

STATE OF TAMIL NADU

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v.

STATE OF KARNATAKA AND ANOTHER

(I.A. No.95384 of 2019)

In

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(Original Suit No.1 of 2018)

NOVEMBER 14, 2019

[UDAY UMESH LALIT AND VINEET SARAN, JJ.]

Constitution of India: Article 131 – Original jurisdiction of Supreme Court – Plaintiff-State of Tamil Nadu, and defendant No.1- State of Karnataka, two riparian States among the three basin States and the union territory of Puducherry in which Inter-State River Pennaiyar flowing – River Markandeyanadhi is a tributary of Pennaiyar river which originates in Karnataka and enters Tamil Nadu – Agreement of 1892 between the States of Tamil Nadu and Mysore/Karnataka respectively as regards the extent of the rights of the States, in the use, control and distribution of waters of the Inter State River – Plaintiff came to know that 1st defendant was proposing to construct a check dam across Markandeyanadhi, a tributary of Pennaiyar river – Plaintiff filed suit u/Art. 131 against defendant no. 1 and Union of India seeking that said action of the 1st Defendant was illegal; and grant of permanent injunction restraining the 1st Defendant, from proceeding with the construction of Check Dam/Anicut across Markandeyanadhi and across the Pennaiyar river and its tributaries, and pumping water from them to the existing tanks in Pennaiyar basin – Subsequently, interim application by plaintiff to restrain the 1st Defendant and its instrumentalities from proceeding further with the construction of dam across Markandeyanadhi; and to direct the State of Karnataka and its instrumentalities not to obstruct the natural flows to the downstream State of Tamil Nadu pending disposal of the instant application – Held: The said project was undertaken after receiving all requisite sanctions and permissions – Construction work began few years back; and as of now 75% work is complete,

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- A *thus, no case is made out for granting any interim relief – Furthermore, neither in the plaint, nor in the interim application any relief in the nature of directions to constitute a tribunal under the Act is claimed – There was no express communication where the plaintiff had invoked the power of the Central Government and*
- B *sought constitution of an Inter State River Water Disputes Tribunal – Second defendant cannot said to be at fault for not constituting a Tribunal under the Act – In view thereof, plaintiff permitted to make an appropriate application seeking constitution of an Inter State River Water Disputes Tribunal – Inter-State River Water Disputes Act, 1956.*

State of Karnataka v. State of Tamil Nadu and Others (2018) 4 SCC 1 ; State of Tamil Nadu v. State of Kerala and Another (2014) 12 SCC 696 ; State of Orrisa v. Government of India and Another (2009) 5 SCC

- D *492 ; Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangamv. Union of India and Others (1990) 3 SCC 440 – referred to.*

Case Law Reference

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|---|-------------------|-------------|---------|
| E | (2018) 4 SCC 1 | referred to | Para 10 |
| | (2014) 12 SCC 696 | referred to | Para 10 |
| | (2009) 5 SCC 492 | referred to | Para 10 |
| F | (1990) 3 SCC 440 | referred to | Para 10 |

CIVIL ORIGINAL JURISDICTION : Interlocutory Application No. 95384 of 2019 in Original Suit No. 1 of 2018.

- G Suit filed on behalf of the inhabitants of the State especially in the drought prone Krishnagiri, Dharmapuri District and part of Thiruvannamalai districts of Pennaiyar Basin.

Shekar Naphade, Shyam Divan, S. Wasim A. Quadri, Sr. Advs., G. Umapathy, C. Paramasivam, K. V. Vijayakumar, V. N. Raghupathy, Ms. Sanam Tripathi, M. P. Gupta, D. L. Chidanand, S. S. Rebello,

- H Arvind Kumar Sharma, Advs. for the appearing parties.

The Order of the Court was passed by

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UDAY UMESH LALIT, J.

1. This Suit has been filed on 18.05.2018 by State of Tamil Nadu under Article 131 of the Constitution of India against State of Karnataka and Union of India submitting *inter alia*,

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A] “2.The plaintiff (State of Tamil Nadu), and Defendant No.1 (State of Karnataka) are the two riparian States among the three basin States and the union territory of Puducherry in which the Inter-State River Pennaiyar flows. As a riparian State, the Plaintiff is entitled to and has been using the waters of the river Pennaiyar and its tributaries/rivulets, etc., except for the reasonable beneficial use of the 1st Defendant. The extent of the rights of the Party States, in the use, control and distribution of waters of the Inter State River, is recognized in an agreement of 1892 entered into between the then State of Madras and Mysore (hereinafter referred to as 1892 Agreement), the predecessor States of Tamil Nadu and Mysore/Karnataka respectively.

