CHAPTER - III

VIOLATION OF AGREEMENTS SINCE 1974

The final agreements between the Mysore and Madras Government in regard to the construction of a dam and reservoir at Krishnarajasagara was concluded by the Government on 18th February, 1924. According to the 1924 agreement the Mysore State was entitled to extend irrigation to an extent then fixed at 1,10,000 acres in Mysore. The extension was to be carried out by means of reservoirs to be constructed on the Cauvery and its tributaries. The Madras Government also gave assent to the construction of the Krishnarajasagara dam by Mysore. The agreement contemplated the reconsideration of some of the arrangements in the year 1974 in the light of the experience gained and of an examination of the possibilities of the further extension of irrigation within territories of the respective Governments.

One of its principal provisions related to settlement of disputes through arbitration or through the Government of India. The agreement contemplated reconsideration and some of the arrangements in 1974. The 1924 agreement was set to lapse after a run of 50 years. As a result of these agreements Karnataka claimed that Mysore was forced to give up rights to over 80% of the Cauvery waters. However both Mysore and Madras were able to complete their projects at Kannambadi and Mettur respectively. According to the Agreement of 1924, Mysore Government constructed the Krishnarajasagara dam at Kannambadi to a capacity of 45 TMC, Madras Government built the Mettur dam to hold 93.5 TMC. If the 1892 agreement could last only for 32 years the 1924 agreement which should have been declared no more operative in 1947 continued till 1974 when Karnataka stated in unambiguous terms that it was an unjust and unfair

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agreement imposed on it by the paramount power and it no more existed after the stipulated period of 50 years. Already taking advantage of the relaxed atmosphere brought about by Independence, Tamil Nadu had built up the Bhavaniisagar dam on the Bhavani river and the Kodaverry anicut with little concern for the fact that the river had its origin in Kerala and it has a drainage area of 562 sq.km. One of the tributaries of the river in Kerala, by name Siruvani, had been taken away by Tamil Nadu for domestic water supply in Coimbatore and the other tributary in Kerala, the Varagar. Karnataka could not be a silent spectator at the construction of several dams across the Cauvery and its tributaries by the lower riparian State and it had therefore taken up building reservoirs on the tributaries of Cauvery on its side namely the Hemavathy, the Kabini and the Harangi to which Tamil Nadu protested. On the other hand, no protest was made by Kerala against the building of the dam across Kabini which is one of the three east flowing rivers of Kerala and of the total 2,070 sq.km. of its drainage area 1,920 sq.km. or 92.75 per cent.3

Kerala's claim to Cauvery water is on the basis of its three east flowing rivers (Hemavathy, Kabini and the Harangi) which are tributaries of the Cauvery. Karnataka had no plan funds for the construction of the dams across, Hemavathy, Harangi and Kabini and it had to find its own resources for the purpose.

The three projects were completed with non-plan funds which indeed was a great strain on its financial resources. The representatives of the disputant States Karnataka and Tamil Nadu meet 26 times after 1974 but they could not arrive at any agreeable solution. Their contention was that the 1924 agreement did not permit the Madras Government to construct new irrigation works on the main river and developed irrigation beyond the limit of 3,01,000 acres in the main river basin. The other objection that Mysore raised was that since the 1924 agreement had to be revised in 1974 the new uses of the river by Madras might seriously prejudice

its case at the time of the revision as the existing uses then might create prescriptive rights in favour of Madras. It was accepted that the decision would be taken in 1976 as these new schemes had not yet been implemented. Regarding the Mettur high level canal, the contention of the Madras Government had been that no specific approval of the Planning Commission was needed as it was entitled to increase its lands under irrigation to 3,01,000 acres. The Mysore Government referred the matter for arbitration. This Statement obviously refers to the 1924 agreement. Karnataka felt that the 1924 agreement had been very harsh and that it is at a disadvantage. This is on account of the fact that whereas, 75 per cent of the catchment area of the Cauvery basin lies within its territory its utilisation is minuscule. Of the total utilisation of the Cauvery waters of 671 TMC, the usage by Tamil Nadu was 489 TMC, while only 177 TMC was consumed by Karnataka and 5 TMC by Kerala. Apart from the revision clause after 50 years in the 1924 agreement, the case of Karnataka had been further advanced by the fact that after the reorganisation of States Coorg State and a portion of the Cauvery basin [Kollegal Taluk in Coimbatore District] previously part of Tamil Nadu were merged with Karnataka Section 108 of the States.4 Some princely States got merged with the neighbouring States and through the States Reorganisation Act 1956 the boundaries of certain States were also changed. Thus the erstwhile princely State of Travancore became a part of Kerala and Mysore became part of Karnataka and after bifurcation of Madras, Tamil Nadu became the successor of Madras in regard to Cauvery matter.

