# State Of Tamil Nadu vs State Of Kerala & Anr on 7 May, 2014

## Equivalent citations: AIR 2014 SUPREME COURT 2407, 2014 AIR SCW 3178, 2014 (6) SCALE 380, (2014) 4 KCCR 470, 2014 (12) SCC 696, (2014) 2 KER LJ 748, (2014) 2 KER LT 603, (2014) 4 MAD LJ 177, (2014) 6 SCALE 380

## Author: R.M. Lodha

## Bench: M.Y. Eqbal, Madan B. Lokur, Chandramauli Kr. Prasad, H.L. Dattu, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
ORIGINAL SUIT NO. 3 OF 2006

State of Tamil Nadu ..... Plaintiff

Versus

State of Kerala & Anr. ..... Defendants

JUDGMENT

R.M. LODHA, CJI.

This Court remains seized of the problem with regard to the water level of Mullaperiyar dam after it had solved on 27.02.2006 (Mullaperiyar Environmental Protection Forum[1]) because the Kerala State Legislature enacted the law immediately thereafter fixing and limiting Full Reservoir Level (FRL) to 136 ft.

Mullaperiyar dam : 1886 Lease Agreement

2. Mullaperiyar dam – a masonry dam – was constructed pursuant to the Periyar Lake Lease Agreement dated 29.10.1886 ("1886 Lease Agreement") across Periyar river. The construction continued for about eight years and was completed in 1895. The dam is situated at Thekkady District in Kerala and is owned and operated by the Government of Tamil Nadu. By the 1886 Lease Agreement between the Maharaja of Travancore and the Secretary of State for India in Council, the leased area as set out therein was granted on lease for 999 years from 01.01.1886. The length of the main dam is 1200 ft. (365.76 m.) and top of the dam is 155 ft. (47.24 m.). The top of solid parapet and maximum height of the dam from deepest foundation are 158 ft. (48.16 m.) and 176 ft. (53.64 m.), respectively. The FRL of the dam is 152 ft. (46.33 m.). The original spillway capacity of the dam

was 10 vents of 36' x 16' (10.97 m. x 4.88 m.). The length of the Baby dam is 240 ft. (73.15 m.).

1979-1980 : Controversy about safety of the Dam

3. In 1979 with regard to the safety of the Mullaperiyar dam, the Government of Kerala wrote to the Tamil Nadu Government to take immediate steps to strengthen the dam. Simultaneously, the Kerala Government also requested the Central Government to depute a team from Central Water Commission (CWC) to inspect the dam and suggest strengthening measures.

4. In pursuance of the request from the Kerala Government, the then Chairman, CWC inspected the dam and held a meeting on 25.11.1979 in which the officers from Tamil Nadu and Kerala participated. In that meeting, three level measures, (i) emergency, (ii) medium and (iii) long term, were suggested to strengthen the dam. In the meantime, it was recommended that water level in the reservoir be kept at 136 ft. (41.45 m.)

5. In the second meeting held on 29.04.1980, it was opined that after the completion of emergency and medium-term strengthening measures, the water level in the reservoir can be restored up to 145 ft. (44.2 m.). 1998 : Litigation begins

6. Tamil Nadu says that all measures – emergency, medium and long term as suggested by the CWC have been undertaken by it but despite that no consensus could be reached between the two State Governments (of Tamil Nadu and Kerala) to raise the water level in the Mullaperiyar reservoir beyond 136 ft. This led to the filing of number of writ petitions in the Kerala High Court as well as in the Madras High Court sometime in 1998 on the issue for and against raising of water level in the Mullaperiyar reservoir and the safety of the dam. As the controversy was pending before the two High Courts and there was likelihood of conflicting judgments, some transfer petitions were filed before this Court.

7. On 28.04.2000, in the transfer petitions, this Court desired Union Minister of Water Resources to convene a meeting of the Chief Ministers of Kerala and Tamil Nadu to amicably resolve the issue. The meeting was convened on 19.05.2000 but no consensus could be reached in the meeting as well. However, in that meeting, the Union Minister of Water Resources decided to constitute an Expert Committee to go into the details of the safety of the dam and advise him on raising of water level in the reservoir.

8. On 14.06.2000, the Expert Committee was constituted having the following terms of reference.

"(a) To study the safety of Mullaperiyar dam located on Periyar river in Kerala with respect to the strengthening of dam carried out by the Government of Tamil Nadu in accordance with the strengthening measures suggested by CWC and to report/advise the Hon'ble Minister of Water Resources on the safety of the dam.

(b) To advise the Hon'ble Minister of Water Resources regarding raising of water level in Mullaperiyar reservoir beyond 136 ft. (41.45

m) as a result of strengthening of the dam and its safety as at (a) above."

9. After initial resistance, the Government of Kerala nominated one Member to the Expert Committee.

10. The Expert Committee gave its final report on 16.03.2001. While the matter was under consideration by the Expert Committee, it also gave certain interim directions. In its report, the Expert Committee had opined that water level in the Mullaperiyar reservoir could be raised to 142 ft. (43.28 m.) as that will not endanger the safety of the main dam, including spillway, baby dam and earthen bund.

First litigation before this Court

11. Despite the above recommendation from the Expert Committee, the Government of Kerala continued to resist raising of water level in the reservoir beyond 136 ft. It was then that a writ petition was filed by Mullaperiyar Environmental Protection Forum directly before this Court wherein diverse prayers were made. This Court also transferred the writ petitions which were pending before the Kerala High Court and Madras High Court to this Court.

12. After hearing the parties, including the two states, this Court gave its decision on 27.02.2006 permitting the water level in the Mullaperiyar dam to be raised up to 142 ft. The State of Kerala and its officers were also restrained from causing any obstruction to the above. It was also observed that after the strengthening work was complete to the satisfaction of CWC, independent experts would examine the safety angle before the water level is permitted to be raised up to 152 ft.

2003 Act

13. Kerala Irrigation and Water Conservation Act, 2003 (for short, "2003 Act") was enacted by Kerala legislature, which came into force on 18.09.2003. 2003 Act was enacted to consolidate and amend the laws relating to construction of irrigation works, conservation and distribution of water for the purpose of irrigation and levy of betterment, contribution and water cess on lands benefited by irrigation works in the State of Kerala and to provide for involvement of farmers in water utilisation system and for matters connected therewith or incidental thereto. 2003 Act was neither referred to nor relied upon by Kerala at the time of hearing in Mullaperiyar Environmental Protection Forum1.

2006 (Amendment) Act

14. On 18.03.2006, in less than three weeks of the decision of this Court in Mullaperiyar Environmental Protection Forum1, the Kerala State legislature amended 2003 Act by the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 [for short, "2006 (Amendment) Act")][2].

15. In the Second Schedule, appended to the 2006 (Amendment) Act, the Mullaperiyar dam owned and maintained by Tamil Nadu is included as Item No. 1 where the height of the FRL has been fixed at 136 ft.

Second litigation before this Court : Suit by Tamil Nadu

16. The State of Tamil Nadu immediately thereafter instituted the present suit under Article 131 of the Constitution of India against the State of Kerala. It is necessary to elaborate somewhat on facts as proceedings are in the nature of suit in original jurisdiction of this Court. The plaint avers that on coming into force of the States Reorganisation Act, 1956, (for short, "SR Act"), the State of Travancore – Cochin (Part – B, State) was formed. The State of Kerala (first defendant) is the successor in interest of the State of Travancore – Cochin. The State of Tamil Nadu is the successor in interest of the Governor in Council, Secretary of State for India. Tamil Nadu has, thus, pleaded that plaintiff and the first defendant are successors in interest of the original contracting parties of the 1886 Lease Agreement.

17. It is averred by Tamil Nadu that on 29.05.1970, two supplemental agreements were executed between it and Kerala. The two supplemental agreements did not change the basic character of the 1886 Lease Agreement. By first supplemental agreement, Tamil Nadu surrendered the fishing rights in the leased lands and also agreed to the upward revision of the rent of the leased land. The second supplemental agreement conferred on Tamil Nadu, the right to generate power and right to construct all facilities required for power generation. An additional extent of 42.7 acres was leased to Tamil Nadu for the said purposes and correspondingly Tamil Nadu was required to pay to Kerala a sum annually as specified in the agreement. Tamil Nadu claims that the two supplemental agreements have re-affirmed, re-asserted and ratified 1886 Lease Agreement, which was statutorily protected and continued by Section 108 of the SR Act.

Grounds of challenge to 2006 (Amendment) Act

18. The challenge to 2006 (Amendment) Act to the extent it affects Mullaperiyar dam is laid in the plaint on diverse grounds, some of which are the following:

> (a) The impugned legislation amounts to usurpation of judicial power inasmuch as Kerala State Legislature has arrogated to itself the role of a judicial body and has itself determined the questions regarding the dam safety and raising the water level when such questions fall exclusively within the province of the judiciary and have already been determined by this Court in its judgment dated 27.02.2006.
>
> (b) 2006 Amendment Act is beyond the legislative competence of the State of Kerala insofar as it affects the Mullaperiyar dam in view of Section 108 of the SR Act which is a law made by Parliament under Articles 3 and 4 of the Constitution, which confer plenary power to traverse all legislative entries in all the three lists including Entry 17 List II.

(c) The impugned legislation, in its application to the Mullaperiyar dam, violates the rule of law and the federal structure and the separation of power under the Constitution. The Kerala State Legislature has taken the law in its own hands after the declaration of law by this Court. Kerala having participated in the adjudicatory process before this Court cannot become a Judge in its own cause and seek to reverse the decision of this Court because it has gone against it.

(d) The impugned legislation not only fixes and limits the FRL to 136 ft. in direct contravention of the judgment of this Court but also proceeds to authorise the Dam Safety Authority of Kerala – to disobey and disregard the decision of this Court by the following, among other provisions:

• Section 62(1)(e) empowers the authority to direct the suspension or restriction of the functioning of any dam or decommissioning.

• Section 62A(1) read with Second Schedule is a legislative judgment that the Mullaperiyar dam is endangered on account of its age, degradation, structural or other impediments and limits the water level to 136 ft.

• Sub-section (2) prohibits increase of water level fixed in the Second Schedule notwithstanding any judgment, decree or order of any court or any other law or any treaty, contract, agreement, instrument or document except and in accordance with the provisions of the Act.

• Sub-section (3) also contains a non-obstante clause and requires prior consent in writing of the authority for increasing storage capacity and for doing any act or work for such purpose.

• Sub-section (4) directs any act or work for preparation by any executant to stop the work immediately and to apply for consent of the authority.

• Section 68A protects the authority and any officer or employee from any suit, prosecution or other legal proceedings in respect of anything done under the Act and also ousts the jurisdiction of civil courts.

• 2006 (Amendment) Act is not a validation act but a mere device to defy, obstruct and nullify the judgment of this Court and constitutionally interfere with, restrict or extinguish the legal rights of Tamil Nadu as upheld by this Court. A Legislature cannot by mere declaration and enactment overrule and nullify a judicial decision. The direct object and effect of the impugned legislation is to overturn the judgment of this Court and to arrogate to Kerala the power to prevent Tamil Nadu from exercising its legal rights which have already been upheld by this Court.

19. On the above grounds, Tamil Nadu has sought two-fold relief,

(i) to declare the 2006 (Amendment) Act passed by the Kerala legislature as unconstitutional in its application to and effect on the Mullaperiyar dam and (ii) to pass a decree of permanent injunction restraining the first defendant from applying and enforcing the impugned legislation interfering with or obstructing the plaintiff from increasing the water level to 142 ft. and from carrying out the repair works as per the judgment of this Court dated 27.02.2006 in W. P. (Civil) No. 386 of 2001 with connected matters. The Union of India has been impleaded as defendant no. 2 in the suit.

Defence by Kerala

20. Kerala has traversed the claim of Tamil Nadu on merits and has also raised objections about the maintainability of the suit. Kerala's defence is that the 1886 Lease Agreement for 999 years lapsed under the provisions of Section 7(1)(b) of the Indian Independence Act, 1947 ("Act of 1947"). From 1947 to 26.01.1950, the lease was continued as a temporary lease on annual basis. After 26.01.1950, even the temporary continuation of the lease came to an end. The possession of the land held and continued by the then Government of Madras and now Tamil Nadu, after 26.01.1950 has no juridical basis.

21. Kerala states that 1886 Lease Agreement, on the basis of which Tamil Nadu has laid its claim, is an unconscionable contract because of its duration (999 years) as well as the fact that the lease conveys for a small rent a vital resource of Kerala. The lease was obtained by the Secretary of State for India in England obviously by holding threat of paramountcy over Maharaja of Travancore, who was his vassal.

22. As regards the two supplemental agreements of 1970, Kerala states that these agreements have not been executed in terms of mandatory provisions of Article 299 of the Constitution and, therefore, they do not constitute contracts in the eye of law. In any event, these agreements do not bind the State legislature at all.

23. About 2006 (Amendment) Act, it is stated that Kerala legislature enacted the Act regulating the storage levels of 22 dams listed in the Second Schedule read with Section 62A (1), as these dams fall entirely within the territory of Kerala and these dams are considered to be endangered on account of their age, degeneration, degradation, structural or other impediments. Kerala states that such law is perfectly valid. Under Section 62A(3) of the 2006 (Amendment) Act, the FRL can be increased beyond 136 ft. after obtaining prior consent of the Dam Safety Authority headed by a retired Judge of the High Court. If Tamil Nadu approaches under Section 62A(3), Kerala reserves its right to oppose such plea by demonstrating how such increase would lead to spread of backwater beyond the contour line of 155 ft. and how the flora and fauna including ecology would be destroyed. The impact of increased storages on the safety of the dam will also be demonstrated before the Dam Safety Authority. This was not the matter that was required to be considered by this Court in the previous case, since in that case, the focal issue was the implications of the increase in height upon the safety and integrity of the dam. 2006 (Amendment) Act creates a working mechanism to deal with a problem like displacement of those whose lands are likely to be affected by the backwater effect.

24. The competency of Kerala legislature to enact the 2006 (Amendment) Act is sought to be justified by relying upon Entries 17 and 18 of List II (State List) and Entries 17, 17-A and 17-B of the Concurrent List of the Seventh Schedule to the Constitution. Kerala also states that it is competent for the Kerala legislature to modify the terms of the lease in public interest (if the lease has survived as contended by the Tamil Nadu), as the lease inherited under Article 295 of the Constitution does not bind the legislature of the state and that it is always open to the legislature to modify such conditions by law.

25. As regards structure of the Mullaperiyar dam, Kerala's stand is that it is not constructed entirely with rubble masonry in lime mortar. The front and rear faces are constructed of uncoursed rubble masonry in lime mortar. The hearting (center core) is of lime surkhi concrete, therefore, dam cannot be considered as homogeneous masonry dam under any circumstances. In view of Kerala, a dam could never have been intended to remain for long years without decommissioning at some point of time. For this background, people in Kerala living in the downstream region of the Mullaperiyar dam have raised serious apprehensions against the safety of the structure.

26. Kerala has denied that river Periyar is an inter-state river. It has asserted that river Periyar is an intra-state river as it rises in Quilon District in Kerala and traverses only through the territory of Kerala before falling into the Arabian sea. The total catchment of Periyar basin is 5398 sq. km. of which only about 113 or 114 sq. km. lie within the territory of Tamil Nadu. Even this small catchment of 113 sq. km. lying in Tamil Nadu, is in the downstream region of the Mullaperiyar dam. Therefore, no water from this catchment is contributed to the kitty of Mullaperiyar dam.

27. As regards the earlier judgment of this Court, Kerala's stand is that the judgment concluded the issue relating to safety of the people and degradation of the environment, apart from issue arising from Article 363 of the Constitution. The doctrine of res judicata or constructive res judicata has no relevance to the question of powers on the Kerala legislature to regulate the storage level of the Mullaperiyar dam in larger public interest by legislation. Kerala states that the impugned legislation removes the legal basis of the judgment, i.e., the right of Tamil Nadu to store water up to 142 ft. in Mullaperiyar reservoir. The legislature is competent to remove the basis of any judgment and, therefore, it is not permissible for Tamil Nadu to claim any right to store water at Mullaperiyar dam beyond 136 ft. Kerala has assailed the findings and conclusions in the earlier judgment dated 27.02.2006 on all possible grounds.

28. Kerala has raised the objection about maintainability of the present suit under Article 131 of the Constitution of India. According to Kerala, because the basis of claim made by Tamil Nadu lies in the 1886 Lease Agreement which is a contractual right leading to civil dispute, if any, but it is not in dispute in the constitutional context as required under Article 131 of the Constitution of India. Kerala's further case is that 1886 Lease Agreement was executed between the Maharaja of Travancore and Secretary of State for India in England and as such the agreement is in the nature of treaty and act of state, the enforcement of which is barred by proviso to Article 131 of the Constitution. Tamil Nadu, therefore, cannot seek enforcement of 1886 lease deed before this Court.

29. Kerala has also challenged the report of the Expert Committee for assessing the structural safety of the dam that was relied upon by this Court in its judgment on 27.02.2006. Kerala says that both the interim report and final report submitted by the Expert Committee are riddled with inconsistencies and the views of the Committee do not constitute an authoritative opinion. Kerala has denied that storages at Mullaperiyar dam beyond 136 ft. will not pose any danger.

30. Kerala states that the storage at Mullaperiyar dam beyond 136 ft. would not be required to meet the irrigation requirement of 2,08,144 acres in 5 southern districts of Tamil Nadu, although the irrigation originally planned was not more than 1.5 lakh acres. Kerala has denied the contention of Tamil Nadu that due to non-restoration of FRL from 136 ft., Tamil Nadu's irrigation is getting suffered. According to Kerala, Tamil Nadu was able to irrigate more area with Mullaperiyar water, even after lowering the water level to 136 ft.

31. Kerala has, thus, prayed that suit filed by Tamil Nadu be dismissed with costs.

Issues

32. On 13.12.2007, the Court framed the following issues for consideration in the suit:

> "1. Whether the suit is maintainable under Article 131 of the Constitution of India.
>
> 2. (a) Whether the Kerala Irrigation and Water Conservation (Amendment) Act 2006 is unconstitutional and ultra vires, in its application to and effect on the Mullai Periyar Dam?

(b) Whether plaintiff is entitled to a permanent injunction restraining the first defendant from applying and enforcing the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 with reference to Mullai Periyar Dam?

3. Whether the rights of the plaintiff, crystalised in the Judgment dated 27.02.2006 passed by this Court in WP(C) No. 386/2001 can be nullified by a legislation made by the Kerala State Legislature?

4. (a) Whether the judgment dated 27.2.2006 of this Court in WP(C) No. 386/2001 operated as res judicata, in respect of all or any of the defences set up by the first defendant in its written statement?

(b) Whether the pleas relating to validity and binding nature of the deed dated 29.10.1886, the nature of Periyar River, structural safety of Mullai Periyar Dam etc. raised by the first defendant in its defence, are finally decided by the judgment of this Court dated 27.2.2006 in WP(C) No. 386/2001, and consequently first defendant is barred from raising or reagitating those issues and pleas in this suit, by the principle of res judicata and constructive res judicata?

5. Whether the suit based on a legal right claimed under the lease deed executed between the Government of the Maharaja of Travancore and the Secretary of State for India on 29.10.1886, is barred by the proviso to Article 131 of the Constitution of India?

6. Whether the first defendant is estopped from raising the plea that the deed dated 29.10.1886 has lapsed, in view of subsequent conduct of the first defendant and execution of the supplemental agreements dated 29.05.1970 ratifying the various provisions of the original Deed dated 29.10.1886.

7. Whether the lease deed executed between the Government of the Maharaja of Travancore and Secretary of State for India on 29.10.1886 is valid, binding on first defendant and enforceable by plaintiff against the first defendant.

8. Whether the first defendant is estopped from contending that Periyar River is not an inter-State river.

9. Whether the offer of the first defendant, to construct a new dam across River Periyar in the downstream region of Mullai Periyar Dam would meet the ends of justice and requirements of plaintiff.

10. Whether the first defendant can obstruct the plaintiff from increasing the water level of Mullai Periyar Dam to 142 ft. and from carrying out repair works as per the judgment dated 27.2.2006 of this Court in WP(C) No. 386/2001.

11. To what relief is the plaintiff entitled to?" Documentary and oral evidence by the parties

33. The admission/denial of documents tendered by the parties was completed on 16.05.2008. Documents Ex. P1 to Ex. P44 tendered by Tamil Nadu were admitted by Kerala and documents Ex. D1 to D17 tendered by Kerala were admitted by Tamil Nadu. Tamil Nadu's documents Ex. XP1 to XP4 and Kerala's documents Ex. XD1 to XD24 were denied by the other side.

34. As regards oral evidence, Tamil Nadu produced R. Subramanian (PW-1) as the sole witness. On the other hand, Kerala produced five witnesses, V.K. Mahanudevan (DW-1), K. Jayakumar (DW-2), Dr. A.K. Gosain (DW-3), Dr. Dhrubajyoti Ghosh (DW-4) and M.K. Parameswaran Nair (DW-5).

Reference to the 5-Judge Constitution Bench

35. Initially, the matter was heard by a three-Judge Bench. On 10.11.2009, matter was referred to the Constitution Bench as some of the issues framed in the suit involved decision on certain substantial questions of law concerning interpretation of the Constitution and in particular:

(i) Articles 3 and 4 read with Article 246 of the Constitution;

(ii) Article 131 read with Article 32 of the Constitution (in the context of res-judicata);

iii) Proviso to Article 131 read with Articles 295 and 363 of the Constitution and the effect of the Constitution (26th Amendment) Act, 1971; and

iv) The effect of decision of this Court in Mullaperiyar Environmental Protection Forum1 in the context of afore-referred constitutional provisions.

Constitution of the Empowered Committee (EC)

36. A very important development occurred when the matter was taken up initially by the Constitution Bench. It was felt by the Constitution Bench that examination of all aspects of the matter including safety of Mullaperiyar dam by an Empowered Committee (EC) may help the Court in deciding the matter effectively. Accordingly, on 18.02.2010, the Constitution Bench directed the Central Government to constitute an EC under the Chairmanship of Dr. A.S. Anand, former Chief Justice of India and comprising of two members nominated by the States of Kerala and Tamil Nadu and two renowned technical experts. The EC was requested to hear parties to the suit on all issues that may be raised before it, without being limited to the issues that have been raised before the Court in the matter and furnish a report as far as possible within six months from its constitution. It was left open to the EC to frame its own procedure and issue appropriate directions as to the hearings as well as venue of its sittings and it was also left to the EC to receive such further evidence as it considered appropriate. It was, however, clarified that the legal and constitutional issues including validity of the 2006 Amendment Act, are matters that would be considered by the Court.

37. The EC submitted status reports from time to time. The time for giving final report was extended also. The report was submitted by the Empowered Committee finally on 23.04.2012.

General observation

38. As a general observation, before we embark upon the discussion on diverse issues, it must be stated, that a suit of this nature cannot and ought not to be decided with very technical approach insofar as pleadings and procedure are concerned. A suit filed in original jurisdiction of this Court is not governed by the procedure prescribed in Civil Procedure Code save and except the procedure which has been expressly made applicable by the Supreme Court Rules. It is also important to bear in mind that the contest between the states is to be settled in the large and ample way that alone becomes the dignity of litigants concerned (State of Andhra Pradesh[3]). Unfortunately, there is a sharp conflict over each and every aspect of the subject matter between the contesting states. Even in respect of the report submitted by the EC chaired by a former Chief Justice of this Court, one nominee each of the two states who are former judges of this Court and two renowned technical experts, the two states have different views although EC has submitted its report after a very tedious and minute consideration of facts on the safety of the Mullaperiyar dam, which embraced the reports of tests, investigation and technical studies carried out through the three apex organizations, besides through other specialist organizations of the Government of India and specialist expert agencies and also after site appraisal. Moreover, the investigations, tests and technical studies were directed to be carried out by the EC in association with the representatives of both the States.

Issue Nos. 1, 5, 6 and 7.