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3. The 2nd Defendant, Union of India is duty bound to ensure that, none of the riparian States steal a march over the other by undertaking construction or execution of any works, either small or big, or construct a Check Dam or diversion structure relating to the use, control and distribution of waters of an Inter-State River either in the main river or its tributaries/sub-tributaries which may defeat the right of one of the riparian States.

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4. The 1st Defendant has taken up five different works in the Pennaiyar river Basin of Karnataka, affecting the natural flows of the river namely,

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i) Construction of a pumping scheme to pump the waters of Pennaiyar river from Thattanur (Tattanur) village, Malur taluk, Kolar district to Lakkur Tank, which is at about 65 ft. higher elevation, for distributing the water to about 160 tanks through underground PVC pipeline,

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ii) Lift irrigation scheme at Ellamallappa Chetty tank (Yellamallappa Chetty tank) for pumping 22 MLD (284

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- A Mcft.) of water to fill up the Hoskote tank, which is located upstream, using 3 Nos. of 120 HP motors.
- iii) Pump water from the main Pennaiyar river at Belahalli (Byalhalli) village for irrigation purpose,
- B iv) Diversion of surplus waters of Varathur Tank (Vartur Tank) to Narsapur Tank in Kolar district by pumping through 2.5 m diameter pipeline and also implementation of pumping schemes to fill the tanks in Kolar district and
- v) Construction of a reservoir of 500 Mcft storage capacity, across Markandeya river, a tributary of Pennaiyar river, near Yargol village, just upstream of Karnataka – Tamil Nadu border by Karnataka Urban Water Supply and Drainage Board.
- D 5. The projects undertaken by the 1st Defendant would severely affect the livelihood of lakhs of farmers in Krishnagiri, Dharmapuri, Thiruvannamalai, Villupuram and Cuddalore districts of Plaintiff State as the flow of the river will be drastically reduced/hampered besides affecting the drinking water needs of the Plaintiff state.”
- E B] The plaint narrates certain works taken up by the first defendant as under:-
- F “12. The river Markandeyanadhi is a tributary of Pennaiyar river which originates in Karnataka and enters Tamil Nadu near Sigaralapalli village, in Krishnagiri District and joins with Pennaiyar after traversing a distance of about 29.4 km in Tamil Nadu, upstream of Krishnagiri Reservoir. The sub basin area of the Markandeyanadhi falling in Karnataka is about 150 sq.km. The average annual rainfall in that area is about 730 mm. The lower riparian State is entitled to realization of flow from the upstream areas. There are four Anicuts across Markandeyanadhi in Tamil Nadu, viz., Sigaralapalli Anicut, Marasandiram Anicut, Beemandapalli Anicut and Kollapatti Anicut having a total ayacut of 870.55 ha. (2150 acres). The 1st Anicut across Markandeyanadhi is Sigaralapalli Anicut which is at a distance of about 1.9 km from the Karnataka – Tamil Nadu State border, near Sigaralapalli village. This anicut is said to have been constructed during the Berigai Zameen Regime of Pre-

Independence days, which is evidenced by way of dilapidated brick masonry and stone masonry which are still available. It was rehabilitated in the year 2008. The ayacut irrigated by this Anicut in the Plaintiff State is 115.60 ha. (or 286 acres). It is submitted that if any check dam or diversion structure is taken upstream of these Anicuts by the 1st Defendant, the ayacut irrigated by the above referred four Anicuts will be affected.

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13. The Secretary of the Plaintiff State, vide, letter dated 09.03.2012 to the 1st Defendant, stated, inter-alia, that it has planned to divert Pennaiyar waters at Orathur through Mindchalli tank and to distribute the water to about 160 tanks in Malur taluk, and that the Pennaiyar, an inter-State river is one of the 15 rivers named in the Schedule – A of the Madras-Mysore Agreement of 1892 and as per Clauses II and III of the Agreement, the 1st Defendant shall not without the previous consent of the Plaintiff State take up any new irrigation works etc., for execution and requested to furnish the full details of the proposal.

