p>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.</p> <p>It is not necessary, at present, to state the details mentioned in the findings.</p>

<u>protection of their prescriptive rights ?</u>	
<u>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?</u>	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.
<u>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 ?</u>	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 17<sup>th</sup> 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 1<sup>st</sup> – 2<sup>nd</sup> 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 18<sup>th</sup> 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 I' 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 11<sup>th</sup> 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 10<sup>th</sup> 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 19<sup>th</sup> 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 13<sup>th</sup> 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 9<sup>th</sup> 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 6<sup>th</sup> 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 I to the said agreement. In the letter dated 6<sup>th</sup> 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, 3<sup>rd</sup> 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.

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## 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-sluiques 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 the 124 feet above the bed of the river; the level of the bed of the river before the construction of the reservoir being taken as 12 feet below the sill level of the existing under-sluiques; 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 to 1910.

(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 month 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 17<sup>th</sup> 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 1<sup>st</sup> 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 <sup>1</sup> / <sub>2</sub> feet gauge	...	29,800 cusecs.
July and August for 7 <sup>1</sup> / <sub>2</sub> ft. gauge	..	40,100 "
September for 7 feet gauge	..	35,000 "
October for 6 <sup>1</sup> / <sub>2</sub> feet gauge	..	29,800 "
November for 6 feet gauge	..	25,033 "
December for 3 <sup>1</sup> / <sub>2</sub> 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.

17<sup>th</sup> 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 'shall at

the expiry of fifty years from the date of the execution of these presents, be open to reconsideration in the light of the experience gained and of an examination of the possibilities of the further extension of irrigation within the territories of the respective Governments and to such modifications and additions as may be mutually agreed upon as the result of such reconsideration.' 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	<u>1,18,704</u> “
Total:	<u>3,53,704 Acres</u>

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 6<sup>th</sup> 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
<b>Total:</b>	<b>377.141 TMC”</b>

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	<u>104.746 TMC</u>
	Total:	<u>377.141 TMC</u>

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 negated 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 29<sup>th</sup> 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 131 and 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.

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## 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 6<sup>th</sup> 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.

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## 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 15<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> 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 11<sup>th</sup> 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 18<sup>th</sup> 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 1<sup>st</sup> 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 18<sup>th</sup> June 1924 to the

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

“Telegram dated 18<sup>th</sup> June, 1924, from S/S Viceroy of India  
Your dispatch No. 1-P.W. dated 1<sup>st</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> June 1924. Thereafter, the Government of India approved and confirmed the said agreement on 11<sup>th</sup> 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, 3<sup>rd</sup> 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 28<sup>th</sup> 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 15<sup>th</sup> August 1947 but it was continued in force by the "Standstill Agreement" entered into on the 8<sup>th</sup> 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 28<sup>th</sup> 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 15<sup>th</sup> 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 restoring 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