39. These four issues are interrelated inasmuch as two of these issues relate to validity and binding nature of 1886 Lease Agreement and the effect of 1970 supplemental agreements and the other two issues concern maintainability of suit under Article 131, if 1886 Lease Agreement is held valid, binding and enforceable. Extensive arguments have been addressed to us by the learned senior counsel for the two contesting states in respect of these issues. However, it must be noted immediately that Kerala did not dispute the position that under Section 177 of the Government of India Act, 1935 existing contracts made by the Secretary of State prior to 1935 (made for the purposes of the Government of a Province) would have effect as if they were made on behalf of that Province. In view of this admitted position by Kerala, we shall first see whether 1886 Lease Agreement was an existing contract made for the purposes of the Government of Province of Madras on the commencement of 1935 Act.

1886 Lease Agreement – whether an existing contract under 1935 Act

40. The Madras Presidency (Fort St. George) was established by the Pitts Act, 1784. Thereafter, by the Government of India Act, 1858, the territories under the Government of East India Company were transferred for being vested in Her Majesty. Under this enactment, the Secretary of State in Council was empowered to enter into contracts. By the 1859 (Amendment) Act, the British Parliament authorised the Governor in Council of Fort St. George to enter into contracts referred to as Secretary of State in Council. 1886 Lease Agreement was entered into between the Secretary of State in Council and Maharaja of Travancore under this provision. Government of India Act, 1919 did not alter the position with regard to the 1886 Lease Agreement since Presidency of Fort St. George was treated as Province for the purposes of local government. By virtue of Section 46 of the 1935 Act, the Presidency of Fort St. George which was deemed to be a Province under 1919 Act became Governor's Province of Madras.

41. Section 177 of the 1935 Act, omitting the unnecessary part reads, "…..any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date – (a) if it was made for the purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province…" By virtue of this provision, the existing contracts of the Secretary of State in Council would have the effect as if they had been made on behalf of the Province. When we see 1886 Lease Agreement in light of Section 177 of the 1935 Act, there remains no doubt at all that lease that was executed by the Secretary of State in Council for the Presidency of Madras (Madras Province) had the effect as if it had been made on behalf of the Presidency of Madras or for that matter Madras Province. To put it differently, by legal fiction created under Section 177(1)(a), the Presidency of Madras (Madras Province) became lessee under the 1886 Lease Agreement. We have, therefore, no hesitation in accepting the submission of Mr. Vinod Bobde, learned senior counsel for Tamil Nadu that by virtue of Section 177 of the 1935 Act, as from the commencement of the 1935 Act, the Government of the Province of Madras is deemed to be substituted as the lessee in the 1886 Lease Agreement.

Effect and impact of events between 18.07.1947 and 26.01.1950

42. In light of the above holding, we have to see the effect and impact of certain events that occurred between 18.07.1947 (when Act of 1947 was enacted by British Parliament) and 26.01.1950 (the date of commencement of Constitution).

42.1. On 18.07.1947, a bulletin was issued by the Maharaja of Travancore State denouncing all agreements.

42.2. On 22.07.1947, the Dewan of Travancore is said to have stated in his notes submitted to the Maharaja that in his discussion with the Viceroy, he had unequivocally denounced the 1886 Lease Agreement and that the Viceroy had accepted the good sense underlying the denouncement. 42.3. On 10.08.1947, in his letter, Mr. C.C. Desai, Additional Secretary gave an assurance that all agreements would be renegotiated. 42.4. On 12.08.1947, Instrument of Accession was executed by the Ruler of Travancore declaring that Travancore has acceded to the Dominion of India.

42.5. Following Instrument of Accession, on 12.08.1947 itself, a standstill agreement was entered into between State of Travancore and the Dominion of India.

42.6. On 14.08.1947, India (Provisional Constitution) Order, 1947 was promulgated whereby, inter alia, Section 177 of the 1935 Act was omitted. 42.7. On 15.08.1947, Act of 1947 came into effect.

42.8. On 24.05.1949, the two States – Travancore and Cochin – merged together.

Whether 1886 Lease Agreement lapsed?

43. Mr. Harish N. Salve, learned senior counsel for Kerala, in view of the above events submits that 1886 Lease Agreement lapsed and did not survive on and from 15.08.1947.

44. By Act of 1947, the provisions were made for setting up in India of two Indian dominions to be known respectively as India and Pakistan from 15.08.1947. Section 7 of Act of 1947 reads as follows :

> "7. Consequences of the setting up of the new Dominions.—(1) As from the appointed day—
>
> (a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;
>
> (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date of His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise:

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this sub-section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements. (2) ....."

45. As noted above, Act of 1947 came into effect from 15.08.1947. Section 7 deals with the consequences of the setting up of the new dominions. Clause (b) of sub-section (1) of Section 7 declares that suzerainty of His Majesty over the Indian States lapses. On lapsing of suzerainty, it provides for lapsing of all treaties and agreements in force between His Majesty and the Rulers of Indian States from that date. Proviso appended to sub-section (1), however, continues such agreements unless the provisions in such agreement are denounced by the Ruler of the Indian State or are superseded by a subsequent agreement.

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

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

48. The nature of 1886 Lease Agreement being not political is already concluded by this Court in 2006 judgment (Mullaperiyar Environmental Protection Forum1). This Court has held therein – and we have no justifiable reason to take a different view – that 1886 Lease Agreement is an ordinary agreement being a lease agreement and it is wholly non- political in nature.

49. There is, thus, no merit in the contention advanced on behalf of Kerala that 1886 Lease Agreement lapsed under the main provision of Section 7(1)(b) of 1947 Act.

50. Now, for consideration of the other limb of the argument addressed to us by Mr. Harish N. Salve that even otherwise, the Maharaja of Travancore denounced all agreements including 1886 Lease Agreement, it is necessary to refer to the proviso appended to Section 7(1)(b). The expression "denounced by the Ruler of the Indian State" in the proviso appended to Section 7, in our opinion, refers to unambiguous, unequivocal and express denouncement. Kerala has not produced any material or document to show that there was express denouncement of that nature by the Ruler of Travancore insofar as 1886 Lease Agreement is concerned. We do not think that the bulletin issued on 18.07.1947 clearly or finally denounced the 1886 Lease Agreement.

51. Moreover, to be a valid and effective denouncement of the agreement between the Ruler and His Majesty such denouncement must be made after 1947 Act came into effect. Admittedly, there is no denouncement of 1886 Lease Agreement by the Travancore Ruler after 15.08.1947.

52. The relevant portion of the standstill agreement dated 12.08.1947 reads as follows:

> "Agreement between the State of Travancore and the Dominion of India Whereas it is to the benefit and advantage of the Dominion of India as well as of the Indian States that existing agreements and administrative arrangements in the matters of common concern, should continue for the time being, between the Dominion of India or any part thereof and the Indian States :
>
> Now therefore it is agreed between the Travancore State and the Dominion of India that:-
>
> 1. (1) Until new agreements in this behalf are made, all agreements and administrative arrangements as to matters of common concern now existing between the Crown and any Indian State shall, in so far as may be appropriate, continue as between the Dominion of India or as the case may be, the part thereof and the State.

(2) In particular, and without derogation from the generality of sub-clause (1) of this clause the matters referred to above shall include the matters specified in the Schedule to this Agreement."

53. It is argued by Mr. Harish N. Salve that the standstill agreement, which is between parties different from those who had executed the 1886 Lease Agreement, is a fresh agreement which brought into force, for the time being, contractual obligations between the Maharaja of Travancore and the Dominion of India. As the parties were different and the Act of 1947 provided for the lapse of the British suzerainty over the Princely States, the question of continuance of 1886 lease agreement does not arise. In any case, learned senior counsel for Kerala argues that standstill agreement could not survive after the deletion of Section 177 of the 1935 Act. We find no merit in these arguments. The standstill agreement is not a fresh agreement between Dominion of India and State of Travancore as suggested by Mr. Harish N. Salve. The standstill agreement was intended for the benefit of the parties who were parties to the agreements and arrangements, which were matters of common concern existing between the Crown and the State of Travancore. In the background of Instrument of Accession, it became necessary to have some arrangement so that the existing

agreements and arrangements between the Crown and the Indian States continued. We do not think that standstill agreement is political in nature as contended on behalf of Kerala.

54. The argument that standstill agreement could not survive after the deletion of Section 177 with effect from 15.08.1947 by virtue of India (Provisional Constitution) Order, 1947 is also without substance. Section 177 was deleted because it could no longer work and because Dominion of India was to come into being with provinces as part of the Dominion and there was to be no Secretary of State in Council. We are in agreement with Mr. Vinod Bobde, learned senior counsel for Tamil Nadu that deletion of Section 177 was prospective and it did not affect the deeming that had already taken place in 1935. The standstill agreement, in our view, cannot be said to have been wiped out by the deletion of Section 177.

55. Mr. Harish N. Salve is right in submitting that under Section 177 existing contracts made by the Secretary of State prior to 1935 would have effect as if they were made on behalf of the concerned Province and by virtue of this provision, the Province of Madras was a beneficiary of standstill agreement but he does not seem to be right when he says that this situation changed on 14.08.1947 when the India (Provisional Constitution) Order, 1947 was issued and the standstill agreement arrived at on 12.08.1947 ceased to be for the benefit of Province of Madras. As stated by us earlier, the deletion of Section 177 is prospective and did not undo what had already taken place. This also negates the argument of Mr. Salve that the rights of the Crown, which were enjoyed by the Province of Madras under Section 177, on deletion of the said Section had come to an end as there was no successor to the Crown.

56. The argument that there is no successor of Crown is irrelevant because by virtue of Section 177, the Government of Province of Madras had already become lessee in the 1886 Lease Agreement by deeming in 1935 itself. The standstill agreement continued 1886 Lease Agreement between the Province of Madras and the State of Travancore. 1886 Lease Agreement did not lapse under the main provision of Section 7(i)(b) of the Act of 1947. There was no unequivocal and unambiguous denouncement of 1886 Lease Agreement by the Ruler of Travancore under proviso to Section 7(i)(b). The Province of Madras was beneficiary of the standstill agreement. Surely, deletion of Section 177 has not affected the rights of Province of Madras.

57. Relying upon Babu Ram Saksena[4], it is vehemently argued by Mr. Harish N. Salve, learned senior counsel for Kerala that upon merger of two states – Travancore and Cochin – in 1949 all treaties entered into by the Rulers of erstwhile states lapsed. His submission is that the standstill agreement, whether it was an independent agreement or in continuation of 1886 Lease Agreement, came to an end in light of the legal position exposited in Babu Ram Saksena4. Learned senior counsel in this regard also relied upon the decision of this Court in State of Himachal Pradesh[5].

Babu Ram Saksena

58. Let us carefully consider Babu Ram Saksena4. The facts in Babu Ram Saksena4 were as follows: Babu Ram Saksena was a member of Uttar Pradesh Civil Service and served Tonk State in various capacities. It was alleged that during service, he helped the Nawab of Tonk in obtaining the sanction

of the Government of India to the payment of Rs.14,00,000/- to the Nawab out of State treasury for the discharge of his debts, and induced the Nawab by threats and deception to pay him, in return for such help, sums totaling Rs.3,00,000/- on various dates. Dr. Babu Ram Saksena was charged with the offences under Sections 383, 575 and 420 of the Indian Penal Code. These offences were extraditable offences under the Indian Extradition Act, 1903 (for short, '1903 Act'). The warrant was issued under Section 7 of the 1903 Act to the District Magistrate, Nainital, where the accused was residing after reverting to the service of the Uttar Pradesh Government, to arrest and deliver him up to the District Magistrate of Tonk. The accused raised defences on merits as well as to the validity of the warrant and challenged the jurisdiction of the Magistrate at Nainital to take cognizance of the matter and arrest the appellant. The High Court overruled all the objections and dismissed the application for the release of the appellant. The matter was carried to this Court. Inter alia, the contention on behalf of the appellant before this Court was that the treaty entered into between the British Government and the Tonk state on 28.01.1869, although declared by Section 7 of the 1947 Act, to have lapsed as from 15.08.1947 was continued in force by the standstill agreement entered into on 08.08.1947; that that treaty exclusively governed all matters relating to extradition between the two states, and that, inasmuch as it did not cover the offences now charged against the appellant, no extradition of the appellant could be demanded or ordered. The Attorney General, on the other hand, responded by contending that the standstill agreement entered into 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 to the Dominion of India and they were superseded by the instrument of Accession executed by the Rulers of those states. Tonk having acceded to the Dominion on 16.08.1947, the standstill agreement relied on by the appellant must be taken to have lapsed as from that date. Secondly, the treaty was no longer subsisting and its execution became impossible, as the Tonk State ceased to accede politically and as 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 the common executive, legislature and judiciary, by the name of the United State of Rajasthan", the last of such covenants which superseded the earlier ones, having been entered into on 13.03.1949. Lastly, it was argued by the Attorney General that the treaty was still in operation as a binding executory contract and its provisions were in no way derogated from by the application of Section 7 of the 1903 Act in the extradition warrant issued under that Section and the arrest made in pursuance thereof were legal and valid and could not be called in question under Section 491 of the Code of Criminal Procedure.

59. It is important to note that in Babu Ram Saksena4, two opinions have been given by this Court, one by Patanjali Sastri, J. and the other by Mukherjea, J. Insofar as Patanjali Sastri, J. is concerned, His Lordship did not give any opinion on the first two contentions raised by the Attorney General. This is clear when Patanjali Sastri, J. said, "As we are clearly of the opinion that the appellant's contentions must fail on this last ground, we consider it unnecessary to pronounce on the other points raised by the Attorney General especially as the issues involved are not purely legal but also of a political character, and we have not had the views of the accused concerned on those points". Having said that, Patanjali Sastri, J. considered the question whether extradition under Section 7 of the 1903 Act for an offence which is not extraditable under the treaty is, in any sense, a derogation from the provisions of the treaty which provides for the extradition of offenders for certain specified

offences committed in the respective territories of the high contracting parties.

59.1. In the other opinion given by Mukherjea, J. as regards the question, how far was the Extradition Treaty between the Tonk State and the British Government affected by reason of the merger of the Tonk State along with eight other States in view of a covenant entered into by the Rulers of these nine States, into the United State of Rajasthan, it has been held that as a result of amalgamation or merger, a State loses its full and independent power of action over the subject matter of a treaty previously concluded, the treaty must lapse. Mukherjea, J. noted Article 6 of the merger and the general opinion of the international jurists that 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 treaties of the former are automatically terminated. Mukherjea, J. observed as follows:

> ".....The result is said to be produced by reason of complete loss of personality consequent on extinction of State life. The cases discussed in this connection are generally cases where independent States have ceased to be such through constrained or voluntary absorption by another with attendant extinction of the former's treaties with other States. Thus the forceable incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the Treaties of the Independent Republic of Texas. The position is the same when Korea merged into Japan. According to Oppenheim, whose opinion has been relied upon by Sir Alladi, no succession of rights and duties ordinarily takes place in such cases, and as political and personal treaties presuppose the existence of a contracting State, they are altogether extinguished. It is a debatable point whether succession takes place in cases of treaties relating to commerce or extradition but here again the majority of writers are of opinion that they do not survive merger or annexation" 59.2. The above observations of Mukherjea, J. were based on the two renowned books, (one) Hyde on International Law, Vol. III, Pg. 1529 and (two) Oppenheim on International Law, Vol. I, Pg. 152.

59.3. Dealing with the covenant under consideration, Mukherjea, J. went on to state as follows:

> "The remarks quoted above do not, however, seem quite appropriate to a case of the present description. Here there was no absorption of one State by another which would put an end to the State life of the former and extinguish its personality. What happened here was that several States voluntarily united together and integrated their territories so as to form a larger and composite State of which every one of the covenanting parties was a component part. There was to be one common executive, legislature and judiciary and the Council of Rulers would consist of the Rulers of all the Covenanting States. It may not be said, therefore, that the Covenanting States lost their personality altogether and it is to be noted that for purposes of succession of Rulership and for counting votes on the strength of population and other purposes the Covenant of Merger recognises a quasi-separation between the territories of the

different States. But although such separation exists for some purposes between one State territory and another, it is clear that the inhabitants of all the different States became, from the date of merger, the subjects of the United State of Rajasthan and they could not be described as subjects of any particular State. There is no such thing as subject of the Tonk State existing at the present day and the Ruler of Tonk cannot independently and in his own right exercise any form of sovereignty or control over the Tonk territory. The Government, which exercises sovereign powers, is only one, even though the different Rulers may have a voice in it. It seems to us that in those altered circumstances the Extradition Treaty of 1869 has become entirely incapable of execution. It is not possible for the Tonk State, which is one of the contracting parties to act in accordance with the terms of the treaty, for it has no longer any independent authority or sovereign rights over the Tonk territory and can neither make nor demand extradition. When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded, the treaty must necessarily lapse. It cannot be said that the sovereignty of the Tonk State in this respect is now vested in the United State of Rajasthan. The authority, so far as extradition was concerned, was already surrendered by the Tonk State in favour of the Dominion Government by the Instrument of Accession. But even assuming that these treaty rights could devolve upon the United State of Rajasthan by reason of Article 6 of the Covenant of Merger, the latter, it seems to me, could be totally incapable of giving effect to the terms of the treaty. As has been said already, there could be no such thing as a subject of the Tonk State at the present moment and Article 2 of the Treaty which provides for extradition of Tonk subjects accused of having committed heinous offences within Tonk territory and seeking asylum elsewhere would be wholly infructuous. The United State of Rajasthan could not possibly demand extradition on the basis of this article, and if reciprocity, which is the essence of an Extradition Agreement, is gone, the Treaty must be deemed to be void and inoperative." 59.4. The view of Mukherjea, J. was concurred with by Mahajan, J.

Das, J. substantially agreed with the reasoning of Mukherjea, J. Fazl Ali, J. agreed with the line of reasoning in both the judgments delivered by Patanjali Sastri, J. and Mukherjea, J.

59.5. A careful consideration of the judgment by Mukherjea, J. in Babu Ram Saksena4 would show that His Lordship's opinion has no application to a non-political agreement such as 1886 Lease Agreement. The observation of Mukherjea, J., "When as a result of amalgamation or merger, a State loses its full independent power of action over the subject matter of a treaty previously concluded, the treaty must necessarily lapse..." is in the context of an extradition treaty which is purely political in nature. In our view, Babu Ram Saksena4 is clearly distinguishable and does not help Kerala in its argument that 1886 Lease Agreement lapsed on merger of the two States, Travancore and Cochin, into the United State of Travancore and Cochin.

State of Himachal Pradesh

60. Mr. Harish N. Salve also placed heavy reliance upon the decision of this Court in the case of State of Himachal Pradesh5. The dispute in that case was between the State of Himachal Pradesh on the one hand and the Union of India, State of Punjab, State of Haryana, State of Rajasthan and Union Territory of Chandigarh on the other relating to the power generated in the Bhakra-Nangal and Beas Projects. One of the issues under consideration was whether after the merger of the State of Bilaspur with the Dominion of India, the State of Himachal Pradesh could still have any cause of action to file the suit. While dealing with this issue, this Court referred to Bilaspur Merger Agreement dated 15.08.1948, particularly, Article 1 thereof. After having noticed that provision, this Court in paragraph 48 of the Report (Pgs. 359-360) held as under:

> "48. It is thus clear that by the Bilaspur Merger Agreement dated 15-8- 1948 the Raja of Bilaspur ceded to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State and agreed to transfer the administration of the State to the Dominion Government on 12-10-1948. Thereafter, the Government of India, Ministry of Law, issued a Notification dated 20-7- 1949 (Ext. D-4/2-A) in exercise of its powers under Section 290-A of the Government of India Act, 1935 making the States Merger (Chief Commissioners' Provinces) Order, 1949, which came into force from 1-8- 1949. Under this States Merger (Chief Commissioners' Provinces) Order, 1949, Bilaspur was to be administered in all respects as if it was a Chief Commissioner's Province. Under the Constitution of India also initially Bilaspur continued to be administered as the Chief Commissioner's Province and was included in the First Schedule to the Constitution as a Part C State. Under Article 294(b) all rights, liabilities and obligations of the Government of the Dominion of India, whether arising out of any contract or otherwise, became the rights, liabilities and obligations of the Government of India. These provisions of the Bilaspur Merger Agreement dated 15-8-1948 (Ext. D-4/1-A), the States Merger (Chief Commissioners' Provinces) Order, 1949, the First Schedule to the Constitution and Article 294(b) of the Constitution make it clear that Bilaspur became the part of the Dominion of India and thereafter was administered as a Chief Commissioner's Province by the Government of India and all rights of the Raja of Bilaspur vested in the Government of India. We, therefore, hold that the plaintiff will not have any cause of action to make any claim on the basis of any right of the Raja of Bilaspur prior to the merger of Bilaspur State with the Dominion of India."

61. The above observations in State of Himachal Pradesh5 must be read in the context of Bilaspur Merger Agreement dated 15.08.1948 whereby the Raja of Bilaspur ceded to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State and all rights of Raja of Bilaspur had vested in the Government of India. We find it difficult to appreciate how these observations have any application insofar as the continuance of the 1886 Lease Agreement after the merger of the Travancore State and the Cochin State into a new state, namely, United State of Travancore and Cochin are concerned. The judgment of this Court in State of Himachal Pradesh5, in our view, has no application to the submission advanced on behalf of Kerala.

Status of Indian States on accession

62. It is important to bear in mind that accession of Indian States to the Dominion of India did not extinguish those States as entities. They only became part of Dominion of India as constituent States along with the provinces of erstwhile British India. We are unable to hold that the entities of those States who acceded to the Dominion of India were totally wiped out. There is merit in the submission of Tamil Nadu that the fact that on 24.05.1949 the States of Travancore and Cochin merged together also establishes that Indian States which acceded to the Dominion continued as entities.

63. In light of the above, we are unable to accept the argument of Kerala that Madras ceased to be a lessee on 15.08.1947. It is pertinent to observe here that Kerala entered into the supplemental agreements with Tamil Nadu in 1970. In these supplemental agreements, the continuance of 1886 lease is stated in clear and unambiguous words. Had 1886 Lease Agreement ceased to be operational on and from 15.08.1947, there was no occasion for Kerala to enter into supplemental agreements with Tamil Nadu in 1970. By first supplemental agreement, Tamil Nadu surrendered the fishing rights in the leased lands and also agreed to the upward revision of the rent of the leased land. The second supplemental agreement conferred on Tamil Nadu the right to generate power and right to construct all facilities required for power generation. An additional extent of 42.7 acres was leased to Tamil Nadu for the said purposes. Mr. Harish N. Salve, learned senior counsel for Kerala argued that 1970 supplemental agreements and the statement therein about continuance of 1886 Lease Agreement were based on a mistake of law (wrongful assumption) of continuance of lease of 1886. The submission of the learned senior counsel for Kerala can hardly be accepted firstly, in view of our finding that 1886 Lease Agreement continued on and from 15.08.1947 and secondly, in view of the decision of this Court in State of Andhra Pradesh3, wherein a three-Judge Bench of this Court speaking through one of us (R.M. Lodha, J., as he then was) observed, “when an agreement is entered into between two or more states, they have assistance of competent, legal and technical minds available with them. The states do not have lack of drafting ability. Such agreement is provided by trained minds.....”. The 1970 supplemental agreements having been entered into by two high parties, namely, State of Kerala and State of Tamil Nadu, it can hardly be accepted that the continuance of 1886 lease was wrongly assumed though it had lapsed on 15.08.1947. Kerala obviously must have had competent and legal minds available with them when supplemental agreements were entered into in 1970 with Tamil Nadu. There is no merit in the argument of Kerala that supplemental agreements were based on mistake of law.

Is 1886 lease agreement an act of State?

64. Is 1886 Lease Agreement an act of State or International Treaty? The answer has to be in the negative. It is well settled that an act of State is the taking over of sovereign powers by a State in respect of territory which was not till then part of it, by conquest, treaty, cession or otherwise, and the municipal courts recognised by the new sovereign have the power and jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise, and that such a recognition may be express or may be implied from the circumstances. 1886 Lease Agreement is an ordinary contract of lease. Merely, because the

contract was arrived at between the Crown through the Secretary of State and the Travancore State – a princely Indian State – the nature of contract is not changed and it does not become a political arrangement. As noted above, this Court in Mullaperiyar Environmental Protection Forum1 has already declared that 1886 Lease Agreement is not political in nature. We are in agreement with this view. The same reasoning applies equally to standstill agreement.