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14. It is stated that a news item appeared in Indian Express, Chennai Edition dated 23.02.2012 wherein it was reported that 1st Defendant planned to block the flow of water to the Pennaiyar river altogether. The water thus blocked is sought to be diverted to replenish some 160 tanks in the Malur taluk in Karnataka, which is emerging as a ‘vegetable basket’ in the region.”

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C] The plaint then refers to various communications between the parties and recites:-

“22. The Plaintiff came to know that the 1st Defendant was proposing to construct a check dam across Markandeyanadhi, a tributary of Pennaiyar river, near Yargol village which is stated to provide drinking water supply to the villages nearby. The concerned Executive Engineer, WRD, of the Plaintiff State, visited the site on 22.05.2013 and found the preliminary works for the Anicut were going on. The display board put up at the site revealed that the Anicut work is being undertaken across Markandeyanadhi near Yargol village in Bangarapettai Taluk to supply drinking water to Kolar, Bangarapettai, Malur towns and 45 enroute villages by Karnataka State Water Supply and Sanitary Board, Bangalore. The details of the proposed Anicut found in the display board was that the length of Anicut is

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- A 414 m, with a water storing capacity of 500 Mcft, with project cost is Rs.87.18 Crore. The location of the Anicut is at a distance of approximately, 9.0 km from the Inter State border which includes a distance of 2.5 km in the forest area and the location of the site is in the forest area. If 1st Defendant constructs the Anicut across Markandeyanadhi with a capacity of 500 Mcft, the flows in the Markandeyanadhi at the entry point in the border of Tamil Nadu, will get seriously affected.”
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D] Under the caption “Jurisdiction”, the plaint states:-

- C “46. This Hon’ble Court has original jurisdiction under Article 131 of the Constitution to entertain the present Suit. The inter-State Agreement of 1892 is binding on the party States and the rule of law forbid the 1st Defendant form taking any action in violation of the said Agreement. Thus, there exists a dispute between the Plaintiff and the Defendants, which involves a question of law and fact with regard to the common law rights pertaining to construction of various works executed or being taken up by the 1st Defendant to the detriment of Plaintiff State. The 1st Defendant notwithstanding the request of the Plaintiff State failed to even share the details of the schemes/works undertaken by it is proceeding with construction activities. Further, the 2nd Defendant has failed to take action on the request of the Plaintiff State.”
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E] Finally, it is prayed:-

- F “a) Declare that the unilateral action of the 1st Defendant, in proceeding to construct/having proceeded to construct new Check Dams/Dams and diversion structures across the Pennaiyar river its tributaries, Streams etc to divert the water by gravity or pumping, and pumping from tanks surplusing into the Pennaiyar river or its tributaries without obtaining the prior consent of the Plaintiff State is illegal and violates the fundamental rights of the inhabitants of the Plaintiff State;
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- H b) Grant permanent injunction restraining the 1st Defendant, from proceeding with the construction of Check Dam/Anicut across Markandeyanadhi near

Yargol village in Bangarapettai Taluk and construction of check dam/diversion structure across the Pennaiyar river and its tributaries, and pumping water from them to the existing tanks in the Pennaiyar basin by the 1st Defendant; A

- c) Direct the 1st Defendant to ensure the natural flows in the Pennaiyar river and its tributaries to the Plaintiff State; B
- d) Grant mandatory injunction directing the 2nd Defendant to take action on the Plaintiff's letter dated 16.03.2018 with reference to construction of Dams and diversion structures and pumping schemes undertaken by the 1st Defendant in the Pennaiyar river; and C
- e) Pass such further decree or decrees or order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case." D

2. In its Written Statement filed on 05.12.2018, the second defendant-Union of India submitted:-

"It is pertinent to mention that no request for appointment of Arbitrator under Rule-IV of Agreement 1892 has been received from either State Government in this regard and action as per the agreement could not be taken so far by the Central Government. E

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.....Under Section 3 of Inter-State River Dispute Act, 1956, the State Government may send a request to Central Government stating that water dispute 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. This Act provides for setting up of Water Disputes Tribunal for adjudication of disputes relating to Inter-State Rivers when negotiations do not lead to fruitful results. However, no request from any of the State Governments has been received under the provision of the ISWD Act, 1956." F