Virendra Singh

65. Mr. Harish N. Salve, learned senior counsel for Kerala relied upon the decision of this Court in Virendra Singh[6]. The Constitution Bench in Virendra Singh6 was concerned with the question about the post- Constitutional rights to property situate in Indian States that were not part of British India before the Constitution but which acceded to the dominion of India shortly before the Constitution and became an integral part of the Indian Republic after it. Charkhari and Sarila were independent States under the paramountcy of the British Crown. They acknowledged the British Crown as the suzerain power. India obtained Independence and became a Dominion by reason of Act of 1947. The two States – Charkhari and Sarila – executed Instruments of Accession and acceded to dominion. In the Instrument of Accession, the sovereignty of the acceding States was expressly recognised and safeguarded. The Ruler of Sarila granted, on 28.01.1948, one village to the writ petitioners and the Ruler of Charkhari also granted certain villages to the petitioners. On 13.03.1948, thirty-five States in Bundelkhand and Baghelkhand (including Charkhari and Sarila) agreed to unite themselves in one State which was to be called United State of Vindhya Pradesh. Few days later, pursuant to the above agreement, a covenant was signed by all the thirty-five Rulers which brought the new State into being. This arrangement was domestic arrangement and not a treaty with the dominion of India. Soon after this, the Revenue Officers of the newly formed Vindhya Pradesh Union tried to interfere with the grants made by the above Rulers. The integration did not work satisfactorily. So, on 26.12.1949, the same thirty-five Rulers entered into another agreement abrogating their covenant and dissolving the newly created State as from 01.01.1950. By the same instrument each Ruler ceded to the Government of the Indian Dominion as from the same date. The instrument was called the Vindhya Pradesh Merger Agreement. The Government of Indian Dominion was also party to the agreement. The Dominion Government took over the administration of the States which formed Vindhya Pradesh on 01.01.1950 and decided to form them into a Chief Commissioner's province. The Constitution came into force on 26.01.1950. The grants of Jagirs and Muafis made by the Rulers of Charkhari and Sarila were revoked somewhere in August, 1952. It was this order of revocation which was challenged before this Court by invoking Article 32 of the Constitution. 65.1. While dealing with the issue noted above and in light of various decisions cited at the bar, this Court exposited as follows:

> "Now it is undoubted that the accessions and the acceptance of them by the Dominion of India were acts of State into whose competency no municipal Court could enquire; nor can any Court in India, after the Constitution, accept jurisdiction to settle any dispute arising out of them because of article 363 and the proviso to article 131; all they can do is to register the fact of accession; see section 6 of the Government of India Act, 1935 relating to the Accession of States. But what then? Whether the Privy Council view is correct or that put forward by Chief Justice

Marshall in its broadest outlines is more proper, all authorities are agreed that it is within the competence of the new sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them; and these laws can, and indeed when the occasion arises must, be examined and interpreted by the municipal Courts of the absorbing State." 65.2. The exposition of above legal position by the Constitution Bench hardly admits of any doubt. Obviously, the accession of an Indian State to the dominion of India and acceptance of it by the Dominion are acts of State and jurisdiction of the courts to go into its competency or settle any dispute arising out of them are clearly barred under Article 363 and the proviso to Article 131. As we have already held – and that is what has been held in the 2006 judgment as well – that 1886 Lease Agreement is an ordinary agreement and that it is not political in nature, the embargo of Article 363 and the proviso to Article 131 have no application.

Scope of Article 363 and Article 131

66. Article 363[7] of the Constitution is an embargo for the courts including Supreme Court to deal with any dispute arising out of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of the Constitution by any Ruler of an Indian state and to which the Government of the dominion of India or any of its predecessors Government was a party and it has or has been continued in operation after such commencement. The jurisdiction of the courts is also barred to interfere in any dispute in respect of any right accruing under 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.

67. A plain reading of Article 363 leaves no manner of doubt that if the dispute arises in respect of a document of that description and if such document had been executed before the commencement of Constitution, the interference by courts is barred. The documents referred to in Article 363 are those which are political in nature. Any dispute regarding such documents is non-justiciable. The object behind Article 363 is to bind the Indian Rulers with treaties, agreements, covenants, engagements, sanads or other similar instruments entered into or executed before the commencement of the Constitution and to prevent the Indian Rulers from resiling from such agreements as the integrity of India was to be maintained at all cost and could not be affected by raising certain disputes. It may be of relevance to refer to the White Paper on Indian States prepared by the Government of India in 1948 which brings out the historical perspective which necessitated the adoption of the provisions in Article 363. It says "Article 363 has therefore been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of courts except in cases which may be referred to the Supreme Court by the President".

68. Article 131[8] of the Constitution deals with the original jurisdiction of this Court. Subject to the provisions of the Constitution, this Court has original jurisdiction in any dispute, inter alia, between the Government of India and any State or States on one side and one or more other States on the other if and insofar as the dispute involves any question (whether of law or fact) on which the existence of legal right depends. However, by proviso appended thereto, the jurisdiction of this Court is barred if the dispute to which a State specified in Part B of the First Schedule is a party if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument was entered into or executed before the commencement of the Constitution and has or has been continued in operation after such commencement.

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

70. 1886 Lease Agreement does provide for resolution of disputes between the parties to the agreement by way of arbitration; it contains an arbitration clause. The submission of Kerala that enforcement of any award under the arbitration clause would be political in nature is misplaced.

The assumption of Kerala that 1886 Lease Agreement was not justiciable and enforceable in court of law prior to the Constitution as no court in Travancore would obviously entertain a claim against Maharaja and no court outside the State of Travancore have jurisdiction over the Maharaja of Travancore is not relevant at all and devoid of any merit.

71. We are in complete agreement with the view taken by this Court in Mullaperiyar Environmental Protection Forum1 that 1886 Lease Agreement would not come within the purview of Article 363 and jurisdiction of this Court is not barred. As a necessary corollary, the dispute arising out of 1886 Lease Agreement is not barred under Article 131 proviso as well. Moreover, the principal challenge laid in the suit pertains to constitutional validity of 2006 (Amendment) Act for which Article 363 or for that matter under Article 131 proviso does not come into operation at all.

Article 294 and Article 295

72. By virtue of Article 294[9], all properties immediately before the commencement of the Constitution which vested in His Majesty for the purposes of the Government of the Dominion of India vest in the Union and all properties which vested in His Majesty for the purposes of the Government of each Governor's Province vest in the corresponding State and all rights, liabilities and obligations of the Government of Dominion of India and the Government of each Governor's Province are recognised to be rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State. In other words, this article declares which property would vest in the Union and which would vest in the State Government. There remains no doubt that by virtue of Article 294(b) read with First Schedule appended to the Constitution, leasehold rights devolved upon the State of Madras under the 1886 Lease Agreement.

73. Article 295[10] relates to succession to property, assets, rights, liabilities and obligations. Clause 1(a) states that from the commencement of the Constitution all property and assets which immediately before such commencement were vested in an 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, be purposes of the Union. Clause 1(b) provides that all rights and 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 and obligations were incurred, be purposes of the Government of India. Clause (2) of this Article provides that Government of each State specified in Part B of the First Schedule shall be the successor of the corresponding 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). This is subject to any agreement entered into that behalf by the Government of India with the Government of the State concerned. The expression 'Government of the corresponding Indian State" in Article 295(2), in our opinion, with reference to Government of Part B State of Travancore—Cochin meant not only the merged erstwhile State of Travancore and Cochin but also its components. Seen thus, by virtue of Article 295(2), the Government of Part B State of Travancore – Cochin became successor of the corresponding State of Travancore as regards all rights, liabilities and obligations arising out of 1886 Lease Agreement.

74. In light of the above, our finding on issue Nos. 1, 5, 6 and 7 are:

(i) The suit filed by the State of Tamil Nadu is maintainable under Article 131 of the Constitution.

(ii) The suit based on a legal right claimed under the lease deed executed between the Government of the Maharaja of Travancore and the Secretary of State for India in Council on 29.10.1886 is not barred by the proviso to Article 131 of the Constitution.

(iii) The State of Kerala (first defendant) is estopped from raising the plea that the lease deed dated 29.10.1886 has lapsed, in view of the supplemental agreements dated 28.05.1970.

(iv) The lease deed executed between the Government of the Maharaja of Travancore and Secretary of State for India in Council on 29.10.1886 is valid and binding on the first defendant and it is enforceable by plaintiff against the first defendant.

75. These issues are inter-related and, therefore, they are being discussed together.

Contentions on behalf of Tamil Nadu

76. Mr. Vinod Bobde, learned senior counsel for Tamil Nadu submits that 2006 judgment had rendered a finding of fact on the safety of Mullaperiyar dam for raising water level to 142 ft. 2006 (Amendment) Act could not have taken away the legal right of Tamil Nadu flowing from the judgment. Section 62(A) of the 2006 (Amendment) Act directly seeks to nullify the judgment of this Court by declaring the dam to be endangered and by fixing the height of the water level at 136 ft. It also authorises the Dam Safety Authority to discard the judgment and to adjudge for itself whether to allow raising of water level. The Section also goes on to freeze all work on the dam allowed by this Court in 2006 judgment. Section 62(1)(e) of the 2006 (Amendment) Act in its application to the subject dam, seeks to overcome the finding of safety by authorizing the Dam Safety Authority to order, inter alia, decommissioning of the dam. The nullification of judgment is, thus, plain and obvious. A final judgment, once rendered, operates and remains in force until altered by the court in an appropriate proceeding. He submits that unilateral legislation nullifying a judgment is constitutionally impermissible.

77. Relying upon the judgment of this Court in Prithvi Cotton[11], learned senior counsel for Tamil Nadu submits that nullification of a judgment without removal of its legal basis is one of the categories of usurpation. A judgment on a question of fact cannot be nullified so also the effect of judgment, which enforces a legal right. By relying upon the Privy Council judgment in Liyanage[12], he submitted that interference with the judicial process in a pending matter also amounts to usurpation of judicial power. In both categories of usurpation, the answer would depend on facts of each case after considering the legal effect of the law on a judgment or a judicial proceeding. Mr. Vinod Bobde submits that the true purpose of the legislation, the haste with which it was enacted, and the surrounding circumstances, are relevant circumstances.

78. It is argued by learned senior counsel for Tamil Nadu that the test for determining whether a judgment is nullified is to see whether the law and the judgment are inconsistent and irreconcilable so that both cannot stand together. The finding of fact by this Court in 2006 judgment that the dam is safe can never be deemed to be imaginary by legal fiction which then proceeds to deem the opposite to be real, namely, that the dam is endangered. The provision limiting the height of water level to 136 ft, enacted within 15 days after the judgment of this Court finding the dam to be safe and allowing the water level to be raised to 142 ft., shows the true purpose of the legislation, the situation to which it was directed and the clear intention to defy and act as a judicial authority sitting in appeal over the judgment of this Court.

79. Mr. Vinod Bobde submits that between 27.02.2006 when the judgment was rendered by this Court and 15.03.2006 when 2006 (Amendment) Act was enacted by Kerala State legislature, no new

facts emerged nor there was any change in circumstances. Kerala Government and Kerala State Legislature did not have a single piece of information of fact before it concerning seismic coefficient values, Probable Maximum Flood (PMF) levels or any other matter or material contradicting or even doubting the finding of this Court in 2006 judgment which was based on the findings of the Expert Committee.

80. It is strenuously urged by learned senior counsel for Tamil Nadu that once a dispute is before a court and parties are at issue on any question of fact, the decision on that question can be rendered only by the court and not by the legislature or the executive. The legislature cannot decide that the water level shall not exceed 136 ft. when the very issue had been adjudicated upon by the court.

81. Learned senior counsel for Tamil Nadu argues that the finding of fact about safety of the dam for water level upto 142 ft. is res judicata and binds the two States. It is not within the province of the Kerala Legislature to sit in judgment on the finding of this Court and purport to reverse the same by directing that water level shall remain at 136 ft. According to Tamil Nadu, this is not a legislation; it is the exercise of "despotic discretion" and offends the rule of law and the principle of separation of powers.

82. Relying upon a decision of this Court in Indra Sawhney[13], it is argued by learned senior counsel for Tamil Nadu that the legislative declaration of fact in Section 62A that the dams in Second Schedule are endangered on account of their age, degeneration, degradation, structure or other impediments is not beyond judicial scrutiny and it is open to the court to examine the true facts.

83. Mr. Vinod Bobde argues that 2006 (Amendment) Act is not a validating enactment because (i) the judgment of this Court did not reach the finding about the safety of the dam founded on any law which was considered to suffer from any constitutional vice or defect; (ii) there was no occasion at all to remove any vice or cure any defect in any law and perform a validating exercise; and (iii) in fact, the 2006 (Amendment) Act does not purport to cure any defect found by this Court in any law. In this regard, reliance is placed upon decisions of this Court in Prithvi Cotton11, Madan Mohan Pathak[14], People's Union for Civil Liberties (PUCL)[15], Municipal Corporation of the City of Ahmedabad and Anr.[16] and Janapada Sabha[17].

84. It is argued by Mr. Vinod Bobde that validating laws are passed by the legislature after curing the defects in the law which have been struck down but where a fact is adjudicated upon, there is no power in the legislature or executive to sit in judgment upon a decision on a disputed question of fact and substitute its own "legislative judgment" for that Court. Learned senior counsel places reliance upon the judgment of this Court in Cauvery reference[18].

85. It is, thus, argued by the learned senior counsel for Tamil Nadu that 2006 (Amendment) Act is unconstitutional.

Contentions on behalf of Kerala

86. Mr. Harish N. Salve, learned senior counsel for Kerala on the other hand argues that Kerala legislature is competent to override the contracts and regulate the safety of Mullaperiyar dam situated within its territory across river Periyar. Even agreements entered into between foreign sovereigns can be overridden in exercise of legislative powers. He relies upon the decisions of this Court in Thakur Jagannath Baksh[19], Maharaj Umeg Singh[20], Manigault[21] and an article by Roderick E. Walston titled "The Public Trust Doctrine in the Water Rights Contexts"[22].

87. Learned senior counsel for Kerala contends that on the basis of "age", etc., as safety standards, the Kerala legislature as a precautionary measure has declared that 22 dams are "endangered" and restricted storages thereunder by virtue of Section 62(A)(1) and (2) read with Second Schedule. Learned senior counsel relies upon Brotherhood of Locomotive Firemen[23], Raymond Motor Transportation[24], Raymond Kassel[25], American Trucking Association[26] and Pfizer Animal Health[27]. Learned senior counsel also relies upon, "Science and Risk Regulation and International Law" by Jacqueline Peel[28] wherein Pfizer Animal Health27 has been referred.

88. Mr. Harish Salve, learned senior counsel for Kerala argues that legislature is competent to remove the basis of judgment and neutralize its effect. In response to the contention of Tamil Nadu that 2006 (Amendment) Act constitutes usurpation of judicial power, learned senior counsel argues that 2003 Act was in place when the judgment was delivered by this Court on 27.02.2006 but the Court has not taken into consideration Sections 3 and 4 and so also Section 30 of the 2003 Act. It was assumed that Section 108 of the 1956 Act would save the contractual rights arising from the 1886 Lease Agreement and purportedly continued by the supplementary agreements of 1970. The 2003 Act was not under challenge either in the previous litigation nor in the present suit. Learned senior counsel for Kerala, thus, submits that where a judgment is per incuriam, one remedy is by way of further appropriate legislation.

89. Learned senior counsel for Kerala in the course of arguments extensively referred to the provisions of 2003 Act and the substitution of Section 62 by providing with non obstante clause that the function of evaluation of safety of a dam and the power to issue directions to the custodian are conferred upon Dam Safety Authority notwithstanding any decree of any court, and notwithstanding anything contained in any treaty, contract, instrument or other documents and submitted that 2003 Act and 2006 (Amendment) Act have created a statutory framework for regulating water level in respect of dams within the State of Kerala, both scheduled and non-scheduled. 2006 (Amendment) Act establishes a statutory authority, which confers upon it the power to take certain measures in the interest of public safety. The judgment of this Court in 2006, Kerala contends, even does not suggest remotely that Kerala legislature lacks power to make measures for public safety in relation to the reservoir situated within the State.

90. Mr. Harish Salve argues that in declaring a dam to be unsafe, the Legislature does not render a finding of fact. It deems the dam to be unsafe and sets up an authority to regulate the dam in a particular manner. The legislative competence of the legislature to put in place statutory machinery to regulate water levels in a dam situated within the State in the interest of public safety cannot be denied. He argues that as to what constitutes an endangered dam is a matter of legislative policy and safety is accepted to be a matter primarily of policy. A court through the process of adjudication

renders findings and adjudication is always as per law in force. Once the law is altered, the adjudication cannot stand on its own. According to Mr. Salve, the argument of Tamil Nadu that impugned legislation is usurpation of judicial power is misconceived.

91. Learned senior counsel for Kerala relies upon Wheeling Bridge[29] in support of the principle that private rights pass into judgments but not the public rights and also submits that Wheeling Bridge29 principle has been applied in the subsequent cases viz., The Clinton Bridge[30], Hodges[31] and Charles B. Miller[32].

92. Shri Harish N. Salve, argues that 2006 (Amendment) Act is not a Validation Act in a stricto sensu. While adjudicating upon constitutional validity, he argues that the court must proceed on the premise that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to the problems made manifest by its experience and are based on adequate grounds. Learned senior counsel for Kerala relies upon the decision of this Court in Elphinstone Spinning[33] which approved the earlier decisions in Sanjeev Coke[34] and Doypack Systems[35].

Indian Constitution : Separation of powers

93. Indian Constitution, unlike Constitution of United States of America and Australia, does not have express provision of separation of powers. However, the structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognized separation of power as a basic feature of the Constitution and an essential constituent of the rule of law. The doctrine of separation of powers is, though, not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the Constitution. Indian Constitution has made demarcation without drawing formal lines between the three organs – legislature, executive and judiciary.

Mahal Chand Sethia

94. In Mahal Chand Sethia[36], while dealing with the argument that although it was open to the State legislature by an Act and the Governor by an Ordinance to amend the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, it was incompetent for either of them to validate an order of transfer which had been quashed by the issue of a writ of certiorari by the High Court and the order of transfer being virtually dead, could not be resuscitated by the Governor or legislature and the validating measures could not touch any adjudication by the Court. Mitter J. speaking for the Court stated the legal position :-

> "……A legislature of a State is competent to pass any measure which is within its legislative competence under the Constitution of India. Of course, this is subject to the provisions of Part III of the Constitution. Laws can be enacted either by the Ordinance making power of a Governor or the Legislature of a State in respect of the topics covered by the entries in the appropriate List in the Seventh Schedule to the Constitution. Subject to the above limitations laws can be prospective as also retrospective in operation. A court of law can pronounce upon the validity of any law

> and declare the same to be null and void if it was beyond the legislative competence of the Legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can strike down or declare invalid any Act or direction of a State Government which is not authorised by law. The position of a Legislature is however different. It cannot declare any decision of a Court of law to be void or of no effect." (emphasis supplied) Prithvi Cotton

95. One of the leading cases of this Court on the legislative competence vis-à-vis decision of the Court is Prithvi Cotton11. In that case, the validity of the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963 was assailed on behalf of the petitioners. The Validation Act had to be enacted in view of the decision of this Court in Patel Gordhandas Hargovindas[37]. Section 3 of the Validation Act provided that notwithstanding anything contained in any judgment, decree or order of a court or tribunal or any other authority, no tax assessed or purported to have been assessed by a municipality on the basis of capital value of a building or land and imposed, collected or recovered by the municipality at any time before the commencement of the Validation Act shall be deemed to have been invalidly assessed, imposed, collected or recovered and the imposition, collection or recovery of the tax so assessed shall be valid and shall be deemed to have been always valid and shall not be called in question merely on the ground that the assessment of the tax on the basis of capital value of the building or land was not authorized by law and accordingly any tax so assessed before the commencement of the Validation Act and leviable for a period prior to such commencement but not collected or recovered before such commencement may be collected or recovered in accordance with the relevant municipal law. The Constitution Bench exposited that the validity of a validating law depended upon whether the legislature possesses the competence which it claims over the subject matter and whether in making the validation it removed the defect which the courts had found in the existing law and made adequate provisions in the validating law for a valid imposition of the taxes. In the words of the Constitution Bench:

> "....When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by

> fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax." (emphasis supplied) Janapada Sabha

96. The Constitution Bench in Janapada Sabha17, considered the position with regard to legislative power and a decision of the Supreme Court and made the following weighty observations:

> "..On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court." (emphasis supplied by us) Municipal Corporation of the City of Ahmedabad

97. The above three decisions and one more decision of this Court in Amalgamated Coal Fields[38] were noted by the two-Judge Bench of this Court in the Municipal Corporation of the City of Ahmedabad16. While accepting that the legislature under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively and that by exercise of those powers, the legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but no legislature has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts.

Madan Mohan Pathak

98. Yet another important decision by the 7-Judge Constitution Bench of this Court on the subject is Madan Mohan Pathak14. P.N. Bhagwati, J. speaking for himself, Krishna Iyer and Desai, JJ. while dealing with the constitutional validity of the Life Insurance Corporation (Modification of Settlement) Act, 1976, which was enacted by the Parliament in light of the decision of the Calcutta High Court holding an impost or tax to be invalid, observed that irrespective of whether the

impugned Act was constitutionally valid or not, Life Insurance Corporation was bound to obey the writ of mandamus issued by the Calcutta High Court. M.H. Beg, C.J., agreeing with the view of P.N. Bhagwati, J. that the benefits of rights recognized by the judgment of the Calcutta High Court could not be indirectly taken away under Section 3 of the impugned Act selectively, said that if the right conferred by the judgment independently is sought to be set aside, then Section 3 would be invalid for trenching upon the judicial power. M.H. Beg, C.J. further said:

> " I may, however, observe that even though the real object of the Act may be to set aside the result of the mandamus issued by the Calcutta High Court, yet, the section does not mention this object at all. Probably this was so because the jurisdiction of a High Court and the effectiveness of its orders derived their force from Article 226 of the Constitution itself. These could not be touched by an ordinary act of Parliament. Even if Section 3 of the Act seeks to take away the basis of the judgment of the Calcutta High Court, without mentioning it, by enacting what may appear to be a law, yet, I think that, where the rights of the citizen against the State are concerned, we should adopt an interpretation which upholds those rights. Therefore, according to the interpretation I prefer to adopt the rights which had passed into those embodied in a judgment and became the basis of a mandamus from the High Court could not be taken away in this indirect fashion." (emphasis supplied by us) P. Sambamurthy

99. The importance of power of judicial review in rule of law has been significantly highlighted in P. Sambamurthy[39]. In that case, this Court while holding that proviso to clause (5) of Article 371-D was violative of the basic structure doctrine, observed that if the exercise of the power of judicial review could be set at naught by the State Government by overriding the decision against it, it would sound the death knell of the rule of law. Sounding a word of caution, this Court said that the rule of law would cease to have any meaning if the State Government were to defy the law and yet to get away with it.

Cauvery Reference

100. In Cauvery reference18, this Court was concerned with the validity of Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991. Relying upon its previous decisions in Madan Mohan Pathak14 and P. Sambamurthy39, this Court declared the Ordinance unconstitutional as it sought to nullify the order of the Tribunal impinging on the judicial power of the State.

PUCL

101. In People's Union for Civil Liberties (PUCL)15, the question under consideration before the three-Judge Bench of this Court was the validity of the Representation of the People (Amendment) Ordinance, 2002. The amendment followed the decision of this Court in Association for Democratic Reforms[40]. M.B. Shah, J. speaking for the majority noticed the earlier decisions of this Court in P. Sambamurthy39, Cauvery reference18 , Municipal Corporation of the City of Ahmedabad16, Prithvi Cotton11 and Mahal Chand Sethia36 and stated :

> "The Legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. The Legislature also cannot declare any decision of a court of law to be void or of no effect".
>
> Kesavananda Bharti, Indira Nehru Gandhi, Bal Mukund Sah and I.R. Coelho

102. That separation of powers between the legislature, the executive and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J. in Kesavananda Bharti[41]. Shelat and Grover, JJ. reiterating the views of Sikri, J. said that demarcation of power between the legislature, the executive and the judiciary could be regarded as basic elements of the Constitutional structure. The same view is expressed in subsequent decisions of this Court in Indira Nehru Gandhi[42], Bal Mukund Sah[43] and I.R. Coelho[44]. The nine-Judge Constitution Bench in I.R. Coelho44 has described that equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. The Court in I.R. Coelho44 said:

> ". . . . . Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary." I.N. Saksena

103. Drawing distinction between legislative and judicial acts and functions, this Court in I.N. Saksena[45] held (para 21 and 22 of the Report):

> "21. The distinction between a "legislative" act and a "judicial" act is well known, though in some specific instances the line which separates one category from the other may not be easily discernible. Adjudication of the rights of the parties according to law enacted by the legislature is a judicial function. In the performance of this function, the court interprets and gives effect to the intent and mandate of the legislature as embodied in the statute. On the other hand, it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law.
>
> 22. While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in Indira Nehru Gandhi

> v. Raj Narain, the rendering ineffective of judgments or orders of competent courts and Tribunals by changing their basis by legislative enactment is a well-

known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power." 103.1. In I.N. Saksena45, this Court referred to an earlier decision in Hari Singh[46] wherein a Bench of seven Judges of this Court noted the two tests for judging the validity of a validating law: (i) whether the legislature possesses competence over the subject-matter, and,

(ii) whether by validation, the legislature has removed the defect which the courts have found in the previous law. While following these two tests, the four-Judge Bench in I.N. Saksena45 added a third test: whether it is consistent with the provisions of Part III of the Constitution.

P. Kannadasan

104. Prithvi Cotton11 has been followed in Hindustan Gum and Chemicals[47], Vijay Mills Company[48] and P. Kannadasan[49]. It is not necessary to burden this judgment with all the three judgments as, in our view, reference to one of them, i.e., P. Kannadasan49 will suffice. In P. Kannadasan49 this Court noted that the Constitution of India recognised the doctrine of separation of powers between the three organs of the State, namely, the legislature, the executive and the judiciary. The Court said :

> "15..... It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid. Ours is also a federal form of government. The subjects in respect of which the Union and the States can make laws are separately set out in List I and List II of the Seventh Schedule to the Constitution respectively. (List III is, of course, a concurrent list.) The Constitution has invested the Supreme Court and High Courts with the power to invalidate laws made by Parliament and the State Legislatures transgressing the constitutional limitations. Where an Act made by a State Legislature is invalidated by the courts on the ground that the State Legislature was not competent to enact it, the State Legislature cannot enact a law declaring that the judgment of the court shall not operate; it cannot overrule or annul the decision of the court. But this does not mean that the other legislature which is competent to enact that law cannot enact that law. It can. Similarly, it is open to a legislature to alter the basis of the judgment as pointed out by this Court in Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality— all the while adhering to the constitutional limitations; in such a case, the decision of the court becomes ineffective in the sense that the basis upon which it is rendered, is changed. The new law or the amended law so made can be challenged on other grounds but not on the ground that it seeks to ineffectuate or circumvent the decision of the court. This is what is meant by "checks and balances"

> inherent in a system of government incorporating the concept of separation of powers. This aspect has been repeatedly emphasised by this Court in numerous decisions commencing from Shri Prithvi Cotton Mills. Under our Constitution, neither wing is superior to the other. Each wing derives its power and jurisdiction from the Constitution. Each must operate within the sphere allotted to it. Trying to make one wing superior to the other would be to introduce an imbalance in the system and a negation of the basic concept of separation of powers inherent in our system of government……." Indian Aluminium Company

105. In Indian Aluminium Company[50], one of the contentions addressed to this Court was that the Kerala legislature had no power to enact Section 11 of the impugned Act validating the levy with retrospective effect as it amounted to encroachment upon judicial power of the courts. While dealing with this contention, the Court referred to earlier decisions of this Court and culled out the following principles (para 56; Pgs. 662- 663 of the Report):

> "(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;
>
> (2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary; (3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.
>
> (4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;
>
> (5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;
>
> (6) The court, therefore, needs to carefully scan the law to find out:
>
> (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same." Arooran Sugars

106. In Arooran Sugars[51], the matter reached this Court from the judgment of the Madras High Court. Before the Madras High Court, the challenge was laid to the constitutional validity of T.N. Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1978 on diverse grounds. The Division Bench of the Madras High Court allowed the writ petitions. The State of Tamil Nadu being not satisfied with that judgment approached this Court. While dealing with the power of the legislature, the Constitution Bench of this Court observed: "The power of the legislature to amend, delete or obliterate a statute or to enact a statute prospectively or retrospectively cannot be questioned and challenged unless the court is of the view that such exercise is in violation of Article 14 of the Constitution. It need not be impressed that whenever any Act or amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case, it cannot be urged that the exercise by the legislature while introducing a new provision or deleting an existing provision with retrospective effect per se shall be violative of Article 14 of the Constitution. If that stand is accepted, then the necessary corollary shall be that

> legislature has no power to legislate retrospectively, because in that event a vested right is effected; of course, in a special situation this Court has held that such exercise was violative of Article 14 of the Constitution……..” . The Constitution Bench held that the provisions of the impugned Act do not purport to affect any vested or acquired right, it only restores the position which existed when the principal Act was in force. It further held that the Amending Act did not ask the instrumentalities of the State to disobey or disregard the decision given by the High Court but what it has done is that it has removed the basis of its decision.

Elphinstone Spinning and Weaving Company

107. The Constitution Bench of this Court in Elphinstone Spinning and Weaving Company33 laid down: (a) there is always a presumption that the legislature does not exceed its jurisdiction, (b) the burden of establishing that the legislature has transgressed constitutional mandates is always on the person who challenges its vires, and (c) unless it becomes clear beyond reasonable doubt that the legislation in question has transgressed the constitutional limits, it must be allowed to stand.

Dharam Dutt

108. The principle that the doctrine of colorable legislation does not involve bona fides or mala fides on the part of the legislature is highlighted by this Court in Dharam Dutt[52]. Relying upon earlier decisions in K.C. Gajapati Narayan Deo[53] and Ayurvedic and Unani Tibia College[54], the Court in Dharam Dutt52 further observed :

> “16……The whole doctrine resolves itself into the question of the competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. We will, therefore, concentrate on the legislative competence of Parliament to enact the impugned legislation. If Parliament has the requisite competence to enact the impugned Act, the enquiry into the motive which persuaded Parliament into passing the Act would be of no use at all.” 108.1. On the question of the effect of the previous judgment of the High Court on the impugned legislation, this Court in Dharam Dutt52 referred to Madan Mohan Pathak14, Prithvi Cotton11, Indian Aluminium Company50, Indira Nehru Gandhi42 and other decisions of this Court and held in paragraph 69 (pg. 753) of the Report as follows:
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> “69. That decision of the learned Single Judge was not left unchallenged. In fact, the correctness of the judgment of the learned Single Judge was put in issue by the Union of India by filing an intra- court appeal. Filing of an appeal destroys the finality of the judgment under appeal. The issues determined by the learned Single Judge were open for consideration before the Division Bench. However, the Division Bench was denied the opportunity of hearing and the aggrieved party could also not press for decision of the appeal on merits, as before the appeal could be heard it was rendered

> infructuous on account of the Ordinance itself having ceased to operate. The Union of India, howsoever it may have felt aggrieved by the pronouncement of the learned Single Judge, had no remedy left available to it to pursue. The judgment of the Division Bench refusing to dwell upon the correctness of the judgment of the Single Judge had the effect of leaving the matter at large. Upon the lapsing of the earlier Ordinance pending an appeal before a Division Bench, the judgment of the Single Judge about the illegality of the earlier Ordinance, cannot any longer bar this Court from deciding about the validity of a fresh law on its own merits, even if the fresh law contains similar provisions." 108.2. The Court, however, did not invalidate the impugned Act.

This is what the court said in para 70 (pg.753) of the Report:

> "...The doctrine of separation of powers and the constitutional convention of the three organs of the State, having regard and respect for each other, is enough answer to the plea raised on behalf of the petitioners founded on the doctrine of separation of powers. We cannot strike down a legislation which we have on an independent scrutiny held to be within the legislative competence of the enacting legislature merely because the legislature has re-enacted the same legal provisions into an Act which, ten years before, were incorporated in an Ordinance and were found to be unconstitutional in an erroneous judgment of the High Court and before the error could be corrected in appeal the Ordinance itself lapsed. It has to be remembered that by the impugned Act Parliament has not overruled the judgment of the High Court nor has it declared the same law to be valid which has been pronounced to be void by the Court. It would have been better if before passing the Bill into an Act the attention of Parliament was specifically invited to the factum of an earlier pari materia Ordinance having been annulled by the High Court. If an Ordinance invalidated by the High Court is still re-enacted into an Act after the pronouncement by the High Court, the subsequent Act would be liable to be annulled once again on finding that the High Court was right in taking the view of the illegality of the Ordinance, which it did. However, as we have already stated, this is not the position obtaining in the present case. The impugned Act is not liable to be annulled on the ground of violation of the doctrine of separation of powers." Virender Singh Hooda (II)

109. In Virender Singh Hooda (II)[55], this Court was concerned with the validity of Haryana Civil Services (Executive) Branch and Allied Services and other Services, Common/Combined Examination Act, 2002 (for short, 'the Act'). The contention of the petitioners in that case was that the Act amounted to usurpation of judicial power by the State legislature with a view to overrule the decisions of this Court in Virender Singh Hooda (I)[56] and Sandeep Singh[57]. Having regard to the contentions of the petitioners, one of the questions framed by the Court for determination was, whether the Act, to the extent of its retrospectivity, is ultra vires as it amounts to usurpation of judicial power by the State legislature or it removes the basis of decisions in Virender Singh Hooda (I)56 and Sandeep Singh57 cases. The Court noted that one of the facets of the question under

consideration was whether a writ of Mandamus can be made ineffective by an enactment of the legislature. Dealing with the legislative power, the Court observed, "The legislative power to make law with retrospective effect is well recognised. It is also well-settled that though the legislature has no power to sit over Court's judgment or usurp judicial power, but, it has subject to the competence to make law, power to remove the basis which led to the Court's decision. The legislature has power to enact laws with retrospective effect but has no power to change a judgment of court of law either retrospectively or prospectively. The Constitution clearly defines the limits of legislative power and judicial power. None can encroach upon the field covered by the other. The laws made by the legislature have to conform to the constitutional provisions ....".

109.1 The Court further said: "It is well settled that if the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject matter and whether in making the validation it removes the defect which the courts had found in the existing law".

109.2. The Court also said : "It is equally well-settled that the legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision; it may, at any time in exercise of the plenary power conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralizing effect the conditions on which such decision is based....." 109.3. While drawing distinction between encroachment on the judicial power and the nullification of the effect of a judicial decision by changing the law retrospectively, the Court referred to Tirath Ram Rajinder Nath[58] and stated, "the former is outside the competence of the legislature but the latter is within its permissible limits. The reason for this lies in the concept of separation of powers adopted by our constitutional scheme. The adjudication of the rights of the parties according to law is a judicial function. The legislature has to lay down the law prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law". 109.4. Relying upon a decision of this Court in S.S. Bola[59], the Court in Virender Singh Hooda (II)55 said :

> "49. When a particular rule or the Act is interpreted by a court of law in a specified manner and the law-making authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly iniquitous and accordingly a new set of rules or laws is enacted, it is very often challenged on the ground that the legislature has usurped the judicial power. In such a case the court has a delicate function to examine the new set of laws enacted by the legislature and to find out whether in fact the legislature has exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislature has altered and changed the character of the legislation which ultimately may render the judicial decision ineffective." Liyanage

110. Having surveyed good number of decisions of this Court on the separation of powers doctrine, it is time that we consider some leading foreign judgments on this aspect. The first judgment in this category that deserves consideration, which was also referred to by Mr. Vinod Bobde, learned senior counsel for Tamil Nadu is Liyanage12. The facts in Liyanage12 provide a classic example of usurpation of judicial function by the legislature in a pending case. In that case, the Judicial Committee of the Privy Council held that the Criminal Law (Special Provisions) Act No. 1 of 1962 usurped and infringed judicial power and was, therefore, invalid. This Act modified the Criminal Procedure Code applicable in Ceylon by purporting to legalise ex-post facto the detention of persons imprisoned in respect of an attempted coup, to widen the class of offences for which trial by three Judges, nominated by the Minister of Justice sitting without a jury, could be ordered to validate retrospective arrests for certain offences made without warrant and to prescribe new minimum penalties for the offence of waging war against the Queen. The legislation was held to involve "a grave and deliberate incursion into the judicial sphere" which was inconsistent with the separation of judicial power from legislative power required by the Constitution of Ceylon. Liyanage12 effectively lays down that judicial power is usurped (i) when there is legislative interference in a specific proceeding, (ii) the interference affects the pending litigation and (iii) the interference affects the judicial process itself, i.e., the discretion or judgment of the judiciary or the rights, authority or jurisdiction of the Court. Liyanage12 inter alia holds that powers in case of countries with written Constitutions must be exercised in accordance with the terms of Constitution from which they are derived. Making observations on the true nature and purpose of the impugned enactment, Liyanage12 says that alterations made by Parliament in the function of the judiciary constituted a grave and deliberate incursion in the judicial sphere. It is worth noticing the following passage from Liyanage12 :

> "If such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the Judges. It is appreciated that the Legislature has no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution."
> 110.1. Liyanage12 is based on the principle of implied limitations on the legislative power. This position is accepted by our own Court in Kesavananda Bharati41 (per Shelat and Grover, JJ.). Nicholas
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> 111. As regards the constitutional position in Australia, it needs to be mentioned that Australia has a Constitution with the rigid demarcation of powers between the legislative and judicial organs of the Government. The Australian Constitution has imperatively separated the three branches of the Government, and has assigned to each, by its own authority the appropriate organ.
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> 112. In Nicholas[60], the High Court of Australia, dealing with the infringement and usurpation of judicial power, held the legislation to be invalid on the ground that it

revised the final judgment of a federal court in breach of separation of powers. It lays down that usurpation occurs when the legislature has exercised judicial power on its own behalf.

Wheeling Bridge

113. The decision of the US Supreme Court in Wheeling Bridge29 deserves a little elaborate consideration since a great deal of reliance has been placed by Mr. Harish Salve on this judgment. The dispute in that case concerned navigation on the Ohio River. In the earlier decision involving the same parties, the U.S. Supreme Court had held the defendant's bridge to be an unlawful structure to the extent that it obstructed navigation on the Ohio River in breach of the federal statutes and thereby obstructing public right of free navigation. The State of Pennsylvania which filed the suit was granted an injunctive relief. The defendant (Wheeling and Belmont Bridge Company) was ordered to remove the bridge, or elevate it to the levels prescribed by statute. Subsequently, Congress enacted legislation by which the bridge was rendered a lawful structure and ships were mandated to be modified so as not to interfere with the bridge.

As the luck would have been, the bridge was destroyed by high winds. The State of Pennsylvania applied for injunction from reconstructing the bridge except in a manner consistent with the order of the court in the previous proceedings which was granted. The company despite the injunction order proceeded to construct the bridge lower than that required by the original court order. The State of Pennsylvania brought the matter again before the court. The defendant relied upon the federal statute which declared the original bridge lawful, and argued that the requirements for a lawful structure were set out therein, rendering the requirements on which the original judgment was based redundant. The question that arose for consideration was whether the statute that overturned the final judgment of the US Supreme Court in the form of injunction in the earlier suit was constitutional? Nelson, J., who delivered the majority opinion of the court, accepted the general proposition that an act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights thereby determined. It was further observed that adjudications upon the private rights of the parties which have passed into judgment, become absolute and it is the duty of the court to enforce it. Nelson, J. held: "But that part of the decree directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree....." Nelson, J., opined that although bridge could still be an obstruction in fact but it was not so in contemplation of the law. Consequently, the court vacated its injunction. Nelson, J. distinguished adjudication upon private rights from adjudication upon public rights and held :

> "In respect to these purely internal streams of a State, the public right of navigation is exclusively under the control and regulation of the state legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the State, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement, nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful." 113.1. The opinion of Nelson, J., which is majority opinion in The Wheeling Bridge29 though maintains the general principle of the inviolability of final judgments pursuant to the separation of powers doctrine but it is made subject to qualification that unlike private rights, public rights do not pass into judgments. In the opinion of Nelson, J., the nature of judicial remedy is relevant; an equitable relief such as injunction is not beyond the reach of the power of the congress but a decree of damages or costs is unaffected by the subsequent law. 113.2. McLean, J., who dissented from the majority opinion, on the other hand, emphasized in Wheeling Bridge29 that the earlier decree was the result of a judicial investigation, founded upon facts ascertained in the course of the hearing and it was strictly a judicial question. The complaint was an obstruction of commerce, by the bridge, to the injury of the complainant, and the court found the fact to be as alleged in the bill.

Following the statement of Chief Justice Marshall that congress could do many things but that it cannot alter a fact, McLean, J. in his opinion stated :

> "The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case. From this view it is at once seen, that congress could not undertake to hear the complaint of Pennsylvania in this case, take testimony or cause it to be taken, examine the surveys and reports of engineers, decide the questions of law which arise on the admission of the testimony, and give the proper and legal effect to the evidence in the final decree. To do this is the appropriate duty of the judicial power. And this is what was done by this court, before the above act of congress was passed. The court held, that the bridge obstructed the navigation of the Ohio River, and that, consequently, it was a nuisance. The act declared the bridge to be a legal structure, and, consequently, that it was not a nuisance. Now, is this a legislative or a judicial act? Whether it be a nuisance or not, depends upon the fact of obstruction; and this would seem to be strictly a judicial question, to be decided on evidence produced by the parties in a case." 113.3. In the minority opinion, McLean. J. declared the act of the Congress inoperative and void and reiterated that decree already passed be carried into effect according to its true intent. 113.4. In another minority opinion in Wheeling Bridge29, Wayne, J., while dissenting with the majority and concurring with McLean J. stated that Congress had no power to interfere with the judgment of the U.S. Supreme Court

> under the pretence of a power to legalize the structure of bridges over the public navigable rivers of the United States, either within the States, or dividing States from each other, or under the commercial powers of Congress to regulate commerce among the States.
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> Clinton Bridge
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> 114. Nelson,J., who delivered majority opinion in Wheeling Bridge29, also delivered opinion of the U.S. Supreme Court in the Clinton Bridge30.

Although in Wheeling Bridge29 a decree had been rendered by the court against the bridge, while in the Clinton Bridge30 the cause was pending undecided, but he followed the majority opinion in Wheeling Bridge29.

Manigault

115. Mr. Harish Salve, learned counsel for the State of Kerala, placed reliance upon Arthur M. Manigault21. In that case, the U.S. Supreme Court followed the principle that interdiction of the statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. While explaining that this power is known as the 'police power', it is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any right under the contracts between the individuals. It is stated that subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary. In such discretion, the courts ordinarily will not interfere with. Dealing with the exposition of law, flowing from some of its previous decisions, the U.S. Supreme Court, observed:

> ".....We see no reason why the same principle should not apply to cases where the state legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right, in one case in improving the navigation of the river, and in the other, in draining its lowlands, and thereby enhancing their value for agricultural purposes." Hodges

116. In Hodges31, the U.S. Supreme Court, following Wheeling Bridge29 held as follows :-

> "In the Wheeling Bridge Case, as in the Clinton Bridge Case, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the Wheeling Bridge Case the bill was filed by the State, although partly in its proprietary capacity as the owner of certain canals and

> railways, the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private." 116.1. Hodges31 was a case where the U.S. Supreme Court dissolved an injunction against the formation of a consolidated school district following legislation which authorised such a consolidation, and yet upheld the judgment in the previous decision making to an award of damages.

Brotherhood of Locomotive Firemen

117. In Brotherhood of Locomotive Firemen23, the U.S. Supreme Court was confronted with the question whether the Arkansas "full-crew" laws specifying a minimum number of employees who must serve as part of a train crew under certain circumstances, violate the commerce clause or the Fourteenth Amendment of the U.S. Constitution. The constitutionality of these Arkansas Laws had been specifically upheld against challenges under the same constitutional provisions in three decisions earlier. However, from the case that reached the U.S. Supreme Court, the District Court found that as a result of economic and technical developments since the last decision on the subject, the statutes were no longer justified as safety measures - the ground on which they had formerly been sustained. The Supreme Court of United States struck down the impugned laws as contrary to the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. Black, J., who delivered the opinion on behalf of the majority, held that the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the commerce clause. The Court said that it was not open for the District Court to place a value on the additional safety in terms of dollars and cents in order to see whether this value as calculated by the Court exceeded the financial cost to the rail roads. The majority view, thus, concluded:

> "Under all the circumstances we see no reason to depart from this Court's previous decisions holding that the Arkansas full-crew laws do not unduly burden interstate commerce or otherwise violate the Constitution. Undoubtedly heated disputes will continue as to the extent to which these laws contribute to safety and other public interests, and the extent to which such contributions are justified by the cost of the additional manpower. These disputes will continue to be worked out in the legislatures and in various forms of collective bargaining between management and the unions. As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry....." Raymond Motor Transportation

118. Two more decisions of the U.S. Supreme Court, one, Raymond Motor Transportation24 and the other, Raymond Kassel25 may now be considered. Raymond Motor Transportation24 was concerned with the question whether administrative regulations of the State of Wisconsin governing

the length and configuration of contracts that may be operated within the state violated the commerce clause. The three-Judge District Court held that the regulations were not unconstitutional on either ground. Upsetting the view of the District Court, Powell, J., who delivered the opinion of the Court first noted the general rule, "..... Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits". Powell, J., then concluded that the challenged regulations violated the commerce clause because they placed a substantial burden on interstate commerce and they cannot be said to make more than most speculative contribution to highway safety.

118.1. Blackmun, J., with whom Brennan, CJ. and Rehnquist, J. concurred, held that if safety justifications were not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce. Blackmun J, also held :

> "Here, the Court does not engage in a balance of policies it does not make a legislative choice. Instead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law." Raymond Kassel

119. In Raymond Kassel25, after recording evidence and conclusion of trial, the District Court applied the standard which was accepted in Raymond Motor Transportation24 and concluded that the state law impermissibly created burden on inter-state commerce. The Court of appeals accepted the District Court's findings and the view. This is how the matter reached the U.S. Supreme Court. Powell, J., who delivered the opinion of the Court in which White, Blackmun and Stevens JJ. joined, observed: "while Supreme Court has been most reluctant to invalidate state regulations that touch upon safety, especially highway safety, constitutionality of such regulations nevertheless depends upon sensitive consideration of weight and nature of state regulatory concern in light of extent of burden imposed on course of interstate commerce". 119.1. Brennan, J., with whom Marshall, J. joined, concurring with the judgment observed : "This Court's heightened deference to the judgments of state law makers in the field of safety is largely attributable to a judicial disinclination to weigh the interest of safety against other societal interests, such as the economic interest in the free flow of commerce....." Plaut

120. The judgment of the US Supreme Court in Plaut[61] on the doctrine of separation of powers is significant and deserves appropriate consideration. In that case, the US Supreme Court was presented with the question whether Section 27A(b) of the Securities Exchange Act, 1934 was violative of the Constitution's separation of powers or the due process clause of the Fifth Amendment to the extent it required Federal Courts to reopen final judgments in private civil actions under Section 10(b) of the Act. Scalia, J., who delivered the majority opinion, referred to the following First Inaugural Address by President Lincoln in which the President explained why the political branches could not, and need not interfere with the judgment :

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in

> any case, upon the parties to a suit, as to the object of that suit . . . . And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice."

120.1. Scalia, J. also referred to the views of Thomas Cooley (a constitutional Scholar) who had said :

> "If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

120.2. Scalia J, observed that the power to analyze a final judgment was "an assumption of judicial power" and, therefore, forbidden. Finality rule was given pre-eminence. This becomes evident from his following observations: "……Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was….." 120.3. In Plaut61, the majority opinion also holds that considerations such as that legislation was motivated by a genuine concern to implement public policy was irrelevant. The majority opinion exposited that prohibition (separation of power) was violated when an individual final judgment is legislatively rescinded for even the best of reasons, such as legislature's genuine conviction (supported by all the professionals in the land) that the judgment was wrong,……." 120.4. The US Supreme Court, thus, by majority declared that Section 27A(b) of the Act was violative of the separation of the powers doctrine.