3. In its Written Statement filed in March 2019, the first defendant has submitted *inter alia*:- G H

- A “2. Article 262 of the Constitution of India specifies that Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters or in any inter State river or river valley and that, 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. Pursuant to Art. 262, Parliament has promulgated the Inter State River Water Disputes Act, 1956 (ACT for short) for adjudication of disputes relating to waters of Inter State rivers and river valleys. Section 11 of the Act specifies that 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 the Tribunal under the Act.
- B 3. The dispute sought to be raised by the State of Tamil Nadu relates to distribution of water of South Pennaiyar river, which is an inter-state river originating in the State of Karnataka and running through the States of Tamil Nadu and Union Territory of Puducherry. In fact, the Pennaiyar river, which is also known as South Pennar river also receives water from some of the tributaries originating in the State of Andhra Pradesh. The entire dispute is an interstate water dispute. Therefore the suit is not at all maintainable and is liable to be dismissed in limine.
- C ...
- D 6. The main grievance of the State of Tamil Nadu is that the State of Karnataka has violated the terms and conditions of the Agreement of the year 1892. It is submitted that the Agreement of the year 1892 has been further modified and amended as per the Agreement of the year 1933. The State of Karnataka has not violated any of the terms and conditions either of the 1892 Agreement or the 1933 Agreement. It is further submitted that under the 1933 Agreement, there is no necessity for the State of Karnataka to inform the State of Tamil Nadu or any other riparian States to utilize the waters of South Pennaiyar river basin for the purpose of drinking water. The relevant portion of the agreement of 1933 reads as under:
- E “An anicut will include any construction of rough stone (dry) or masonry across a river either in part or full and in any direction, which will have the effect of diverting water from
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the river, but the consent of the Madras Government will not be required under the agreement of 1892 for the construction of any anicut if there is to be no irrigation under it.”

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37. Regarding the Construction of a reservoir of 500 Mcft storage capacity across Markandeya river referred to in para 4(v), it is submitted that the Urban Water Supply and Drainage Board has taken up the project for meeting drinking water supply to Malur, Bangarpet Kolar towns and 45 en-route village.

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38. The Markandeya Project was constructed near Yargol village at an estimated cost of 240 crores. The justification for project was that drinking water is supplied from bore wells which are completely dried up. The State Water Quality Atlas prepared in 2002 has declared that the ground water exploitation in Malur town is about 85% classifying it as dark areas and Kolar city and Bangarpet towns where ground water exploitation as 50% to 85% which have been classified as grey area. The present project is constructed to alleviate the drinking water problems arising out of non-availability of potable ground water in bore wells. The population and the demand of water for the population at different points of time is as follows:

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| Sl. No | Name of the town | Population | | | | Per Capita Supply | Demand in MLD | | Demand in Mcft (for 9 months) | |
|-----------|---------------------|------------|--------|--------|--------|-------------------------|------------------|-------|----------------------------------|--------|
| | | 2001 | 2011 | 2038 | 2058 | | 2038 | 2058 | 2038 | 2058 |
| 1. | Kolar | 113299 | 138462 | 204147 | 280653 | 100 lped | 28.16 | 38.73 | 294.93 | 405.64 |
| 2. | Bangarpet | 38684 | 44849 | 69703 | 95824 | 70 lped | 6.73 | 9.26 | 70.50 | 97.01 |
| 3 | Malur | 27791 | 42000 | 50075 | 68841 | 70 lped | 4.85 | 6.65 | 50.77 | 69.62 |
| 4 | Enroute Villages | 29773 | | 53546 | 73751 | 40 lped | 4.07 | 5.60 | 42.60 | 58.68 |

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39. So far as construction of Markandeya reservoir with a capacity of 500 mcft is concerned, it is only to supply drinking water to Kolar, Bangarpet and Malur towns. This project is taken up by the State of Karnataka through KUWS & DB. In regard to this project, 70 to 75% of the work is completed. Since, it is a project to supply drinking water, no permission or consent is required from the State of Tamil Nadu either under the 1892 Agreement or under the Agreement of 1933. Therefore, there is no basis for Tamil Nadu in instituting this suit.