Summary of Separation of powers doctrine under the Indian Constitution

121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus :

> (i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution.

Constitution has made demarcation, without drawing formal lines between the three organs - legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of

powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs – legislature, executive and judiciary – is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.

(vii) The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are, (i) Does the legislative prescription or legislative direction interfere with the judicial functions? (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided? (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If the answer to (i) to (ii) is in the affirmative and the consideration of aspects noted in question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional.

Analysis of the Mullaperiyar Environmental Protection Forum Judgment (2006 Judgment)

122. In light of the above constitutional principles relating to separation of powers between legislature, executive and judiciary, we shall now examine the constitutional validity of the 2006 (Amendment) Act in its application to and effect on the Mullaperiyar dam. For deciding this question, it is appropriate to first refer to the decision of this Court in Mullaperiyar Environmental Protection Forum1 at some length. That decision was rendered by this Court in a writ petition filed by Mullaperiyar Environment Protection Forum under Article 32 of the Constitution of India and few transferred cases. In that case, the petitioner's claim was that water level in the reservoir cannot be raised from its present level of 136 ft. That was the stand of Kerala as well. According to Kerala, the life of Mullaperiyar dam was fifty years from the date of construction but it had already completed more than hundred years and it had served its useful life. In Kerala's view, it was dangerous to allow raising of water levels beyond 136 ft. and serious consequences could ensue resulting in wiping out of three adjoining districts completely. On the other hand, Tamil Nadu set up the case that as per the report of the Expert Committee constituted by this Court, the water level could be raised upto 142 ft. as an interim measure and on taking certain steps and after execution of the strengthening measure in respect of baby dam, earthen bund and on completion of remaining portion, water level could be allowed to be restored at FRL of 152 ft. Tamil Nadu sought specific direction for raising water level to 142 ft. and after strengthening, to its full level of 152 ft.

122.1. The Court noted the following terms of reference and the task given to the Expert Committee:

> "(a) To study the safety of Mullaperiyar dam located on Periyar river in Kerala with respect to the strengthening of dam carried out by the Government of Tamil Nadu in accordance with the strengthening measures suggested by CWC and to report/advise the Hon'ble Minister of Water Resources on the safety of the dam.
>
> (b) To advise the Hon'ble Minister of Water Resources regarding raising of water level in Mullaperiyar reservoir beyond 136 ft (41.45
>
> m) as a result of strengthening of the dam and its safety as at (a) above.

The Committee will visit the dam to have first-hand information and to assess the safety aspects of the dam. It will hold discussions with the Secretary, Irrigation of the Kerala Government as well as Secretary, PWD, Government of Tamil Nadu with respect to safety of the dam and other related issues." 122.2. Then the Court adverted to the recommendations of the Expert Committee as follows:

> "1. The strengthening measures pertaining to baby dam and the earthen bund, as already suggested by CWC and formulated by the Government of Tamil Nadu, should be carried out at the earliest.
>
> 2. The Government of Kerala should allow the execution of strengthening measures of baby dam, earthen bund and the remaining portion of about 20 m of parapet wall on the main Mullaperiyar dam up to EL 160 ft. (48.77 m) immediately.

3. CWC will finalise the instrumentation for installation at the main dam. In addition, instruments will be installed during strengthening of baby dam, including the earthen bund, so that monitoring of the health of Mullaperiyar dam, baby dam and earthen bund can be done on a continuous basis.

4. The water level in the Mullaperiyar reservoir be raised to a level where the tensile stress in the baby dam does not exceed 2.85 t/m2 (as suggested by Shri Parameswaran Nair, Kerala representative) especially in condition E (full reservoir level with earthquake) as per BIS Code IS 6512-1984 with ah= 0.12 g and analysis as per clauses 3.4.2.3 and 7.3.1 of BIS Code 1893-1984.

5. The committee members discussed the issue of raising of water level above EL 136.00 ft (41.45 m) after studying the analysis of safety of baby dam. Prof. A. Mohanakrishnan, Member of Tamil Nadu Government, opined in the light of para 4 that the water level should be raised up to at least EL 143.00 ft (43.59 m) as the tensile stresses are within the permissible limits. Shri M.K. Parameswaran Nair, Member of Kerala Government did not agree to raise the water level above EL 136.00 ft (41.45 m). However, the Committee after detailed deliberations, has opined that the water level in the Mullaperiyar reservoir be raised to EL 142.00 ft (43.28 m) which will not endanger the safety of the main dam, including spillway, baby dam and earthen bund. The abstracts of the calculations for stress analysis are enclosed as Annexure XIX.

6. This raising of reservoir level up to a level where the tensile stress does not exceed 2.85 t/m2 during the earthquake condition is an interim measure and further raising of water level to the FRL EL 152.00 ft (46.33 m) (original design FRL of the Mullaperiyar reservoir) be studied after the strengthening measures on baby dam are carried out and completed." 122.3 The Court framed the following five questions for consideration:

"1. Whether Section 108 of the States Reorganisation Act, 1956 is unconstitutional?

2. Whether the jurisdiction of this Court is barred in view of Article 262 read with Section 11 of the Inter-State Water Disputes Act, 1956?

3. Whether Article 363 of the Constitution bars the jurisdiction of this Court?

4. Whether disputes are liable to be referred to arbitration?

5. Whether the raising of water level of the reservoir from 136 ft to 142 ft would result in jeopardising the safety of the people and also degradation of the environment?" 122.4 While dealing with question No. 1, the Court, inter alia, held that law making power under Articles 3 and 4 of the Constitution was paramount and it was neither subjected to nor fettered by Article 246 and Lists II and III of the Seventh Schedule.

The Court also held that power of Parliament to make law under Articles 3 and 4 was plenary and traverses over all legislative subjects as are necessary for effectuating a proper reorganization of the states. Accordingly, the Court found no merit in challenge to the validity of Section 108 of the States Reorganisation Act, 1956.

122.5 Dealing with question No. 2, the Court noted that the dispute relating to raising the water level in the Mullaperiyar dam was not a water dispute since the right of Tamil Nadu to divert water from Periyar reservoir to Tamil Nadu for integrated purpose of irrigation or to use the water to generate power or for other uses was not in dispute. It was observed that there was no dispute about the lease granted to Tamil Nadu in 1886 or about supplementary agreements of 1970 and that till 1979 there was no dispute with regard to water level at all. In 1979, the water level was brought down to 136 ft. to facilitate Tamil Nadu to carry out certain strengthening measures suggested by the CWC. The Court, thus, held that safety of the dam on increase of water level to 142 ft. was not the issue hit by Article 262 of the Constitution or the Inter-State River Water Disputes Act, 1956.

122.6 With regard to question No. 3, the Court held that there was no question of the jurisdiction of this Court being barred as Article 363 has no application to an agreement such as 1886 Lease Agreement which is an ordinary agreement of lease and is not a political arrangement.

122.7 On question No. 4, the Court observed that present dispute was not about the rights, powers and obligations or interpretation of any part of the agreement but the controversy was confined to whether water level in the reservoir could be increased to 142 ft. for which there was already a report by an Expert Committee.

122.8 For consideration of question No. 5, the Court carefully referred to the report of the Expert Committee with regard to safety of the dam on water level being raised to 142 ft. In para 30 of the judgment, this Court held as under:

“30. Regarding the issue as to the safety of the dam on water level being raised to 142 ft from the present level of 136 ft, the various reports have examined the safety angle in-depth including the viewpoint of earthquake resistance. The apprehensions have been found to be baseless. In fact, the reports suggest an obstructionist attitude on the part of the State of Kerala. The Expert Committee was comprised of independent officers. Seismic forces as per the provisions were taken into account and structural designs made accordingly while carrying out strengthening measures. The final report of the Committee set up by the Ministry of Water Resources, Government of India to study the water safety aspect of the dam and raising the water level has examined the matter in detail. The Chairman of the Committee was a Member (D&R) of the Central Water Commission, two Chief Engineers of the Central Water Commission, Director, Dam Safety, Government of Madhya Pradesh and retired Engineer-in-Chief, U.P. besides two representatives of the Governments of Tamil

Nadu and Kerala, were members of the Committee. All appended their signatures except the representative of the Kerala Government. The summary of the results of stability analysis of Mullaperiyar baby dam contains a note which shows that the permissible tensile strength was masonry as per the specifications mentioned therein based on test conducted by CSMRS, Delhi on the time and agreed by all committee members including the Kerala representative in the meeting of the Committee held on 9/10-2-2001. It also shows the various strengthening measures suggested by CWC having been completed by the Tamil Nadu PWD on the dam including providing of RCC backing to the dam. The report also suggests that the parapet wall of baby dam and main dam have been raised to 160 ft (48.77 m) except for a 20 m stretch on the main dam due to denial of permission by the Government of Kerala. Some other works as stated therein were not allowed to be carried on by the State of Kerala. The report of CWC after inspection of the main dam, the galleries, baby dam, earthen bund and spillway, concludes that the dam is safe and no excessive seepage is seen and that Mullaperiyar dam has been recently strengthened. There are no visible cracks that have occurred in the body of the dam and seepage measurements indicate no cracks in the upstream side of the dam. Our attention has also been drawn to various documents and drawings including cross-sections of the Periyar dam to demonstrate the strengthening measures. Further, it is pertinent to note that the dam immediately in line after Mullaperiyar dam is Idukki dam. It is the case of the State of Kerala that despite the "copious rain", the Idukki reservoir is not filled to its capacity, while the capacity of the reservoir is 70.500 TMC, it was filled only to the extent of 57.365 TMC. This also shows that assuming the worst happens, more than 11 TMC water would be taken by Idukki dam. The Deputy Director, Dam Safety, Monitoring Directorate, Central Water Commission, Ministry of Water Resources in the affidavit of April 2004 has, inter alia, stated that during the recent earthquake mentioned by the Kerala Government in its affidavit, no damage to the dam was reported by CWC officers who inspected the dam. The experts having reported about the safety of the dam and the Kerala Government having adopted an obstructionist approach, cannot now be permitted to take shelter under the plea that these are disputed questions of fact. There is no report to suggest that the safety of the dam would be jeopardised if the water level is raised for the present to 142 ft. The report is to the contrary." (emphasis supplied by us) 122.9 In view of the above consideration, this Court restrained Kerala and its officers from causing any obstruction from carrying out further strengthening measures by Tamil Nadu as suggested by CWC and Tamil Nadu was permitted to increase water level of Mullaperiyar dam to 142 ft. 122.10. The judgment in Mullaperiyar Environmental Protection Forum1 was pronounced on 27.02.2006.

123. On 14/15.03.2006, a special session of the Kerala Legislative Assembly was convened and a Bill was introduced to amend the 2003 Act, which was passed on 15.03.2006. On 18.03.2006, the Bill received the assent of the Governor and became an enactment with effect from that day.

> 124. It is, thus, seen that one of the issues that directly fell for consideration before this Court in Mullaperiyar Environmental Protection Forum1 was whether the raising of water level of the reservoir from 136 ft.

to 142 ft. would result in jeopardising the safety of the people? From the various reports including the report of the Expert Committee, the Court held that apprehensions (wiping out of three districts) of Kerala were found to be baseless in these reports and there was nothing to suggest that the safety of dam would be jeopardised if the water level was raised to 142 ft. The judgment records the finding regarding the safety of the dam on water level being raised to 142 ft. from the present level of 136 ft., in these words: "the various reports have examined the safety angle in-depth including the viewpoint of earthquake resistance. The apprehensions have been found to be baseless." and, "The report of CWC after inspection of main dam, the galleries, baby dam, earthen bund and spillway, concludes that the dam is safe ..... ."

125. For these reasons, and others contained in the judgment, this Court reached to the firm conclusion that raising the water level from 136 ft. to 142 ft. would not jeopardise the safety of the dam in any manner. Consequently, this Court restrained Kerala and its officers from causing any obstruction from carrying out further strengthening measures by Tamil Nadu as suggested by CWC and Tamil Nadu was permitted to increase water level of Mullaperiyar dam to 142 ft.

126. The decision of this Court on 27.02.2006 in the Mullaperiyar Environmental Protection Forum1 case was the result of judicial investigation, founded upon facts ascertained in the course of hearing. It was strictly a judicial question. The claim of the State of Kerala was that water level cannot be raised from its present level of 136 ft. On the other hand, Tamil Nadu sought direction for raising the water level to 142 ft. and, after strengthening, to its full level of 152 ft. The obstruction by Kerala to the water level in the Mullaperiyar dam being raised to 142 ft. on the ground of safety was found untenable, and, in its judgment, this Court so pronounced.

Whether 2006 (Amendment) Act in its application to Mullaperiyar dam amounts to usurpation of judicial power

127. The question now is: Does the impugned legislation amount to usurpation of judicial power and whether it is violative of the rule of law?

128. As noted in the earlier part of the judgment, the 2003 Act was enacted to consolidate and amend the laws relating to construction of irrigation works, conservation and distribution of water for the purpose of irrigation in the State of Kerala and other incidental matters. Section 2(b) defines "Authority" which means the Kerala Dam Safety Authority constituted under Section 57. Section 2(k) defines "distributory system" which means and includes, inter alia, all works, structures and appliances connected with the distribution of water for irrigation. Section 2(w) defines "irrigation work" which, inter alia, includes all reservoirs which may be used for the supply, collection, storage or retention of water for agricultural purposes and reservoirs installed to supply water. Section 2(aq) defines "water course" which means a river, stream, springs, channel, lake or any natural collection of water other than in a private land and includes any tributary or branch of any river, stream,

springs or channel. Section 3 starts with non obstante clause and provides that all water courses and all water in such water courses in the State shall be the property of the Government (Government of Kerala), and the Government shall be entitled to conserve and regulate the use of such water courses and the water in all those water courses for the purposes of irrigation and the generation of electricity and for matters connected therewith or for both. Section 4 makes provision for regulation on abstraction of water from water course. Section 5 provides for regulation on construction of reservoirs, anicut, etc. Section 30 deals with distribution of water to another State or Union Territory. It is provided in Section 30 that no water from a water course in the State shall be distributed to any other State or Union Territory, except in accordance with an agreement between the State Government and the Government of such other State or the Union Territory in terms of a resolution to that effect passed by the Legislative Assembly of the State. Section 57 provides for constitution of Dam Safety Authority for the purpose of surveillance, inspection and advice on maintenance of dams situated within the territory of the State. For the purposes of this section "dam" means any artificial barrier including appurtenant work constructed across a river or tributaries thereof with a view to impound or divert water for irrigation, drinking water supply or for any other purpose. Section 62 spells out the functions of the Authority. This section says that notwithstanding anything contained in any treaty, agreement or instrument, the Dam Safety Authority, inter alia, has the functions (1) to arrange for the safety evaluation of all dams in the State; (2) to advice Government to suspend the functioning of any dam if the public safety so demands; (3) to examine the precariousness of any dam in public interest and to submit its recommendations including decommissioning of dam to the Government; (4) to inspect and advice the Government on advisability of raising or lowering of the reservoir level of any dam taking into account the safety of the dam concerned and the environmental aspects involved; and (5) to inspect and advice the Government on the sustainability of any dam to hold the water in the reservoir thereof. Sub-section (3) of Section 62 provides that where the advice or recommendations of the Authority relate to a dam owned or controlled by person other than the Government, it shall be lawful for the Government to issue orders or directions as it deems fit, requiring any person having possession or control of such dam to take such measures or to do such things within such time as may be specified therein to give effect to the advice or recommendations, and such person shall be bound to comply with the orders and directions issued by the Government.

129. Mr. Harish N. Salve, learned senior counsel for Kerala argued that these provisions were not taken into consideration by this Court in its judgment in Mullaperiyar Environmental Protection Forum1 and, therefore, judgment of this Court is per incuriam.

130. We are not persuaded by this argument at all. 2003 Act was neither referred to nor relied upon by Kerala at the time of hearing in Mullaperiyar Environmental Protection Forum1. It was rightly so because 2003 Act had no direct bearing on the issues which were under consideration. Section 3 refers to water courses and the definition of "water course" in Section 2 (aq) does not include a dam such as Mullaperiyar dam. Kerala Dam Safety Authority was not in place when the arguments in Mullaperiyar Environmental Protection Forum1 were concluded. We are informed that Dam Safety Authority came to be constituted on 18.2.2006, i.e., few days before the judgment was pronounced by this Court in that case. We have carefully considered the provisions of amended 2003 Act and, in our view, in whatever way 2003 Act is seen, there was no impediment for this Court to consider and

decide the question whether raising the water level from 136 ft. to 142 ft. would jeopardize the safety of the dam. This Court answered the question based on the materials on record, in the negative. The judgment of this Court in Mullaperiyar Environmental Protection Forum1 by no stretch of imagination can be termed as per incuriam. The judgment wholly and squarely binds the parties including Kerala.

131. The Kerala legislature amended the 2003 Act by 2006 (Amendment) Act. By the 2006 (Amendment) Act, in Section 2, clauses (ja) and (jb) defining "custodian" and "dam" were inserted after clause (j). Clause (ala) defining "scheduled dam" was also inserted after clause (al). In sub-section (1) of Section 57 of the principal Act, the words "surveillance, inspection" were substituted by "ensuring the safety and security". The explanation in sub-section (2) of Section 57 was deleted. Section 62 of the principal Act was substituted by new Section 62. The new Section 62, inter alia, empowers the Dam Safety Authority with following functions:

"(1) xxx xxx xxx

(a) to evaluate the safety and security of all dams in the State considering among other factors, the age of the structures, geological and seismic factors, degeneration or degradation caused over time or otherwise;

(b) to (d) xxx xxx xxx

(e) to direct the custodian to suspend the functioning of any dam, to decommission any dam or restrict the functioning of any dam if public safety or threat to human life or property so requires;

(f) to advise the Government, custodian, or other agencies about policies and procedures to be followed in site investigation, design, construction, operation and maintenance of dams;

(g) to conduct studies, inspect and advise the custodian or any other agency on the advisability of raising or lowering of the maximum water level or full reservoir level of any dam, not being a scheduled dam, taking into account the safety of the dam concerned;

(h) to (j) xxx xxx xxx"

132. The functions conferred on the Dam Safety Authority under new Section 62 override the judgment, decree or order of any Court or any treaty, agreement, contract, instrument or any other document. Sub-section (3) of new Section 62 provides that where a direction is issued by the Dam Safety Authority under sub-Section (1), the custodian or any other agency to whom it is directed shall take immediate measures within the time frame stipulated by the Authority or do or refrain from doing such things within such time frame as may be stipulated and to comply with the directions of the Authority. After Section 62, new Sections 62A and 62B have been added. The details of the dams which are endangered on account of their age, degeneration, degradation, structural or other impediments are specified in the Second Schedule. Sub-sections (2) and (3) to new Section 62A are overriding provisions, which read as under:

"(1) xxx xxx xxx (2) Notwithstanding anything contained in any other law or in any judgment, decree, order or direction of any court, or any treaty, contract, agreement, instrument or document, no Government, custodian or any other agency shall increase, augment, add to or expand the Full Reservoir Level Fixed or in any other way do or omit to do any act with a view to increase the water level fixed and set out in THE SECOND SCHEDULE. Such level shall not be altered except in accordance with the provisions of this Act in respect of any Scheduled dam.

(3) Notwithstanding anything contained in any other law, or in any judgment, decree, order, direction of any court or any treaty, contract, agreement, instrument or document, any Government, custodian or any other agency intending to, or having secured any right under any treaty, contract, agreement, instrument or document or by any other means to increase, augment, add to or expand, the storage capacity or increase the Full Reservoir Level Fixed of any Scheduled dam, shall not do any act or work for such purpose without seeking prior consent in writing of the Authority and without obtaining an order permitting such work by the Authority.

(4) and (5) xxx xxx xxx"

133. Section 62B gives powers of a Civil Court to the Dam Safety Authority in respect of the matters specified therein while dealing with applications for consent in writing for increasing, augmenting, adding to or expanding the storage capacity or the water spread area or for increasing of Maximum Water Level or Full Reservoir Level fixed for Scheduled dams. Section 68A bars the jurisdiction of Civil Court from settling, deciding or dealing with any question of fact or to determine any matter which under the 2003 Act, as amended by 2006 (Amendment) Act, is required to be settled, decided or dealt with or to be determined by the Authority under the Act. In Second Schedule, at item No.1 is the subject "Mullaperiyar Dam" for which FRL is fixed at 41.45 meter (136 ft.) from the deepest point of the level of Periyar river at the site of the main dam.

134. Tamil Nadu says that 2006 (Amendment) Act to the extent it applies to Mullaperiyar dam seeks to nullify the judgment of this Court in Mullaperiyar Environmental Protection Forum1 by declaring the dam to be endangered and by fixing the height of the water level at 136 ft.; that It authorizes the Dam Safety Authority to disregard the judgment and to adjudge for itself whether to allow raising of water level and Section 62(1)(e) authorizes the Dam Safety Authority to order inter alia decommissioning of the dam despite the finding of safety recorded by this Court in the 2006 judgment and, thus, the 2006 (Amendment) Act is unconstitutional being violative of separation of powers doctrine and consequently rule of law.

135. On the other hand, the argument of Mr. Harish N. Salve, learned senior counsel for Kerala, is that the legislature of every State has not just the power but the obligation to take appropriate legislative measures to ensure the safety and security of its residents. Where the legislature of a State is satisfied that there is a need to curtail the use or storage of a water reservoir to protect its citizenry and elects to enact legislation as a precautionary measure, the legislation cannot be said to be in excess of the legislative competence of the State if it relates to reservoir and dam within the legislating State. Kerala legislature has imposed precautionary measures by placing pro tem restrictions on the storage level of the dams mentioned in the Second Schedule read with Section

62A(2) of the 2006 (Amendment) Act and the said restrictions are based on the legislative wisdom of the Kerala legislature that these dams are endangered on account of their age, degeneration, degradation, structural or other impediments. While adjudicating upon the constitutional validity, Mr. Harish Salve argues that the Court must proceed on the premise that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to the problems made manifest by its experience and are based on adequate grounds.

136. Mr. Harish N. Salve, learned senior counsel for Kerala heavily relies upon 'precautionary principle' and 'public trust doctrine' and argues that Kerala legislature was competent to override the contracts and regulate safety of the Mullaperiyar dam situated within its territory across river Periyar. His submission is that the State as sovereign retains continuing supervisory control over navigable waters and underlying beds. It is his submission that the State has a duty of 'continuing supervision' even after such rights have been granted. In this regard strong reliance is placed by him on Pfizer Animal Health27.

137. In Pfizer Animal Health27, the Court of First Instance of European Communities (Third Chamber) was concerned with the legality and validity of the regulations which, inter alia, banned particular use of the substance in question. Pfizer argued that it was directly concerned by the contested regulation as it withdraws authorization of Virginiamycin. The counsel for the European Union argued that the regulations were enacted to general application which was applicable to objectively determined situations and that they ban the particular use of the substance in question, whether they are marketed by Pfizer or by any one else under a different name. The Court observed that for the purpose of taking preventive action, to wait for the adverse effects of the use of the products was not required.

138. Dealing with precautionary principle, the Court made these observations:

> "First, it must be borne in mind that, when the precautionary principle is applied, the fact that there is scientific uncertainty and that it is impossible to carry out a full risk assessment in the time available does not prevent the competent public authority from taking preventive protective measures if such measures appear essential, regard being had to the level of risk to human health which the public authority has decided is the critical threshold above which it is necessary to take preventive measures.
>
> .....
>
> The precautionary principle allows the competent public authority to take, on a provisional basis, preventive protective measures on what is as yet an incomplete scientific basis, pending the availability of additional scientific evidence.
>
> ..... It is not for the Court to assess the merits of either of the scientific points of view argued before it and to substitute its assessment for that of the Community institutions, on which the Treaty confers sole responsibility in that regard.

.....”