- A 40. An approval has been granted to construct a reservoir with a capacity of 500 Mcft in order to supply water to drought prone towns of Kolar, Bangarpet and Malur and 45 enroute villages. This project has been approved in the year 2007. The estimated cost of the project is about 240 crores, out of which 160 crores is the budgetary allocation of the State of Karnataka and the remaining 79.92 crores is from the Government of India. The project is taken up under a scheme known as UIDSSMT. Clearances have also been obtained from Government of India, Ministry of Urban Development and also from Ministry of Environment and Forest. For the purpose of this project, 375.37 acres of land has been acquired, out of which 127.10 acres is the lands of the farmers, 153.15 acres of land is forest, for which clearance has also been obtained from the Ministry of Forest and Environment. The remaining 95.12 acres of land is the government gomala (grazing land). As of now, more than 70% of the work has been complete. Since, it is a drinking water project, there is no need to obtain the consent or intimate the State of Tamil Nadu in view of the Agreement of 1933.

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- E 84. The allegation in paragraph 46 that this Hon'ble Court has original jurisdiction under Article 121 of the Constitution to entertain the present suit is not true. The allegation that the Agreement of the year 1892 binds the party States is not admitted to be true and correct. The allegation that dispute exist between the plaintiff and the defendant, which involves question of law and fact with regard to common law rights pertaining to construction of various works executed or undertaken by the 1st defendant are not admitted to be true and correct. This Hon'ble Court has no jurisdiction to entertain the present suit."
- F 4. In its Replication filed on 30.04.2019 to the Written Statement of the second defendant, the Plaintiff stated:-
- G "i. The averment of the 2nd Defendant that as no request for appointment of Arbitrator was received from State Government, under Rule-IV of the 1892 Agreement, is the reason for the Central Government not being able to take action is wholly untenable. It is stated that whether Markandeyanadhi, which is a tributary of Pennaiyar river,

is specifically mentioned in the 1892 Agreement or not is not relevant. Moreover, the principles envisaged in the Agreement is important, i.e., no new structure should be constructed without the concurrence of lower riparian State or without affecting the existing utilization (drinking & irrigation) in the downstream areas. The construction of a large dam across Markandeyanadhi would prejudicially affect the downstream areas in Tamil Nadu and no drop of water would flow downstream of the dam under construction. If such constructions are encouraged, the existing utilization would be seriously affected.

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- ii. The 2nd Defendant has stated that no request has been received from any State Government for constitution of Board under the provisions of River Boards Act, 1956 and for setting up of Tribunals under Act, 1956. The said contention is denied. Regulation of water of an inter-State river, is covered under Entry 56 of List I (Union List). The Defendant No.2 has failed to initiate action to stop the unilateral action of 1st Defendant from going ahead with such un-authorized diversions. The 2nd Defendant has not taken any effective action even after the representations made by the Plaintiff State were received except sending an inspection team and conducting one meeting in 2018, while the issue has cropped up in 2012 itself.
- iii. With regard to the contention of 2nd Defendant that no request was received from any State Government for setting up of Tribunal for adjudication of disputes relating to Inter-State river Pennaiyar under the provisions of Act, 1956, it is stated that the issue is not related to allocation of waters amongst the basin States but related to un-authorized diversions from the inter-State river and its tributary, which is a violation. However, 2nd Defendant has not considered the representations made by the Plaintiff from 2012 onwards to protect and safeguard the interest of the lower riparian State as envisaged in Clause II of Agreement, 1892 and the rights guaranteed under Article 21 of the Constitution.”

- 5. Replication was also filed on 07.05.2019 to the Written Statement filed by the first defendant submitting *inter alia*:

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- A “6. It is reiterated that the Suit is maintainable as the Defendant State is a party to the Agreement. The 1st Defendant by its *suo-motu* action of diverting the Pennaiyar river water directly by pumping in number of places, and also pumping the surplus waters from the tanks draining into the river to other tanks, which were not fed by the river and thereby preventing surplus flows from the tanks flowing to the river, has deprived the flows due to the lower riparian State. Thus, the action of the 1st Defendant in interfering with the rights of the Plaintiff State and the Suit is maintainable under Article 131, the redressal of the grievance.”
- C 6. Thereafter, IA No.95384 of 2019 has been filed by the Plaintiff seeking following directions:-
- “a) restrain the 1st Defendant and its instrumentalities from proceeding further with the construction of dam across Markandeyanadhi near Yargol Village;
- D b) direct the State of Karnataka and its instrumentalities not to obstruct the natural flows to the downstream State of Tamil Nadu pending disposal of the present application; and”
- The application states:-
- E “2. It is stated that the officials of the Applicant State made a visit to the site on 16.05.2019 and found the following activities across Markandeyanadhi to divert water by State of Karnataka for its use which would completely impound the natural flows due to downstream State of Tamil Nadu.
- F i. A massive dam construction work is going on across Markandeyanadhi at Yargol (Karnataka State) and it is not a check dam.
- ii. As per local enquiry, the height of the dam is about 50m. At present concrete dam is constructed to a height of about 35m and the work is in progress, the length of the dam seems to be around 400m. The left flank bund has been raised and it has almost reached the top bund level. The upstream bund revetment work is also progressing.
- G iii. A large amount of materials collections are seen in the upstream of the dam.

iv. Pumping station works are progressing.”

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7. Statement of objection filed by the first defendant to the aforementioned interim application, states as under:-

“8. So far as construction of Markandeya reservoir with a capacity of 500 mcft is concerned, it is only to supply drinking water to Kolar, Bangarpet, Malur towns and en-route 45 villages. This project is taken up by the State of Karnataka through Karnataka Urban Water Supply & Drainage Board (KUWS & DB), Bangalore. In regard to this project, 70 to 75% of the work is completed. Since, it is a project to supply drinking water, no permission or consent is required from the State of Tamil Nadu either under the 1892 Agreement or under the Agreement of 1933. Therefore, there is no basis for Tamil Nadu in instituting this suit.

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9. An approval has been granted to construct a reservoir with a capacity of 500 Mcft in order to supply water to drought prone towns of Kolar, Bangarpet, Malur and 45 en-route villages. This project has been approved in the year 2007 and subsequently modified Government Order was issued in 2008. The estimated cost of the project is about Rs.240 crores, out of which Rs.160 crores is the budgetary allocation of the State of Karnataka and the remaining Rs.79.92 crores is from the Government of India. The project is taken up from financial assistance of Rs.79.92 crores under Urban Infrastructure Development Scheme for Small and Medium Tanks (UIDSSMT) of Government of India, known as UIDSSMT. For the purpose of this project, 375.37 acres of land has been acquired, out of which 127.10 acres is the lands of the farmers, 153.15 acres of land is forest, for which clearance has also been obtained from the Ministry of Forest and Environment, Government of India. The remaining 95.12 acres of land is the government gomala (grazing land). As of now, more than 75% of the work has been completed. Since, it is a drinking water project, there is no need to obtain the consent or intimate the State of Tamil Nadu in view of the Agreement of 1933.”

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8. In the rejoinder to the statement of objection and in sur-rejoinder thereto, the parties reiterated their respective stands.

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- A 9. We heard Mr. Shekhar Naphade, learned Senior Advocate for the Plaintiff, Mr. Shyam Divan, learned Senior Advocate for the first defendant and Mr. S. Wasim A. Quadri, learned Senior Advocate for the second defendant.
- B 10. It was submitted by Mr. Naphade, learned Senior Advocate:-
- C A) As laid down by this Court in *State of Karnataka v. State of Tamil Nadu and Others*¹, an Inter State River passing through corridors of riparian States constitutes a national asset and no single State can claim exclusive ownership of its water. However, the attempts on part of first defendant were to appropriate the water exclusively to itself.
- D B) Though river Markandeyanadhi was not referred to in the Agreement of 1933 entered into between the erstwhile States of Madras and Mysore, going by the law laid down by this Court in *State of Tamil Nadu v. State of Kerala and Another*² a tributary would be part of the Inter State River and as such would be covered by said agreement.
- E C) Clause 1(3) of the Agreement of 1933 permitted creation of anicuts i.e. smaller canals if no irrigation was involved. However, such provision would not apply to irrigation projects where a dam is being constructed with 36 metres of height.
- F D) Documents at page 215-216 of the paper book show that grievance was raised by the plaintiff and request was made for full information about all the schemes in Pennaiyar basin but no requisite information was supplied. Though representations and complaints were made by the plaintiff to the second defendant, no action was taken.
- G E) Since the Agreement of 1933 was violated by the first defendant, the second defendant ought to have interfered in the matter but there was total inaction on part of the second defendant.

¹ (2018) 4 SCC 1 (Para 446.7)

² (2014) 12 SCC 696

F) Dealing with the issue whether the matter ought to go before a Tribunal under the Indian State River Water Disputes Act, 1956 ('the Act', for short) reliance was placed on the decisions of this Court in *State of Orrisa v. Government of India and Another*³ and *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam v. Union of India and Others*⁴ and it was submitted in the alternative that interim relief as prayed for be granted till the appropriate steps were taken by the second defendant to constitute such Tribunal. A

11. On the other hand, Mr. Divan, learned Senior Advocate appearing for the first defendant submitted:- B

- a) The instant suit itself was not maintainable in view of the express mandate under Article 262 of the Constitution of India read with Section 11 of the Act. C
- b) Agreement of 1933 would apply only in respect of irrigation projects and would not cover drinking water projects. The report of Central Water Commission (CWC) was also relied upon in support of the submission. D
- c) The projects for supply of drinking water have been given highest priority under the National Water Policy and in any case 80% of the water supplied for drinking purposes would normally come back by return flows into the basin. E
- d) About 75% to 80% of construction work was already completed which was undertaken after due sanctions and permissions from the concerned authorities. The steps in that behalf were undertaken from the year 2013 onwards and the instant application preferred by the plaintiff suffered from delay and laches. F
- e) Considering the length of the Inter State River, 75% of the basin including the catchment area is in the State of Tamil Nadu and the projects undertaken by the first defendant would not cause any prejudice to the plaintiff. G

³ (2009) 5 SCC 492

⁴ (1990) 3 SCC 440 H

- A 12. Mr. S. Wasim A. Quadri, learned Senior Advocate for the second defendant submitted that though various communications were addressed by the plaintiff, at no stage any request was made in the prescribed form invoking the powers of the second defendant in terms of the provisions of the Act to constitute a Tribunal to consider the disputes in question.
- B 13. The rival contentions advanced by the parties touching upon merits of the matter including maintainability of the suit will certainly be gone into after the parties are allowed opportunity to lead evidence in accordance with law and to make appropriate submissions. At this juncture we are called upon to consider whether pending consideration of the present suit, any interim directions are required to be passed.
- C 14. From the record it is *prima facie* evident that the project in question was undertaken after receiving all requisite sanctions and permissions. The issue was engaging the attention of the authorities for a while; the construction work began few years back; and as of now 75% work is complete. Therefore, in our *prima facie* view, no case is made out for granting any interim relief.
- D 15. We now consider the alternative submission of Mr. Naphade, learned Senior Advocate and the decisions of this Court in *State of Orrisa*³ and *Tamil Nadu Cauvery*⁴ case relied upon by him. In the first case the State had approached this Court under Article 32 of the Constitution submitting *inter alia* that despite several requests made by it for constituting an Inter State River Water Disputes Tribunal, there was complete inaction on part of the Central Government. The principal relief claimed in the petition was for appropriate direction to the Central Government to constitute an Inter State River Water Disputes Tribunal and pending such decision by the Central Government, interim relief was prayed for. This is clear from paragraphs 1, 2, 47, 49, 50, 51, 52 and 53 of the decision of Kabir, J. (as the learned Chief Justice then was), with whom Katju, J. concurred:-
- E “1. The State of Orissa has filed this writ petition under Article 32 of the Constitution of India, wherein the Government of India has been made Respondent 1 and the State of Andhra Pradesh has been made Respondent 2, *inter alia*, for the following reliefs:
- F “(a) direct the Government of India to constitute an appropriate Tribunal under Section 4 of the Inter-State

Water Disputes Act, 1956 and thereafter, refer to it the dispute relating to the construction of Side Channel Weir and Flood Flow Canal Project at Katragada on River Vansadhara by the State of Andhra Pradesh;

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- (b) issue a writ of mandamus commanding the State of Andhra Pradesh to forbear from carrying on any works of the proposed project;"

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2. As indicated in the very opening paragraph, the writ petition was filed by the State of Orissa for a direction to the Central Government to constitute a Water Disputes Tribunal under the Inter-State Water Disputes Act, 1956 and to refer to the Tribunal the dispute contained in the complaint made by the State of Orissa on 13-2-2006, as to whether the State of Andhra Pradesh was justified in constructing a Side Channel Weir and Flood Flow Canal Project on River Vansadhara at Katragada, which would adversely affect the supply of water from the river to the State of Orissa and adversely affect the livelihood of thousands of people of Orissa in glaring violation of Article 21 of the Constitution of India.