139. Kerala has also relied upon the article, “The Public Trust Doctrine in the Water Rights Context” by Roderick E. Walston22. The author has culled out following four principles of the Public Trust doctrine:

> “(1) The state as sovereign “retains continuing supervisory control” over navigable waters and underlying beds;
>
> (2) The legislature, either directly or through the water rights agency, has the right to grant usufructuary water rights even though such rights will “not promote, and may unavoidably harm, the trust uses at the sources stream;” (3) The state has the “affirmative duty” to take the public trust into account in planning and allocating water resources; and (4) The state has a “duty of continuing supervision” over water rights even after such rights have been granted.” 139.1 Public trust doctrine, Roderick E. Walston says, is regarded by some as an exercise of sovereign state regulatory, analogous to the police power.
>
> 140. In our opinion, the principle of ‘public trust doctrine’ in the context of water rights culled out by Roderick E. Walston or the ‘precautionary principle’ explained in Pfizer Animal Health27 can hardly be doubted but these principles have no application in the context of safety of Mullaperiyar dam on raising the water level from the present level to 142 ft., which was directly in issue and has been expressly, categorically and unambiguously determined by the Court. This Court has found - supported by the Expert Committee Reports - that the safety of the subject dam is not at all jeopardized if the water level is raised from the present level to 142 ft. Kerala, which is contesting party, by applying ‘public trust doctrine’ or ‘precautionary measure’, cannot through legislation do an act in conflict with the judgment of the highest Court which has attained finality. If a legislation is found to have breached the established constitutional limitation such as separation of powers, it has to go and cannot be allowed to remain.

141. It is true that the State’s sovereign interests provide the foundation of the public trust doctrine but the judicial function is also a very important sovereign function of the State and the foundation of the rule of law. The legislature cannot by invoking ‘public trust doctrine’ or ‘precautionary principle’ indirectly control the action of the Courts and directly or indirectly set aside the authoritative and binding finding of fact by the Court, particularly, in situations where the executive branch (Government of the State) was a party in the litigation and the final judgment was delivered after hearing them.

142. 2006 (Amendment) Act in its application to and effect on the Mullaperiyar dam seeks to attain the following:

(a) It substitutes Section 62 with a new provision whereby, notwithstanding the judgment of this Court and notwithstanding anything contained in any treaty, contract, 1886 Lease Agreement and 1970 supplemental agreements, the function of evaluation of safety of the Mullaperiyar dam and the power to issue directions to Tamil Nadu as custodian are conferred upon Dam Safety Authority;

(b) the Dam Safety Authority is empowered, inter alia, to restrict the functioning of Mullaperiyar dam and/or to conduct studies on the advisability of raising or lowering of the maximum water level or the full reservoir level;

(c) Mullaperiyar dam is considered by Kerala legislature to be endangered and by virtue of Section 62(A), it takes away the right of Tamil Nadu to increase, expand the FRL or in any manner increase the water level as set out in the Second Schedule except in accordance with the provisions of the Act;

(d) under Section 62A(4), Tamil Nadu as custodian has to submit an application to the Dam Safety Authority for its prior consent for the increase in the water level;

(e) it takes away all rights of Tamil Nadu including the right which has passed into judgment of this Court to increase the water level;

(f) the Dams Safety Authority has power to order de-commissioning of the Mullaperiyar dam.

143. This Court in Mullaperiyar Environmental Protection Forum1, after hearing the State of Kerala, was not persuaded by Kerala's argument that Mullaperiyar dam was unsafe or storage of water in that dam cannot be increased. Rather, it permitted Tamil Nadu to increase the present water level from 136 ft. to 142 ft. and restrained Kerala from interfering in Tamil Nadu's right in increasing the water level in Mullaperiyar dam to 142 ft. Thus, a judgment has been given by this court in contest between the two States in respect of safety of Mullaperiyar dam for raising water level to 142 ft. The essential element of the judicial function is the decision of a dispute actually arising between the parties and brought before the court. Necessarily, such decision must be binding upon the parties and enforceable according to the decision. A plain and simple judicial decision on fact cannot be altered by a legislative decision by employing doctrines or principles such as 'public trust doctrine', 'precautionary principle' 'larger safety principle' and, 'competence of the State legislature to override agreements between the two States'. The Constitutional principle that the legislature can render judicial decision ineffective by enacting validating law within its legislative field fundamentally altering or changing its character retrospectively has no application where a judicial decision has been rendered by recording a finding of fact. Under the pretence of power, the legislature, cannot neutralize the effect of the judgment given after ascertainment of fact by means of evidence/materials placed by the parties to the dispute. A decision which disposes of the matter by giving findings upon the facts is not open to change by legislature. A final judgment, once rendered, operates and remains in force until altered by the court in appropriate proceedings.

144. 2006 (Amendment) Act plainly seeks to nullify the judgment of this court which is constitutionally impermissible. Moreover, it is not disputed by Kerala that 2006 (Amendment) Act is not a validation enactment. Since the impugned law is not a validating law, it is not required to inquire whether in making the validation the legislature has removed the defect which the Court has found in existing law. The 2006 (Amendment) Act in its application to and effect on Mullaperiyar dam is a legislation other than substantially legislative as it is aimed at nullifying the prior and authoritative decision of this Court. The nub of the infringement consists in Kerala legislator's revising the final judgment of this Court in utter disregard of the constitutional principle that the revision of such final judgment must remain exclusively within the discretion of the court.

145. Section 62A declares the dam to be endangered. The Second Schedule appended to the Act fixes the height of the water level at 136 ft. though this Court in its judgment had declared Mullaperiyar dam safe and permitted the increase of the water level to 142 ft. Moreover, the 2006 (Amendment) Act authorises the Dam Safety Authority to adjudge its safety to allow raising of water level. The provision is in direct disregard of the judgment of this Court. Section 62A also freezes all work on the dam allowed by this Court in its judgment dated 27.2.2006. In our opinion, by 2006 (Amendment) Act, the Kerala legislature has overturned a final judgment in the interest of its own executive Government. The impugned law amounts to reversal of the judgment of this Court which determines directly the question of safety of Mullaperiyar dam for raising water level to 142 ft. and whereunder Tamil Nadu's legal right has been determined.

146. On behalf of Kerala, it is strenuously argued by Mr. Harish Salve that right to safety of the people being a public right could not have passed into 2006 judgment of this court. In this regard, heavy reliance is placed on the majority decision of the Wheeling Bridge29. Firstly, public right qualification in Wheeling Bridge29 has no application in the present case as there is a critical difference between the provisions impugned before us and the provisions which were impugned before US Supreme Court in Wheeling Bridge29. The principle question before the US Supreme Court in Wheeling Bridge29 was whether or not the compact could operate as a restriction upon the power of courts under the Constitution to regulate commerce among several States. In response to the argument urged before it that the Congress cannot have the effect to annul the judgment of the court already rendered or the rights determined thereby was accepted as a general proposition but this proposition was held not applicable in the matters of adjudication upon the public rights. In our view, a legislation violating the separation of powers principle cannot be saved by carving out an exception that the legislature has regulated a public right. We think that the act of legislature designed to achieve a legitimate regulatory measure does not grant constitutional immunity to such law enacted in violation of separation of powers principle or in other words, rule of law. Once a judicial decision on ascertainment of a particular fact achieves finality, we are afraid the legislature cannot reopen such final judgment directly or indirectly. In such cases, the courts, if brought before them, may reopen such cases in exercise of their own discretion.

147. In our view, Wheeling Bridge29 qualification by the majority decision of U.S. Supreme Court cannot be read to permit the actual revision of the final judgment by the legislature. If Wheeling Bridge29 lays down the proposition that a judgment declaring a public right may be annulled by subsequent legislation as contended by Mr. Harish Salve, then we say, as we must, that we are not

persuaded to accept such proposition of majority judgment in Wheeling Bridge29. The two separate opinions in Wheeling Bridge29 one by McLean J. and the other by Wayne J. - though in minority- also did not accept such proposition.

148. The above discussion must also answer the argument of Mr. Harish Salve that rules of inter partes litigation do not determine the obligation of the State for safety of its people. We do not think it is necessary to consider the opinion of Weeramantry, J. in Gobcikovo-Nagymaros Project (ICJ) in detail. The stress laid by Weeramantry, J. is that where issue of serious or catastrophic environmental danger arises, the Court must look beyond inter partes adversarial procedures.

149. It is true that safety of dam is an aspect which can change from time to time in different circumstances but then the circumstances have to be shown based on which it becomes necessary to make departure from the earlier finding. It is always open to any of the parties to approach the court and apply for re-assessing the safety aspect but absent change in circumstances, factual determination in the earlier proceedings even on the questions such as safety of dam binds the parties. If the circumstances have changed which necessitates a re-look on the aspect of safety, the Court itself may exercise its discretion to reopen such case but legislative abrogation of judgment for even the very best of reasons and genuine concern for public safety does not clothe the legislature to rescind the judgment of the court by a legislation.

150. The contention of Mr. Harish Salve that by declaring dam unsafe, the legislature has not rendered any finding of fact; it deems dam unsafe and sets up an Authority to regulate it, is noted to be rejected. What has been found as a fact by judicial determination cannot be declared otherwise by applying legal fiction. We are, however, persuaded to accept the submission of Mr. Vinod Bobde, learned senior counsel for Tamil Nadu that the fact that the Mullaperiyar dam is safe was found by this Court and that finding of fact can never be deemed to be imaginary by a legal fiction which then proceeds to deem the opposite to be real, viz., that the dam is endangered. This is not a matter of legislative policy as it is being made out to be, rather in our opinion, it is incursion in the judicial process and functions of judicial organ. The declaration in Section 62A read with item No. 1 of the Second Schedule leaves no manner of doubt that the enactment is intended to reach the question decided by the Court.

151. The question whether or not the legislature has usurped the judicial power or enacted a law in breach of separation of powers principle would depend on facts of each case after considering the real effect of law on a judgment or a judicial proceeding. One of the tests for determining whether a judgment is nullified is to see whether the law and the judgment are inconsistent and irreconcilable so that both cannot stand together. In what we have already discussed above, it is abundantly clear that on the one hand there is a finding of fact determined by this Court on hearing the parties on the basis of the evidence/materials placed on record in the judgment of this Court in Mullaperiyar Environmental Protection Forum1 and on the other in 2006 (Amendment) Act, the Kerala legislature has declared the dam being an endangered one and fixed the water level in the dam at 136 ft. If the judgment of this Court in Mullaperiyar Environmental Protection Forum1 and the 2006 (Amendment) Act are placed side by side insofar as safety of the Mullaperiyar dam for raising the water level from 136 ft. to 142 ft. is concerned, it is obvious that the judgment of this Court and the

law enacted by Kerala State legislature cannot stand together and they are irreconcilable and inconsistent. The impugned law is a classic case of nullification of a judgment simpliciter, as in the judgment of this Court the question of safety of dam was determined on the basis of materials placed before it and not on the interpretation of any existing law and there was no occasion for the legislature to amend the law by altering the basis on which the judgment was founded. When the impugned law is not a validation law, there is no question of the legislature removing the defect, as the Court has not found any vice in the existing law and declared such law to be bad.

152. There is yet another facet that in federal disputes, the legislature (Parliament and State legislatures) cannot be judge in their own cause in the case of any dispute with another State. The rule of law which is basic feature of our Constitution forbids the Union and the States from deciding, by law, a dispute between two States or between the Union and one or more States. If this was permitted under the Constitution, the Union and the States which have any dispute between them inter se would enact law establishing its claim or right against the other and that would lead to contradictory and irreconcilable laws. The Constitution makers in order to obviate any likelihood of contradictory and irreconcilable laws being enacted has provided for independent adjudication of federal disputes. Article 131 of the Constitution confers original jurisdiction upon this Court in relation to the disputes between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States insofar as dispute involves any question on which the existence or extent of a legal right depends. The proviso appended to Article 131 carves out an exception to the jurisdiction of this Court to a dispute arising out of treaty, agreement, covenant, engagement, sanad or other similar instrument which have been entered into or executed before the commencement of the Constitution and continues in operation after such commencement, which are political in nature. In relation to dispute relating to waters of inter-State river or river valleys, Article 262 provides for creation of tribunal or forum for their adjudication. In federal disputes, Parliament or State legislatures by law, if seek to decide a dispute between the two States or between the Union and one or more States directly or indirectly, the adjudicatory mechanism provided in Articles 131 and 262 of the Constitution would be rendered nugatory and, therefore, such legislation cannot be constitutionally countenanced being violative of separation of powers doctrine.

153. Mr. Harish Salve, learned senior counsel is right in his submission that a legislation can never be challenged on the principles of res judicata and that it binds a party and not the legislature. The question here is not that the 2006 (Amendment) Act is unconstitutional on the ground of res judicata but the question is, when a categorical finding has been recorded by this Court in the earlier judgment that the dam is safe for raising the water level to 142 ft. and permitted the water lever of the dam being raised to 142 ft. and that judgment has become final and binding between the parties, has the Kerala legislature infringed the separation of powers doctrine in enacting such law? In what has already been discussed above, the answer to the question has to be in the affirmative and we hold so.

154. Where a dispute between two States has already been adjudicated upon by this Court, which it is empowered to deal with, any unilateral law enacted by one of the parties that results in overturning the final judgment is bad not because it is affected by the principles of res judicata but

because it infringes the doctrine of separation of powers and rule of law, as by such law, the legislature has clearly usurped the judicial power.

Res-judicata

155. It is true that 2006 judgment was rendered in exercise of the jurisdiction of this Court under Article 32 of the Constitution and the petitions which were transferred to this Court under Article 139A but to say that such judgment does not bind this Court while deciding the present suit, which confers exclusive jurisdiction upon it, is not correct. The earlier decision of this Court by no stretch of imagination can be regarded as a judgment rendered without jurisdiction. A finding recorded by this Court in the proceedings under Article 32 is as effective and final as in any other proceedings.

156. The rule of res judicata is not merely a technical rule but it is based on high public policy. The rule embodies a principle of public policy, which in turn, is an essential part of the rule of law. In Duchess of Kingston[62], the House of Lords (in the opinion of Sir William de Grey) has observed: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose."

157. Corpus Juris explains that res judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation; and the other, the hardship on the individual that he should be vexed twice for the same cause.

158. In Sheoparsan Singh[63], Sir Lawrence Jenkins noted the statement of law declared by Lord Coke, 'interest reipublica ut sit finis litium,' otherwise great oppression might be done under colour and pretence of law. – (6 Coke, 9A.)

159. In Daryao[64], P.B. Gajendragadkar, J. while explaining the rule of res judicata stated that on general considerations of public policy there seems to be no reason why rule of res judicata should be treated as inadmissible or irrelevant while dealing with the petitions filed under Article 32 of the Constitution. P.B. Gajendragadkar, J. referred to earlier decision of this Court in M.S.M. Sharma[65] wherein the application of the rule of res judicata to a petition filed under Article 32 was considered and it was observed that the question determined by the previous decision of this Court cannot be reopened and must govern the rights and obligations of the parties which are subsequently the same.

160. In Gulab Chand Chhotalal Parikh[66], this Court stated that a decision in a writ petition is res judicata in a subsequent suit.

161. In Nanak Singh[67] the question whether the decision in a writ petition operates as res judicata in a subsequent suit filed on the same cause of action has been settled. In Nanak Singh67, this court observed that there is no good reason to preclude decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and, thus, to give limited effect to the principle of finality of decision after full contest.

162. Nanak Singh67 has been followed by a three Judge Bench of this Court in Bua Das Kaushal[68]. In our view, the rule of res judicata which is founded on public policy prevents not only a new decision in the subsequent suit but also prevents new investigation. It prevents the defendant from setting up a plea in a subsequent suit which was decided between the parties in the previous proceedings. The legal position with regard to rule of res judicata is fairly well-settled that the decision on a matter in controversy in writ proceeding (Article 226 or Article 32 of the Constitution) operates as res judicata in subsequent suit on the same matters in controversy between the same parties. For the applicability of rule of res judicata it is not necessary that the decision in the previous suit must be the decision in the suit so as to operate as res judicata in a subsequent suit. A decision in previous proceeding, like under Article 32 or Article 226 of the Constitution, which is not a suit, will be binding on the parties in the subsequent suit on the principle of res judicata.

163. For the applicability of rule of res judicata, the important thing that must be seen is that the matter was directly and substantially in issue in the previous proceeding and a decision has been given by the Court on that issue. A decision on issue of fact in the previous proceeding – such proceeding may not be in the nature of suit – constitutes res judicata in the subsequent suit.

164. In light of the above legal position, if the 2006 judgment is seen, it becomes apparent that after considering the contentions of the parties and examining the reports of Expert Committee, this Court posed the issue for determination about the safety of the dam to increase the water level to 142 ft. and came to a categorical finding that the dam was safe for raising the water level to 142 ft. and, accordingly, in the concluding paragraph the Court disposed of the writ petition and the connected matters by permitting the water level of Mullaperiyar dam being raised to 142 ft. and also permitted further strengthening of the dam as per the report of the Expert Committee appointed by the CWC. The review petition filed against the said decision was dismissed by this Court on 27.7.2006. The 2006 judgment having become final and binding, the issues decided in the said proceedings definitely operate as res judicata in the suit filed under Article 131 of the Constitution.

165. Shri Harish Salve, learned senior counsel for Kerala, placed reliance upon the decision of this Court in N.D. Jayal[69]. In N.D. Jayal69 Dharmadhikari, J. made general observations on the dam safety aspect that plea like res judicata on the earlier decisions passed by the Supreme Court cannot be allowed to be raised. The observations made by Dharmadhikari, J. in N.D. Jayal69 have to be read as an exception to the res judicata rule in the matters where, by their very nature, the factual situation has drastically changed in course of time. If substantial changes in the circumstances occur and such circumstances are shown to the Court necessitating departure from the earlier finding on the issue of safety, the Court can be approached and in that event the Court itself may exercise its discretion to reopen the safety aspect having regard to the drastic change in circumstances or in

emergent situation as to the safety of dam. In our view, a judicial decision, having achieved finality, becomes the last word and can be reopened in the changed circumstances by that Court alone and no one else.

166. On behalf of Kerala, it is contended that the jurisdiction of this Court under Article 32 of the Constitution for enforcement of the fundamental rights conferred by Part III of the Constitution is ousted or excluded in respect of disputes between two or more States: since such disputes fall within the ambit of the original jurisdiction of this Court under Article 131 of the Constitution or jurisdiction of a tribunal constituted under the provisions of Inter-State River Water Disputes Act, 1956 read with the provisions of Article 262 of the Constitution. Thus, it was submitted that the 2006 judgment is not binding and that the rule of res judicata can hardly be attracted in this situation.

167. We are unable to accept the submission of the learned senior counsel for Kerala. The label of jurisdiction exercised by this Court is not material for applicability of principles of res judicata if the matter in issue in the subsequent suit has already been concluded by the earlier decision of this Court between the same parties. The 2006 judgment was the result of judicial investigation, founded upon facts ascertained in the course of hearing. The plea of lack of jurisdiction of this Court was taken in the earlier proceedings on both the grounds, viz., (1) whether the jurisdiction of this Court is barred in view of Article 262 read with Section 11 of the Inter-State River Water Disputes Act, 1956, and (2) whether Article 363 of the Constitution bars the jurisdiction of this Court. On both these questions the findings were recorded against Kerala. It is too much for Kerala to say that the 2006 judgment is without jurisdiction and not binding.

168. The rule of res judicata is articulated in Section 11[70] of the Code of Civil Procedure.

169. Explanations VII and VIII were inserted in the above provision by Code of Civil Procedure (Amendment) Act, 1976 w.e.f. 1.2.1977. Explanation VIII in this regard is quite relevant. The principles of res judicata, thus, have been made applicable to cases which are tried by Courts of limited jurisdiction. The decisions of the Courts of limited jurisdiction, insofar as such decisions are within the competence of the Courts of limited jurisdiction, operate as res judicata in a subsequent suit, although, the Court of limited jurisdiction that decided the previous suit may not be competent to try such subsequent suit or the suit in which such question is subsequently raised. If a decision of the Court of limited jurisdiction, which was within its competence, operates as res judicata in a subsequent suit even when the subsequent suit is not triable by it, a fortiori, the decision of the highest Court of the land in whatever jurisdiction given on an issue which was directly raised, considered and decided must operate as res judicata in the subsequent suit triable exclusively by the highest Court under Article 131 of the Constitution. Any other view in this regard will be inconsistent with the high public policy and rule of law. The judgment of this Court directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question before this Court, though, label of jurisdiction is different.

170. The principles of res judicata are clearly attracted in the present case. The claim of Kerala in the earlier proceeding that water level cannot be raised from its present level of 136 ft. was expressly not

accepted and the obstruction by Kerala to the water level in the Mullaperiyar dam being raised to 142 ft. on the ground of safety was found untenable. The judgment dated 27.2.2006 of this Court, thus, operates as res judicata in respect of the issue of safety of the dam by increasing its water level from 136 ft. to 142 ft.

171. It is argued by Mr. Harish Salve, learned senior counsel for Kerala, that even agreements entered into between foreign sovereigns can be overridden in exercise of legislative powers. He argues that if the contention of Tamil Nadu that the 1886 Lease Agreement was an ordinary lease agreement is correct and assuming that such an agreement was continued, it clearly was open to the legislature of the State of Kerala to override such a contract. According to him, even contracts by way of sanads, treaties, etc., by the Crown could, after the Government of India Act and also after the Constitution of India, be overridden by exercise of the legislative power.

172. Learned senior counsel for Kerala in support of this contention relied upon the Privy Council decision in Thakur Jagannath Baksh19 and Maharaj Umeg Singh20. Learned senior counsel also submits that Section 108 of the SR Act does not create any limitation upon Kerala exercising legislative power, inter alia, to cancel 1886 Lease Agreement and if Section 108 of SR Act is construed to impose a permanent fetter on the State's legislative power, such provision is unconstitutional.

173. It may be stated immediately that the constitutionality of the SR Act has not been raised by Kerala in its written statement. As a matter of fact, there is no issue framed by the Court in this regard. Rather, in the earlier litigation the constitutionality of Section 108 of the SR Act was challenged. In the 2006 judgment, one of the questions framed for consideration was, whether Section 108 of the SR Act is unconstitutional. The Court held that law making power under Articles 3 and 4 of the Constitution was paramount and it was neither subjected nor fettered by Article 246 and Lists II (State List) and III (Concurrent List) of the Seventh Schedule. The Court also held that power of Parliament to make law under Articles 3 and 4 is plenary and traverses over all legislative subjects as are necessary for effecting a proper reorganization of the States. Consequently, the Court found no merit in the challenge as to the validity of Section 108 of the SR Act.

174. We are, therefore, not persuaded to consider constitutional validity of Section 108(1) of the SR Act again. Moreover, it is not necessary to consider this aspect in view of our finding that 2006 (Amendment) Act enacted by Kerala legislature is unconstitutional.

175. Thakur Jagannath Baksh19 and Maharaj Umeg Singh20 have no application to the situation obtaining in the present case. The effect of a judgment which enforces a legal right flowing from a contract is that the right is incorporated as a right under the judgment and such a right cannot be overridden by legislature as it tantamounts to overriding a judgment.

176. Learned senior counsel for Kerala also relied upon a decision of this Court in State of Orissa[71]. In State of Orissa71, while dealing with Article 131, this Court stated, "Article 131 has no doubt given the Supreme Court exclusive jurisdiction to resolve any dispute between, inter alia, two or more States. This exclusive jurisdiction is, however, subject to two limitations — one contained in

the opening words of the Article, namely, "subject to the provisions of this Constitution" and the other which is contained in the proviso to the Article."

177. There is no doubt that the jurisdiction to resolve any dispute between two or more States is conferred upon the Supreme Court by Article 131 of the Constitution. However, it does not follow logically from this that a judgment rendered by the Supreme Court in a writ jurisdiction under Article 32 amongst others between two States is not conclusive and binding on such States. As already noted above, the 2006 judgment rendered by this Court in exercise of its jurisdiction under Article 32 binds Kerala and Tamil Nadu. We have no hesitation and we state with all emphasis that a finding recorded by this Court in exercise of jurisdiction under Article 32 is binding between the two parties, in a subsequent suit between the two States under Article 131.

Safety of Mullaperiyar dam – Evidence and EC Report

178. Learned senior counsel for Kerala while assailing the finding of fact on safety of Mullaperiyar dam recorded in 2006 judgment, and in support of his contention that it does not constitute res judicata as the circumstances have changed, has relied upon the evidence of its witness Dr. A.K. Gosain (DW-3) on the impact of Probable Maximum Flood (PMF), evidence of Dr. D.K. Paul on the impact of seismic forces and certain admissions of Tamil Nadu's witness PW-1. Mr. Harish Salve argues that the doctrine of finality does not preclude this Court from correcting the errors. Learned senior counsel in this regard places reliance upon three decisions of this Court in A.R. Antulay[72], Isabella Johnson[73], and Rupa Ashok Hurra[74].

179. Being the highest court of the land, this court possesses powers to correct a judgment in a curative petition if the parameters laid down in Rupa Ashok Hurra74 are satisfied. The present case does not fall within the parameters laid down in Rupa Ashok Hurra74. Though there is no justification to reopen the dam safety aspect in view of the judgment of this Court passed on 27.2.2006, yet for our satisfaction as to whether there is any danger to the Mullaperiyar dam, despite strengthening of dam carried out by Tamil Nadu in accordance with the strengthening measures suggested by CWC, we briefly intend to look into this aspect.

180. Learned senior counsel for Kerala submits that danger posed to the safety of the Mullaperiyar dam arises from, (i) the impact of Probable Maximum Flood (PMF), i.e., floods which impact the dam; (ii) the impact of Maximum Considered Earthquake (MCE), i.e., if earthquake happens, the impact of such event on the dam; and (iii) the impact on structural degeneration, i.e., with the age, the dam structure has been rendered unsafe. Kerala's emphasis is that in the 2006 judgment this Court wrongly endorsed the PMF of 2.12 lakh cusecs estimated by the CWC in 1986. Kerala asserts that the observed flood at Mullaperiyar dam in 1943 was 2.98 lakh cusecs and according to Tamil Nadu's own witness (PW-1), the PMF ought to be more than observed flood. Hence, estimation of PMF as 2.12 lakh cusecs by the CWC in 1986 is an underestimation.

181. As regards impact of MCE, Kerala has heavily relied upon the study conducted by Dr. D.K. Paul and Dr. M.L. Sharma, Professors of IIT, Roorkee. Kerala says that these two experts have categorically concluded that, ".....both the Main Mullaperiyar dam and Baby Dam are likely to

undergo damage which may lead to failure under static plus earthquake condition and therefore needs serious attention....".

182. Kerala submits that the dam suffered heavy lime loss between 1930 and 1960 forcing Tamil Nadu to grout admittedly 542 MT of cement in this period.

183. On the aspect of impact of structural degeneration, Kerala's submission is that Mullaperiyar dam is a composite gravity dam constructed of lime surkhi mortar and lime surkhi concrete; that inner core of the dam, which constitutes 62% of the total volume, admittedly consists of lime surkhi concrete; and that Mullaperiyar dam has suffered heavy leaching of lime and has lost as much as 30.48 MT per year as found by the Expert Committee of Tamil Nadu, which has been admitted by PW-1. Kerala has highlighted that the density of the materials used in the dam has gradually gone down from 150 lbs/cft considered in 1895 to 135 lbs/cft in 1986 and that such gradual reduction testifies structural degradation of the Mullaperiyar dam.

184. As noted earlier, when the matter was initially taken up by the Constitution Bench it was felt that all the aspects of the matter including safety of Mullaperiyar dam need to be examined by an Empowered Committee (EC), which may help the Court in deciding the matter effectively. Accordingly, on 18.2.2010 the Constitution Bench directed the Central Government to constitute an EC under the Chairmanship of Dr. A.S. Anand, former Chief Justice of India, and comprising of two members nominated by the States of Kerala and Tamil Nadu and two renowned technical experts. Kerala nominated Justice K.T. Thomas, a former Judge of this Court, and Tamil Nadu nominated Justice (Dr.) A.R. Lakshmanan, a former Judge of this Court, to the EC. Two renowned technical experts, Dr. C.D. Thatte and Shri D.K. Mehta were nominated in consultation with the Chairman of the EC. As per the terms of reference, the EC was free to receive further evidence as it considered appropriate. The two experts, Dr. C.D. Thatte and Shri D.K. Mehta have long experience in all facets of water sector. EC got investigations, tests and technical studies carried out through the three apex organizations, besides other specialized organizations of the Government of India and, especially, expert agencies with a view to appreciate the diverse stand of the two States. In all, 12 investigations and technical studies, besides some site studies, were directed to be carried out to assist the EC to appreciate the stand of the two States and for submission of its report to this Court. The EC also visited Mullaperiyar dam (main dam), Baby dam and earthen bund from the Periyar lakeside as well as from the downstream side. Before EC, the representative of both States explained theories of the existing dam. The two technical members made a visit to drainage galleries and spillway for better appraisal of the dam site. The two experts again visited the dam site for site appraisal and submitted their report.

185. The reports and investigations, tests and studies (ITS reports) are contained in 50 CDs and 4 DVDs. The report of EC consists of 8 Chapters. Chapter I has the title "Dams – An Overview". Chapter II deals with three aspects, viz., (a) Use of Periyar waters; (b) Evolution of Periyar Project; and (c) Mullaperiyar dam Dispute in the Supreme Court. Chapter III refers to the issues settled by the EC. Chapter IV contains –

(i) Report of visit of the EC to Mullaperiyar dam site/areas during 19- 22.12.2010; (ii) Resolutions of the EC dated 21.12.2010, 7.1.2011 and 5.12.2011; and (iii) Report of visit by two technical members (Dr. C.D. Thatte and Shri D.K. Mehta) during 22-26.12.2011. Chapter V records responses in brief of the parties to the issues framed by EC. Chapter VI is appraisal and analysis of the reports of technical investigations, tests and studies. Chapter VII records conclusions. Chapter VIII deals with general observation with the title, "Way Forward-Towards An Amicable Resolution". Two notes, one from Justice K.T. Thomas, member of the EC, and the other from Justice (Dr.) A.R. Lakshmanan, member of the EC, on Chapter VIII of the report of the EC are also appended to the report.

186. In Chapter III, the EC has recorded the issues for consideration. One of the issues, viz., Issue No.4 for consideration reads, "Should the reservoir level be raised from 136 ft.? If yes, what further measures for strengthening the existing dam, do the two parties envisage, to allow the raising of reservoir level from 136 ft. to 142 ft. and beyond?"

187. In Chapter V, the EC has noted responses by Tamil Nadu and Kerala to the issues framed by it.

188. Chapter VI, in which appraisal and analysis of ITS reports have been made, shows that following tests and studies were formulated so as to effectively deal with the concerns and grievances of the two States:

"A. HYDROLOGIC SAFETY

| Title | Purpose of ITS |
|---|---|
| Verification of the Probable Maximum Flood (PMF) computations with flood routing for revisiting spillway capacity. | To determine:<br>Probable Maximum Flood (PMF)<br>Outflow PMF hydrograph and its moderation from Mulla Periyar Dam upto tip of Idukki reservoir.<br>Outflow PMF hydrograph of Idukki reservoir.<br>Maximum Water Level (MWL) for various scenarios of operative / inoperative gates for different FRLs.<br>Free board |
| Integrated Dam Break Flood study from Mulla Periyar Dam to Idduki Dam and beyond to enable preparation of an Emergency Action Plan. | To assess Dam Break Flood that may be caused by different modes of failure/cascade effect in case of occurrence of MPD Preparation of a sample of plausible worst case of Dam Break Flood going down Periyar river from MPD to Idukki reservoir tip (in 1st phase) and beyond (in other 2 phases). To determine maximum inundation on both banks for preparation of Emergency Action Plan under Disaster Management Plan. Back-water |

studies upstream |To determine afflux | |of tip of Mulla Periyar |(swelling) above the MWL in| |Reservoir into main stem and|the upstream from tip of | |tributaries. |the reservoir caused due to| |Contour map of reservoir |inflow congestion. | |area from present water | | |level to 165 ft (50.29 m) | | |elevation. | | |Computerized Reservoir |To determine loss of | |Sedimentation Survey for |storage due to | |assessment of present |sedimentation and its | |elevation-area-capacity |effect (if any) on Probable| |relations. Assessment in |Maximum Flood attenuation. | |higher elevations by Remote | | |Sensing. | | Note: Side items of ITS pertain to i) Dams built with spillway design flood less than PMF, ii) Availability of water for Tamil Nadu, and

iii) Requirement for environmental flow.

B. STRUCTURAL SAFETY |Mapping of upstream face of |To scan upstream face of Dam| |dam above water level by |for discontinuities, cracks,| |means of photography |hollows, voids & joints etc.| | |above water level by grid | | |based photography. | |Underwater scanning of |To scan upstream face of Dam| |upstream face of the dam by |for discontinuities, cracks,| |means of a Remotely Operated|hollows, voids & joints etc.| |Vehicle to assess its |under water by means of a | |condition. |Remote Operated Vehicle. | |Studies of seepage and its |To compile measured values | |free lime content. |of seepage from dam body and| | |foundation. | | |To determine proportion of | | |seepage through dam | | |body/foundation by flow net | | |studies. | | |To determine leached free | | |lime content in seepage. | |Determination of |To carry out core drilling | |in-situ/ex-situ strength & |in Dam body/ foundation to | |integrity of the dam body |enable following physical | |materials and foundation for|and chemical, in-situ and | |using in safety/stability |ex-situ (in laboratories) | |status assessment. |tests. | | | | |In-situ Tests: | | | | |Sonic test | | |Gamma – Gamma / | | |Neutron-Neutron | | |Dye Tracer | | |Electrical Resistivity & | | |Geophysical Tomographic | | |Study | | |Ex-situ Tests: | | |Compressive strength | | |Tensile Strength | | |Modulus of Elasticity | | |(Static as well as dynamic) | | |Poisson's ratio | | |Density | | |Free Lime | | |Chemical analysis of | | |materials | |Measurement of loss of |To determine loss of | |stress in the sample |pre-stress and hence | |pre-stressed cable |residual pre-stress in the | | |cable anchors installed in | | |1981, as part of | | |strengthening measures. | Note: Side items of ITS pertain to i) Thermal properties of backing concrete and effect on interface, ii) Instrumentation, and iii) Stability of Main and Baby Dam.

C. SEISMIC SAFETY |Finite Element Method (FEM) |To determine tensile stress | |analysis employing (response |caused due to Earthquake | |spectra) / (time histories) |forces based on: | |to asses stability of dam |2D FEM Studies based on | |under design basis/maximum |Response Spectra method (in | |credible earthquake forces. |two parts) submitted by SoK. | | |3D FEM studies (two times) | | |submitted by SoTN. | | |2D FEM studies (in two parts)| | |based on Time-History | | |analysis. | |Identify evidence of |To make a traverse and | |geological fault in the |identify evidence if any, of | |surroundings of the Baby Dam.|the suspected geological | | |fault in the Baby dam | | |foundation. | Note: Side items of ITS pertain to i) Study of 3D FEM Analysis by Prof. R.N. Iyengar of Indian Institute of Sciences, Bangalore, ii) Seismic Design Parameters of Mulla Periyar Dam, and iii) Impact of recent earthquake events."

189. The above reports have then been carefully analysed and on the basis of the appraisal of the ITS reports, EC held that Probable Maximum Precipitation (PMP) considered earlier was correct and

the determination of observed maximum flood in 1943 was not reliable. EC's assessment is that peak of PMF reaching the Mullaperiyar dam reservoir / periphery / upstream tip remains at 2.12 lakh cusecs (6003 cumecs).

190. EC has been of the view that spillway designed capacity of Mullaperiyar dam for flood lower than PMF is acceptable. The EC carefully analysed the two studies, viz., (i) study above water level by photography, and (ii) study below water level by means of a Remote Operated Vehicle, upto a safely reachable level, and on appraisal from both scans/studies read together did not apprehend cause for concern about manifestation of any distress for the dam.

191. EC has also carefully considered the concerns expressed by Kerala with regard to (a) seepage measurement and assessment of loss of free lime; (b) loss of strength of dam body constituents due to lime loss; and (c) vulnerability due to free lime loss. According to EC appraisal, the total lime leaching in 116 years of dam's existence was about 3.66%, which is less than the upper permissible limit of 15-20%. EC held that as lime loss as assessed was far within permissible limits, there is no cause for concern about loss of strength of Mullaperiyar dam.

192. The physical properties of dam body material has also been reviewed and assessed by applying in situ non destructive tests, viz., (a) sonic test from dam's upstream face; (b) neutron-logging and tracer study;

(c) geophysical tomographic study; and (d) scanning of internal surface of bore hole walls using digital video recording system. EC also requested Tamil Nadu to obtain and test core samples from dam body / foundation rock, besides carrying out in situ tests in 9 holes on Mullaperiyar dam, of 150 mm size and more, which were got done by Tamil Nadu. These test reports were also considered. The chemical tests on constructed material used in the dam body and reservoir water were also conducted. The test results indicate innocuous nature of all these materials.

193. All time seepage data of Mullaperiyar dam has been appraised and analysed by EC, which indicates that it is within permissible limits. Testing of one ungrouted cable anchor for residual pre-stress was got done. Analysis has also been done of thermal properties of backing concrete and effect on interface. The detailed appraisal and analysis of ITS reports for seismic design parameters on Mullaperiyar dam show the recent earthquake events to be transient and inconsequential.

194. One of the apprehensions highlighted by Kerala is that a dam break flood would cause large scale devastation. This aspect has been considered by the EC under the head "Dam Break Flood and possible cascading effect". EC in this regard has observed that Kerala has not supplied to it inundation maps even for normal flood with return periods such as 50, 100 years in downstream area for phase-I and between Idukki and lower Periyar dam or further downstream for later phases. Such inundation maps have to be prepared for Emergency Action Plan. Kerala also has not submitted any assessment as prescribed in CWC 'Guidelines for Development and Implementation of Emergency Action Plan for Dams, May, 2006'. EC, accordingly, depended on maps developed by using Archived Satellite Imagery and Survey of India toposheets, through 'Mapsets', and accomplished illustrative contouring of area between Mullaperiyar dam and Idukki complex. EC has

observed that all the projections / concerns by Kerala were not based on computations / studies. Despite the request made to Kerala to supply contour map, Kerala did not do so. EC has further observed that Kerala's projection is conjectural since there is deficiency in assessing the likely inundated area. EC, therefore, did not accept the scare of dam break flood.

195. Having done elaborate and detailed appraisal and analysis of the voluminous tests and reports of experts and having regard to the concerns expressed by Kerala about the safety of the Mullaperiyar dam, EC has summarized its conclusions on the three aspects, viz., (a) hydrologic safety; (b) structural safety; and (c) seismic safety as follows:

> "A) Hydrologic Safety
>
> 23. The MPD is found hydrologically safe. The Probable Maximum Flood (PMF), with a peak flow of 2.12 lakh cusecs (6003 cumecs) is accepted by EC. It can be routed over the reservoir FRL 142 ft (43.28
>
> m) to safely pass over the MPD spillway with 13 gates operative, resulting into a peak out flow of 1,43,143 cusecs (4053 cumecs), raising the Maximum Water Level (MWL) to elevation 153.47 ft (46.78 m) transiently. Even for the Test Case of one gate remaining inoperative, the MWL raises to elevation 154.10 ft (46.97 m) when PMF impinges the reservoir at FRL 142 ft (42.28 m).
>
> B) Structural Safety
>
> 24. Both the main and Baby Dam (gravity and earth), are structurally safe. FRL can be restored to the pre-1979 position. Following maintenance and repair measures, should however be carried out in a time-bound manner: i) treatment of upstream surface, ii) reaming of drainage holes, iii) instrumentation, iv) periodical monitoring, analysis and leading away the seepage from toe of the dam towards downstream, v) geodetic re-affirmation, etc., vi) the dam body should be grouted with a properly designed grout mix of fine cement / suitable chemical / epoxy / polymer according to expert advice so that its safety continues to remain present.
>
> C) Seismic Safety
>
> 25. MPD is found to be seismically safe for FRL 152 ft (46.33 m) / MWL 155 ft (47.24 m) for the identified seismic design parameters with acceleration time histories under 2-D FEM Analysis. The strength and other properties of dam material presently available, indicate ample reserve against the likely stresses / impacts assessed under this analysis. In addition, reserve strength of cable anchors makes the dam further safe. The suspicion about existence of a geological fault in the Baby Dam foundation is ruled out. The recent earthquake activity in the dam area is considered of no consequence to the seismic safety. Also, it has caused no distress to MPD / Idukki dams."

196. Kerala has vehemently challenged the EC report and its conclusions. Mr. Harish Salve, learned senior counsel for Kerala, argues that the ITS reports contained in 50 CDs and 4 DVDs are not admissible and should not be considered as part of material on record before this Court. He submits that EC suo motu decided to conduct investigations, tests and studies on various aspects related to the case through the apex organizations, the Coordination Committee was formed, headed by Dr. C.D. Thatte, member of the EC, and consisting of representatives of Kerala and Tamil Nadu and though the representatives of States were made part of the Coordination Committee, but their role was limited to more of being an observer and unilateral decisions regarding the studies, etc., were taken by Dr. C.D. Thatte, which were prejudicial to the interest of Kerala. Kerala's grievance is that the EC on 5.12.2011 declined to disclose and supply the copies of results and ITS reports without dealing with the question of prejudice. Subsequently, EC submitted its report before this Court and the Court directed the Registry on 4.5.2012 to supply copy of the report of the EC to party States and, accordingly, the Registry of this Court made available a photocopy of the report. The report supplied by the Registry to Kerala did not include the results and reports of the ITS listed in Annexure 6.1 of the report but later on pursuant to the order of this Court dated 31.8.2012, all 50 CDs and 4 DVDs were supplied to the counsel for Kerala. It is submitted on behalf of Kerala that the fair procedure and rules of natural justice demanded that the EC should have disclosed the results and reports of ITS relied upon by it and given an opportunity to Kerala on the acceptability of the ITS reports. It is strenuously urged by learned senior counsel for Kerala that the ITS reports are the opinions of experts and, therefore, the EC could not have relied upon such results and reports without giving an opportunity to it to meet the adverse contents and Kerala has the right to cross-examine the authors and also to lead evidence of experts, if any, challenging the adverse results and reports of the ITS. In this regard, Kerala referred to the application made before EC on 21.11.2011. Kerala also relied upon the decision of Queens Bench in Regina[75].

197. We are not persuaded by the submissions of Mr. Harish Salve. It is true that 50 CDs and 4 DVDs containing ITS reports were supplied to Kerala pursuant to the order of this Court dated 31.8.2012 after the report had been submitted by the EC but the fact of the matter is that the EC decided to conduct the investigations, tests and studies on various aspects relating to the safety of the Mullaperiyar dam through the apex organizations pursuant to the task given to it by this Court. The EC in its proceedings dated 17.2.2011 formed a Coordination Committee which comprised the representatives of both the States. It is very difficult to accept that the role of the representatives of the States in the Coordination Committee was limited to that of being an observer. The ITS reports have been given by the organizations and bodies which are expert on the job. We have no hesitation in holding that the investigations, tests and technical studies were directed to be carried out by the EC in association with representatives of both the States.

198. Moreover, this Court appointed EC to assure itself about the safety of the Mullaperiyar dam. The EC, we must say, has completed its task admirably by thoroughly going into each and every aspect of the safety of Mullaperiyar dam. We do not find any merit in the objections of Kerala challenging the findings and conclusions of the EC on hydrologic safety, structural safety and seismic safety of the dam. The findings of EC with elaborate analysis of reports of investigations, tests and studies lead to one and only one conclusion that there is no change in the circumstances necessitating departure from the earlier finding on the safety of Mullaperiyar dam given by this

Court in 2006 judgment. As a matter of fact, there is no change in circumstances at all much less any drastic change in circumstances or emergent situation justifying the reopening of safety aspect of Mullaperiyar dam which has been determined by this Court in the earlier judgment.

Findings on Issue Nos. 2(a), 3, 4(a), 4(b) and 10

199. In light of the above discussion, our findings on Issue Nos. 2(a), 3, 4(a), 4(b) and 10 are as follows:

> (i.) Kerala Irrigation and Water Conservation (Amendment) Act, 2006 is unconstitutional and ultra vires in its application to and effect on the Mullaperiyar dam.
>
> (ii.) The rights of Tamil Nadu, crystallized in the judgment dated 27.2.2006 passed by this Court in W.P. (C) No.386/2001 cannot be nullified by a legislation made by the Kerala State legislature.

(iii.) The earlier judgment of this Court given on 27.2.2006 operates as res judicata on the issue of the safety of Mullaperiyar dam for raising water level to 142 ft. and ultimately to 152 ft. after completion of further strengthening measures on the Mullaperiyar dam. (iv.) The plea raised by Kerala relating to the lease deed dated 29.10.1886 and structural safety of Mullaperiyar dam have been finally decided by the judgment of this Court dated 27.2.2006 and Kerala is estopped from raising or re-agitating these issues in the present suit. (v.) Kerala cannot obstruct Tamil Nadu from increasing the water level of Mullaperiyar dam to 142 ft. and from carrying out repair works as per judgment dated 27.2.2006.

Issue No. 8.

200. This issue covers the controversy as to whether Kerala is estopped from contending that Periyar river is not an inter-State river.

201. Tamil Nadu in the plaint has averred as follows:

> "The plaintiff, defendant no.1, State of Kerala are the two riparian States through which the Inter-State river Periyar flows. The river is one of the west flowing rivers in the State of Kerala, with a portion of its catchment lying with the State of Tamil Nadu....."

202. Traversing the above pleading of the Tamil Nadu, Kerala has set up the case that river Periyar is not an inter-State river but it is intra- State river; that it rises in Quilon District in Kerala and traverses only through the territory of Kerala before falling into the Arabian sea.

203. In its replication, Tamil Nadu has averred that, in any event, in the earlier proceedings, Kerala had raised the plea of lack of jurisdiction of this Court to entertain the river water disputes with

reference to Article 262 of the Constitution read with Section 11 of the Inter-State River Water Disputes Act, 1956. This plea was raised on the ground that river Periyar is an inter-State river. Tamil Nadu, thus, has set up the plea that Kerala is estopped from raising a plea that river Periyar is not an inter-State river.

204. Mr. Harish Salve, learned senior counsel for Kerala, argues that river Periyar rises in Kerala and flows for a length of 244 km. in Kerala before entering in the sea at Kerala coast. River Periyar does not touch any part of Tamil Nadu. He submits that in the earlier proceedings, Kerala had not admitted that river Periyar was an inter-State river. Learned senior counsel contends that river Periyar is an intra-State river and Kerala's averments in the earlier proceedings does not estop it from raising the plea that river Periyar is not an inter-State river.

205. In 2006 judgment, one of the points considered and decided by this court is whether the jurisdiction of this court is barred in view of Article 262 of the Constitution read with Section 11 of the Inter-State River Water Disputes Act, 1956. This point would not have been raised by Kerala but for the fact that river Periyar happened to be an inter-State river. While deciding this point, obviously, the court proceeded on the footing that river Periyar is an inter-State river. This court decided this point against Kerala. It appears that in the review petition, for the first time, Kerala took the specific plea that Periyar is an intra-State river but covered by an inter-State agreement. The review petition has been rejected by this Court on 27.7.2006.

206. It is true that in the earlier proceedings there is no express and categorical admission of Kerala that river Periyar is an inter-State river, but the very plea of lack of jurisdiction of this court for considering the applicability of Article 262, as noted above, would not have been raised by Kerala if river Periyar was an intra-State river. Moreover, the entire area drained by the river and its tributaries is called the river basin. It is well-understood in the water laws that the basin of any river includes the river valley. The topographical map of Periyar river-basin shows that part of Periyar basin (about 114 sq. km.) is in Tamil Nadu. This is established from Water Atlas of Kerala published by Centre for Water Resources Development and Management, Kazhikode, Kerala. Though the Periyar basin area that falls in Tamil Nadu is very small but, in our view, that does not make any difference insofar as the status of Periyar river as inter-State river is concerned. The fact of the matter is that 114 sq. km. of Periyar basin area falls in Tamil Nadu. This is also fortified by the advance report of Public Works Department, Government of Kerala, which, inter alia, states, "the rivers which have their drainage area lying in more than one State have been brought under the category of Inter-State rivers and a consolidated study has been admitted in this chapter....." "Of the west flowing rivers, those which have a portion of their catchment area lying in Madras State are .....(iv) Periyar."