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47. It is now almost three years since the complaint was made by the State of Orissa but the Central Government has not taken any action in the matter. In this scenario, the prayer made by the State of Orissa does not appear to be unreasonable since the dispute between the two States does not confine itself to the construction of the side channel weir and the flood flow canal, but primarily it involves the unilateral decision taken by the State of Andhra Pradesh to divert the river waters to the State of Andhra Pradesh, which could possibly disturb the agreement to share the waters of the river equally.

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49. Coming to the question of grant of interim order during the interregnum, I am satisfied that unless some interim protection is given till the constitution of the Water Disputes Tribunal by the Central Government, the objection raised by the State of Orissa will be rendered infructuous, which certainly is not the intention of the 1956 Act.

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- A **50.** Notwithstanding the powers vested by Section 9 of the Act in the Water Disputes Tribunal to be constituted by the Central Government under Section 4, which includes the power to grant the interim order, this Court under Article 32 of the Constitution has ample jurisdiction to pass interim orders preserving the status quo till a Tribunal is constituted which can then exercise its powers under Section 9.
- B **51.** The bar under Section 11 of the Act will come into play once the Tribunal is constituted and the water dispute is referred to the said Tribunal. Till then, the bar of Section 11 cannot operate, as that would leave a party without any remedy till such time as the Tribunal is formed, which may be delayed.
- C **52.** I, accordingly, allow the writ petition and direct the Central Government to constitute a Water Disputes Tribunal within a period of six months from the date and to refer to it the dispute relating to the construction of the Side Channel Weir and Flood Flow Canal Project at Katragada on River Vansadhara by the State of Andhra Pradesh for diversion of the waters of the said river which could adversely affect the supply of water from the said river to the State of Orissa.
- D **53.** I also direct that pending constitution of the Water Disputes Tribunal and reference of the above dispute to it, the State of Andhra Pradesh will maintain status quo as of date with regard to the construction of the side channel weir and the flood flow canal at Katragada. Once the Tribunal is constituted the parties will be free to apply for further interim orders before the Tribunal.”
- E The second case dealt with the maintainability of a Writ Petition by the concerned Writ Petitioners.
- F 16. In the present case neither in the plaint, nor in the interim application any relief in the nature of directions to constitute a Tribunal under the Act is claimed.
- G 17. We repeatedly asked Mr. Naphade, learned Senior Advocate to show any communication where the plaintiff had invoked the power of the Central Government and sought constitution of an Inter State River Water Disputes Tribunal to consider the present controversy. Mr. H Naphade accepted that there was no such express communication but

submitted that the request ought to be inferred from various A communications addressed by the plaintiff to the Central Government.

18. It must be stated that Section 3 of the Act postulates that a request be made in such form and manner as may be prescribed, whereafter the requisite power can be exercised by the Central Government. The rules framed pursuant to rule making power conferred upon the Central Government under Section 13 of the Act also prescribe a particular form. It is not as if that there was lack of proper legal opinion in the matter. The State would normally be guided by expert legal advice in such matters. It is also possible to say that in a given case, a State may not be inclined to have any Inter State River Water Disputes Tribunal to be constituted and would therefore consciously avoid any direct request asking for such constitution of the Tribunal. There could be variety of reasons. It will not therefore be correct on our part to infer such an idea from the communications addressed by the plaintiff to the second defendant and then find second defendant to be at fault for not constituting a Tribunal under the Act. D

19. In the circumstances all we can do at this stage is to permit the plaintiff to make an appropriate application invoking the powers of the Central Government in terms of the provisions of the Act and seek constitution of an Inter State River Water Disputes Tribunal. If the plaintiff is so advised, such request may be made within four weeks E from the date of this order.

20. Subject to the aforesaid, we see no reason to entertain the present application. I.A. No.95384 of 2019 is therefore dismissed. Let the Suit be listed for further directions on 10th January, 2020.

Nidhi Jain

I.A. dismissed.