207. Kerala's witness M.K. Parameswaran Nair has admitted that in Chapter LXIII under the heading "Interstate waters" from "Water Resources of Kerala" published by Public Works Department, Government of Kerala in 1958, Periyar has been mentioned as an inter-State river. This witness also admits that Water Atlas of Kerala wherein details of Periyar basin are given shows that part of the basin falls in the neighbouring State of Tamil Nadu.

208. Since Kerala has raised the plea that river Periyar is an intra- State river, obviously, burden is on Kerala to prove this fact. Kerala, except asserting that Periyar river rises in and traverses only in the territory of Kerala before entering into Arabian sea and no part of the land in Tamil Nadu abuts river Periyar, has not produced substantial evidence to prove that river Periyar is an intra-State river. Kerala has not discharged its burden to the satisfaction of the Court.

209. It is true that averment of Tamil Nadu in the plaint that the two States – Kerala and Tamil Nadu – are riparian States is not right in its entirety because Tamil Nadu is not a riparian State but the status of Periyar river as inter-State river, on the basis of what we have observed above, cannot be overlooked. It is not open to Kerala to take a totally inconsistent plea and begin fresh controversy about the status of Periyar river on the ground that the earlier plea was founded on some erroneous premise. In our view, Kerala cannot be permitted to contend that Periyar river is not an inter-State river.

Finding on Issue No.8

210. In light of the above discussion, it is held that Kerala cannot be permitted to contend that river Periyar is an intra-State river. Issue No.8 is answered accordingly.

Issue No.9

211. This issue is founded on the offer made by Kerala to Tamil Nadu to construct a new dam across river Periyar in the downstream region of Mullaperiyar dam. EC in Chapter VIII under the title "Way Forward – Towards An Amicable Resolution" has dealt with this aspect as a first alternative and suggested as follows:

> "1. That the SoK may construct a new dam, at its own expense to serve its own perceptions, if techno-economically cleared by the Planning Commission, and cleared by MoEF in accordance of their regulations. The construction of a new dam, giving due margin for inflation etc, may cost the exchequer more than Rupees one thousand crores. The statutory clearances, fixing of a construction agency, preliminary works, the actual construction and decommissioning with demolition of existing dam is likely to take 8 to 10 years. The existing dam shall not be dismantled, demolished or decommissioned till the new dam construction is completed and it becomes operational. Till such time, the rights of the SoTN in the existing Dam to all waters of Mulla Periyar Dam arising out of the Lease Deed of 1886 and the Agreements of 1970, shall be fully honoured.
>
> 2. However, the operation of the New Dam would commence only after:
>
> 2(a) A fresh MOU is executed between the SoK and the SoTN.
>
> 2(b) That to control, manage, operate, maintain and regulate the waters of the New Dam, an Independent Committee / Board, to be chaired by a representative of the

Union of India, with representatives of the SoK and the SoTN as its Members, is put in place;

2(c) That the terms of rent/levies etc payable by the SoTN to the SoK are settled and the power generation rights of the two States are settled beforehand;

2(d) That before construction of the new dam and till its commissioning, the existing dam will be strengthened by the measures suggested by the CWC, including Dam Safety requirements as already voiced, which still remain to be carried out.

2(e) That the SoTN will be entitled to all its existing rights including all water levels under the Lease Deed of 1886 and Agreement of 1970.

2(f) That decommissioning or demolition of the existing dam would be subject to the conditions 2(a) to 2(e) being met by the two Party States.

2(g) The Empowered Committee had made the suggestion to the two States during the hearing on 2nd January, 2012. Learned counsel for the parties had sought time to consult the States and file their responses. Counsel for the parties later on gave their responses in general terms, but there has been no direct response or opposition to the alternatives suggested."

212. Any amicable resolution of the present dispute between the two States would have been really good for the people of these States but this has not been possible as the two States have sharp conflict over the subject matter and their stance is rigid, inflexible and hard. The offer made by Kerala for construction of new dam has been outrightly rejected by Tamil Nadu. It is important to bear in mind that Mullaperiyar dam has been consistently found to be safe, first, by the Expert Committee, and, then, by this Court in 2006 judgment. The hydrological, structural and seismic safety of the Mullaperiyar dam has been confirmed by the EC as well.

Finding on Issue No.9

213. In this view of the matter for the construction of new dam, there has to be agreement of both the parties. The offer made by Kerala cannot be thrusted upon Tamil Nadu. Issue No.9, therefore, has to be decided against Kerala and it is so held.

214. EC has also suggested the following second alternative:

"2. The Dam Safety Organization Central Water Commission, the Government of India (Ministry of Water Resources), has laid down the Criteria and Guidelines for Evacuating Storage Reservoirs, Sizing Low Level Outlets and Initial Filling of Reservoirs.

i) According to the criteria, generally speaking, Dams should be provided with low level outlets of adequate capacity to lower the reservoir water level to a specified elevation for inspection, maintenance and repair, and ii) to control the rate of reservoir pool rise during initial filling.

ii) The Guidelines recommend that an outlet should be provided at the lowest possible level and should be of sufficient dimensions to cater to evacuation of storage with requisite flow capacity.

The decision about level at which the outlet has to be provided is left to the concerned dam owning entity. The level will depend upon assessment of the dam's condition, a judgment on location at which distress may be caused, its nature and the time of evacuation needed for enabling completion of restoration measures.

3. In the existing MPD project, as noted in Chapter-ll(b) (supra), a tunnel had been designed with a D-Section 12 feet wide and 7.5 ft high with provision of the sluice head gate having sill at El 106.5 ft for diversion of water from Periyar reservoir to Vaigai basin in the SoTN. This tunnel was modernized by widening and lining in the year 1958. The tunnel can allow reservoir draw-down to 106.5 ft as per criteria laid down in (i). Storage lower than El 106.5 ft to an identified elevation based on assessment of likely distress cannot be drawn-down through the present arrangement of drawl of water for the SoTN through the existing tunnel.

4. Further, digging of a New Tunnel at say at EL 50 ft., of course, after conducting surveys, designs, and techno-economic feasibility studies, with requisite sluice gates for evacuation of reservoir water from EL 106.5 ft to say 50 ft. These studies will have to be undertaken within a specified time frame. It goes without saying that the water flow from the New Tunnel can be used for power generation or for any other purpose by making changes in its existing infrastructure. Depending upon a decision about the elevation of the New Tunnel outlet, evacuation of the MPD reservoir will be possible in corresponding time period.

a) The new tunnel, will need to be constructed by the SoTN, since the ownership of the existing dam vests in it. The total expenditure for construction of the new tunnel should be borne by the SoTN. The costs may be small as compared to the cost of the replacement of the new dam. The SoTN should accomplish surveys and feasibility studies for the proposal of having a new tunnel within a year.

b) The New Tunnel say at EI 50 ft will enable the SoTN to use additional water available in storage between EL 106 ft to 50 ft. At present, these waters are remaining unused.

c) More importantly, if this alternative is implemented in an agreed period of time, the fear perception in the minds of people of the SoK will be set at rest. They can then appreciate that the New Tunnel is going to help evacuation of storage faster and better, in case the dam develops any distress. As a gravity dam seldom gives in suddenly, such evacuation will reduce Dam Break flood (DBF) magnitude significantly.

d) Though, the demand of the SoK for 1.1 TMC of water for Environmental Flow is not substantiated, yet, a legitimate need which is yet to be assessed, can be met with after the FRL is raised to 142 ft. A small pipe outlet of a suitable diameter through right bank hillock can be dug to release the Environmental Flow as firmed up by the SoTN in consultation with CWC & the SoK.

5. That a MoU would have to be executed by the SoTN and the SoK, in the presence of a representative of the Govt. of India, Ministry of Water Resources, regarding the construction of the new tunnel within a specified time."

215. EC has itself noted that the second alternative is dependent on agreement between the two States but to us there appears to be no possibility of mutual agreement on this aspect as well. The alternatives suggested by EC are worth exploring by the two States but having regard to the unbending stance adopted by them, this does not seem to be possible. We, however, grant liberty to the parties to apply to the Court if they are able to arrive at some amicable solution on either of the two alternatives suggested by the EC.

216. With reference to these issues, it is strenuously urged by Kerala that Tamil Nadu has not suffered any injury because of the reduction of the storage at Mullaperiyar dam to 136 ft. since 1979. According to Kerala, more water was drawn and more area was irrigated after 1979. Kerala has in this regard relied upon the data supplied by Tamil Nadu Public Works Department and the analysis thereof. It is submitted that average water drawn during the pre-1979 period was 19,277 Mcft. while in the post-1979 period the water drawn was 21,434 Mcf. As regards extent of irrigation, Kerala submits that the extent of irrigation in Tamil Nadu from Mullaperiyar, water has admittedly increased from about 1,71,307 acres before 1979 to 2,31,412 acres. Kerala has also relied upon the answers of PW-1 to question Nos. 585 to 601 and 58 to 59. Kerala has also relied upon the decision of this Court in State of Andhra Pradesh3 wherein this Court observed, ".....that in a suit for injunction filed by one State against the other State, the burden on the complaining State is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. The complaining State has to establish that threatened invasion of rights is substantial and of a serious magnitude. In the matter between States, injunction would not follow because there is infraction of some rights of the complaining State but a case of high equity must be made out that moves the conscience of the Court in granting injunction....."

217. Tamil Nadu on the other hand asserts that raising the water level in the dam to original FRL is absolutely necessary to irrigate the lands in about 2 lakh acres in five drought-prone districts of Theni, Dindigul, Madurai, Sivagangai and Ramanathanpuram. About 6.8 lakh farmers and agricultural labourers besides 80 lakh people of the above five districts continue to suffer due to inadequate timely supply of water for irrigation and drinking purposes.

218. Pertinently, EC has also considered this aspect and observed as follows:

> "EC has assessed that increase in irrigation in Vaigai Basin is mainly due to i) construction of Vaigai Dam in 1954 and related canal distribution system post 1974, which worked as a balancing reservoir for release from power station in

non-irrigation months from 1954 onwards, and ii) World Bank assisted Modernization of Periyar Vaigai Irrigation Project, phase-I & II, implemented in 1980's, which enabled improved Water Use Efficiency.

Although firming up of irrigation is achieved by the SoTN, there is still large drought-prone area in Vaigai Basin and adjoining area, which needs protective irrigation. Also domestic / municipal / industrial needs of the area are significant. These present requirements remain unmet, if FRL is not restored even partially.

EC is unable to accept the submission of the SoK that no harm will be done under these circumstances to the SoTN if FRL is not restored."

219. Insofar as drawal of water in pre-1979 period and post-1979 period is concerned, the sole witness of Tamil Nadu has admitted that in the post-1979 period the water drawn was 21,434 Mcft. and the average water drawn pre-1979 period was 19,277 Mcft. Similarly, he has admitted increase of irrigation from 1,71,307 acres before 1979 to 2,31,412 acres in 1992-93, but, as observed by EC, this has been due to construction of Vaigai dam in 1954 and related canal distribution system post-1974. The five districts Theni, Dindigul, Madurai, Sivagangai and Ramanathanpuram that are served by Periyar project are drought prone. About 2 lakh acres of land fall in these five districts which needs to be irrigated. The inadequate timely water supply of water for irrigation and drinking purposes to the population of these districts may affect their lives as well as livelihood. The increase of irrigation and more drawal of water post 1979 still appears to be deficient for the population of more than 80 lakh people in these districts.

220. In these facts, therefore, it can safely be said that Tamil Nadu has been able to establish that invasion on its rights is substantial. Tamil Nadu has been able to make out a case for grant of injunction on the principles laid down by this Court in State of Andhra Pradesh3. Moreover, present suit is not a suit for injunction simpliciter as the main prayer is that Kerala Irrigation and Water Conservation (Amendment) Act, 2006 be declared unconstitutional and ultra vires in its application to and effect on the Mullaperiyar dam.

221. In view of the foregoing discussion, we hold that Tamil Nadu is entitled to the reliefs as prayed in para 40 (i) and (ii) of the suit. Consequently, it is declared that the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 passed by the Kerala legislature is unconstitutional in its application to and effect on the Mullaperiyar dam. The 1st defendant – State of Kerala – is restrained by a decree of permanent injunction from applying and enforcing the impugned legislation or in any manner interfering with or obstructing the State of Tamil Nadu from increasing the water level to 142 ft. and from carrying out the repair works as per the judgment of this Court dated 27.2.2006 in W.P.(C) No. 386/2001 with connected matters.

222. However, to allay the apprehensions of Kerala- though none exists - about the safety of the Mullaperiyar dam on restoration of the FRL to 142 ft., a 3-Member Supervisory Committee is constituted. The Committee shall have one representative from the Central Water Commission and one representative each from the two States – Tamil Nadu and Kerala. The representative of the

Central Water Commission shall be the Chairman of the Committee. The Committee will select the place for its office, which shall be provided by Kerala. Tamil Nadu shall bear the entire expenditure of the Committee.

223. The powers and functions of the Supervisory Committee shall be as follows:

(i) The Committee shall supervise the restoration of FRL in the Mullaperiyar dam to the elevation of 142 ft.

(ii) The Committee shall inspect the dam periodically, more particularly, immediately before the monsoon and during the monsoon and keep close watch on its safety and recommend measures which are necessary. Such measures shall be carried out by Tamil Nadu.

(iii) The Committee shall be free to take appropriate steps and issue necessary directions to the two States - Tamil Nadu and Kerala – or any of them if so required for the safety of the Mullaperiyar dam in an emergent situation. Such directions shall be obeyed by all concerned.

(iv) The Committee shall permit Tamil Nadu to carry out further precautionary measures that may become necessary upon its periodic inspection of the dam in accordance with the guidelines of the Central Water Commission and Dam Safety Organisation.

224. The suit is decreed as above, with no order as to costs.

.....CJI.

(R.M. Lodha) .....J. (H.L. Dattu) .....J. (Chandramauli Kr. Prasad) .....J. (Madan B. Lokur) .....J. (M.Y. Eqbal) NEW DELHI;

MAY 07, 2014.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) No.13955 of 2012

C.R. NEELAKANDAN & ANR. … PETITIONERS

VERSUS

UNION OF INDIA & ORS. … RESPONDENTS

O R D E R

In view of our separate judgment pronounced today in Original Suit No.3 of 2006 (State of Tamil Nadu v. State of Kerala and another), nothing further remains to be decided in this special leave petition and it is dismissed accordingly.

.....CJI.

(R.M. Lodha) .....J. (H.L. Dattu) .....J. (Chandramauli Kr. Prasad) .....J. (Madan B. Lokur) .....J. (M.Y. Eqbal) NEW DELHI MAY 07, 2014

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[1] Mullaperiyar Environmental Protection Forum v. Union of India & Ors.; [(2006) 3 SCC 643] [2] The salient features of the 2006 (Amendment) Act are as follows:

> i. In Section 2, clause (ja) defines 'custodian' to mean a State Government which has established or is running or otherwise operating any dam in Kerala. Further, clause (ala) defines 'Scheduled Dam' to mean any dam included in the second schedule. The very first entry in the Second Schedule is the Mullai Periyar Dam.
>
> ii. In Section 57 (1) the words "Surveillance, inspection" is replaced by "ensuring the safety and security" iii. Introduction of 57(3) in main Chapter XII – 'Constitution of Dam Safety Authority' to give effect to Chapter XII inspite of any other laws.
>
> iv. Replacement of existing section 62(1)(a) to (i) by new section 62 (1)(a) to (j). The newly substituted Section 62(1), in so far as is material, reads as under:
>
> 62(1) Notwithstanding anything contained in any other law, judgment, decree or order of any Court or in any treaty, agreement, contract, instrument or other document, the authority shall exercise the following powers viz:-
>
> (a)(b)(c) xxx xxx xxx
>
> (d) to direct the custodians to carry out any alteration, improvement, replacement or strengthening measures to any dam found to pose a treat to human life or property;

(e) to direct the custodian to suspend the functioning of any dam, to decommission any dam or restrict the functioning of any dam if public safety or threat to human life or property, so requires;

(f) to advise the Government, custodian, or other agencies about policies and procedures to be followed in site investigation, design, construction, operation and maintenance of dams;

(g) to conduct studies, inspect and advise the custodian or any other agency on the advisability of raising or lowering of the Maximum Water Level or Full Reservoir Level of any dam not being a scheduled dam, taking into account the safety of the dam concerned;

(h) to conduct studies, inspect and advise the custodian or any agency on the sustainability or suitability of any dam not being a scheduled dam, to hold water in its reservoir, to get expert opinion of international repute, and provide advice by dam-break analysis and independent study and to direct strengthening measures or require the commissioning of a new dam within a timeframe to be prescribed to replace the existing dam;" [3] State of Andhra Pradesh v. State of Maharashtra and Ors.; [(2013) 5 SCC 68].

[4] Dr. Babu Ram Saksena v. State; [AIR 1950 SC 155]
[5] State of Himachal Pradesh v. Union of India & Ors.; [(2011) 13 SCC 344]
[6] Virendra Singh & Ors. v. State of Uttar Pradesh; [(1955) 1 SCR 415 : AIR 1954 SC 447]

[7] 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.

[8] Art. 131. Original jurisdiction of the Supreme Court.— Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

a) between the Government of India and one or more States; or

b) between the Government of India and any State or States on one side and one or more other States on the other; or

c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute." [9] 294. Succession to property, assets, rights, liabilities and obligations in certain cases.—As from the commencement of this Constitution—

(a) .....

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State, subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

[10] Article 295 - Succession to property, assets, rights, liabilities and obligations in other cases. -

(1) As from the commencement of this Constitution-

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of 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).

[11] Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors.; [(1969) 2 SCC 283] [12] Don John Francis Douglas Liyanage & Ors. v. The Queen; [(1966) 1 All E.R. 650] [13] Indra Sawhney v. Union of India and Others; [(2000) 1 SCC 168] [14] Madan Mohan Pathak & Anr. v. Union of India and Others; [(1978) 2 SCC 50] [15] People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr.; [(2003) 4 SCC 399] [16] Municipal Corporation of the City of Ahmedabad & Anr. v. New Shrock Spg. And Wvg. Co. Ltd.

[(1970) 2 SCC 280] [17] Janapada Sabha Chhindwara v. Central Provinces Syndicate Ltd. and Anr.; [(1970) 1 SCC 509] [18] Cauvery Water Disputes Tribunal, Re; [1993 Supp (1) SCC 96 (2)] [19] Thakur Jagannath Baksh Singh v. The United Provinces; [73 IA 123] [20] Maharaj Umeg Singh and Ors. v. State of Bombay and Ors.; [(1955) 2 SCR 164] [21] Arthur M. Manigault v. Alfred A. Springs et al; [(1905) 199 US 473] [22] "The Public Trust Doctrine in the Water Rights Contexts" by Roderick E. Walston; 29 Natural Resources Journal 585. [23] Brotherhood of Locomotive Firemen & Enginemen et al. v. Chicago, Rock Island & Pacific Rail-Road Co. et al.; [(1968) 393 US 129] [24] Raymond Motor Transportation, Inc. et al. v. Zel S. Rice et al.; [(1978) 434 US 429] [25] Raymond Kassel et al. v. Consolidated Freightways Corporation of Delaware; [(1981) 450 US 662] [26] American Trucking Associations, Inc. v. Thomas D. Larson; [(1982) 683 F.2d 787] [27] Pfizer Animal Health SA v. Council of the European Union; [(2002) ECR II-03305] [28] "Science and Risk Regulation and International Law" by Jacqueline Peel; Published by Cambridge University Press, 2010.

[29] The State of Pennsylvania v. The Wheeling and Belmont Bridge Company, et al.;[ (1855) 59 U.S. 421]
[30] The Clinton Bridge case; [(1870) 77 US 454]
[31] Hodges et al. v. Snyder et al.; [(1923) 261 US 600]
[32] Charles B. Miller, Superintendent, Pendleton Correctional Facility et al. v. Richard A. French et al.; [(2000) 530 U.S. 327]
[33] Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and Ors.; [(2001) 4 SCC 139].
[34] Sanjeev Coke Manufacturing Co. v. M/s. Bharat Coking Coal Ltd. and Anr.; [(1983) 1 SCC 147]

[35] M/s. Doypack Systems Pvt. Ltd. v. Union of India and Ors.; [(1988) 2 SCC 299]
[36] Mahal Chand Sethia v. State of West Bengal; Crl. A. No. 75 of 1969, decided on 10th September, 1969;
[1969 (2) UJ 616 SC]

[37] Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad ; [(1964) 2 SCR 608] [38] State of M.P. v. Amalgamated Coalfields Ltd. and Anr; [(1970) 1 SCC 509].

[39] P. Sambamurthy and Ors. v. State of A.P. and Anr.;[ (1987) 1 SCC 362] [40] Union of India v. Association for Democratic Reforms and Anr.; [(2002) 5 SCC 294] [41] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.;[(1973) 4 SCC 225] [42] Smt. Indira Nehru Gandhi v. Shri Raj Narain and Anr; [1975 (Supp.) SCC 1] [43] State of Bihar and Anr. v. Bal Mukund Sah and Others; [(2000) 4 SCC 640] [44] I.R. Coelho (Dead) by LRs. v. State of T.N.; [(2007) 2 SCC 1] [45] I.N. Saksena v. State of Madhya Pradesh; [(1976) 4 SCC 750] [46] Hari Singh and Ors. v. Military Estate Officer and Anr.; [(1972) 2 SCC 239] [47] Hindustan Gum and Chemicals Ltd. v. State of Haryana and Others; [(1985) 4 SCC 124] [48] Vijay Mills Company Limited and Others v. State of Gujarat and Ors.; [(1993) 1 SCC 345] [49] P. Kannadasan and Others v. State of T.N. and Others; [(1996) 5 SCC 670] [50] Indian Aluminium Company and Others v. State of Kerala and Others; [(1996) 7 SCC 637] [51] State of T.N. v. Arooran Sugars Ltd.; [(1997) 1 SCC 326] [52] Dharam Dutt and Ors. v. Union of India and Ors.; [(2004) 1 SCC 712] [53] Sri Sri Sri K.C. Gajapati Narayan Deo v. State of Orissa; [AIR 1953 SC 375] [54] Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi (now Delhi Administration) and Anr.; [AIR 1962 SC 458] [55] Virender Singh Hooda (II) and Ors. v. State of Haryana and Another; [(2004) 12 SCC 588] [56] Virender Singh Hooda (I) and Ors. v. State of Haryana and Another; [(1999) 3 SCC 696] [57] Sandeep Singh v. State of Haryana and Anr.; [(2002) 10 SCC 549] [58] Tirath Ram Rajinder Nath, Lucknow v. State of U.P. and Anr.;

[(1973) 3 SCC 585]
[59] S.S. Bola and Ors. v. B.D. Sardana and Ors.; [(1997) 8 SCC 522]
[60] Nicholas v. the Queen; [(1998) 193 CLR 173]
[61] Plaut et al. v. Spendthrift Farm, Inc., et al.; [(1995) 514 U.S. 211]

[62] Duchess of Kingston; 2 Smith Lead Cas 13 Ed. Pp. 644, 645. [63] Sheoparsan Singh v. Ramnandan Prashad Narayan Singh; [AIR 1916 PC 78] [64] Daryao and Ors. v. State of U.P. and Ors.; [AIR 1961 SC 1457] [65] Pandit M.S.M. Sharma v. Dr. Shree Krishna Sinha and Ors.; [AIR 1960 SC 1186] [66] Gulab Chand Chhotalal Parikh v. State of Bombay; [(1965) 2 SCR 547] [67] Union of India v. Nanak Singh; [(1968) 2 SCR 887 : AIR 1968 SC 1370] [68] State of Punjab v. Bua Das Kaushal; [ (1970) 3 SCC 656] [69] N.D. Jayal and Anr. v. Union of India and Ors.; [(2004) 9 SCC 362] [70] Section 11 – Res judicata No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I. – The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. – For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. – Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. – The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII. – An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

[71] State of Orissa Vs. State of A.P.; [(2006) 9 SCC 591] [72] R.S. Nayak v. A.R. Antulay; [(1984) 2 SCC 183] [73] Isabella Johnson (Smt.) v. M.A. Susai (Dead) by Lrs.; [(1991) 1 SCC 494] [74] Rupa Ashok Hurra v. Ashok Hurra and Anr.; [(2002) 4 SCC 388] [75] Regina v. Deputy Industrial Injuries Commissioner, Ex parte Jones; [(1962) 2 QB 677].

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