Reorganisation of the States Act of 1956 stipulates that agreements affected by the reorganisation of States should be revised by the reorganised States before on 1st November, 1957 in accordance with the new territorial adjustments.5 After reorganisation, Kerala also claimed waters from the Cauvery although neither

5 P.R. Kuppusamy, Cauvery the Role of the Centre and Karnataka and the Apprehensions of the Tamils, Karur, 2000, P. 2.
Kerala nor any territory forming part of it was a party to the 1924 agreement. The 1924 agreement expired in 1974. Since then under the aegis of the Central Government efforts were being made to arrive at an amicable solution to the differences between the States. At one point the three States had almost agreed to the setting up of Cauvery Valley authority for the settlement of the dispute and for the development of the river basin but the authority did not materialise. In 1976 the States agreed to set up a committee C.N.A.C to delve into the question of sharing the available waters among themselves during the years of drought and working out the quantity of surplus water in other years. The committee was to be headed by a member of the Central Water Commission. The terms of reference were,

To assess the requirements of water of the existing areas under irrigation as well as new areas which are proposed to be brought under irrigation taking into consideration the availability of water from the rainfall within the respective command areas; to assess the availability of water for use in a normal year taking into consideration integrated operation of the reservoirs and the demand pattern of releases; to recommend regulation of supplies in normal or good years for protecting the existing ayacuts as well as for the new areas taking into consideration the savings to be effected progressively in Tamil Nadu, Pondicherry and Karnataka. To recommend a workable and equitable formula of regulation and availability of supplies for irrigation of existing ayacuts and new areas in lean years and to determine the quantities of water available as a dependable surplus for further use. The whole objective was an integrated operation of reservoirs in the basin and regulation of supplies to ensure maximum use and equitable distribution of water.
For reasons best known to the concerned States, the committee was not set up. In 1971 writ petitions Numbers 303 and 304 were filed in the Supreme Court of India, seeking directions from the Union of India to refer the dispute to a tribunal under the Inter-State Water Disputes Act of 1956.\(^6\) However, these had to be withdrawn on 24\(^{th}\) July 1974, on account at the suspension of fundamental rights during the emergency. Earlier a suit had been filed in the Supreme Court by the State of Tamil Nadu under Article 131 of the Constitution but was subsequently withdrawn for political consideration and in anticipation of evolving a mutual and negotiated settlement.\(^7\)

At present, Tamil Nadu, Karnataka and Kerala are the contending parties to the said dispute. In 1950s difficulties arose out of the implementation of the following three new projects by Madras Government on the main river (i) Mettur High Level Canal (ii) Kattalai Bed Regulator (iii) Pullambadi scheme. Objecting to these projects Mysore contended that the Agreement of 1924 did not permit Madras to construct new irrigation works beyond the prescribed limit of 1,21,811 ha, in the main river basin. Savings were to be made in water-use by both Tamil Nadu (100 TMC.ft.) and Karnataka (25 TMC.ft.) over a period of 15 years those savings were to be redistributed as 4 TMC.ft. to Tamil Nadu, 87 TMC.ft. to Karnataka and 34 TMC.ft. to Kerala and an Inter-State Cauvery Valley Authority was to be established.

The Inter-State Agreement 1924 between the Government of Mysore and Madras clearly specified the rules of regulation of the flows entering the Krishnarajasagara reservoir in the Karnataka State upstream of Mettur. The impounding formula derived after a long period of observation while, ensuring the low flows to go uninterrupted for the established irrigation along the river downstream, also prescribed a limit above which the floods could be retained in

the Krishnarajasagara reservoir for the benefit of the new ayacut and this limit was also varied in accordance with the normal incidence of the monsoons. The observance of the rules of regulation prescribed by this agreement by Karnataka until 1974 decided the flows entering the Mettur reservoir. The day to day discharges let into the river at Krishnarajasagara diminished to the extent of the river side usage in the Karnataka region through anicuts like the Ramasamy Anicut and also the transmission losses and there upon augmented by the drainages in the intermediate catchment could be anticipated at the Mettur dam. The normal flow time from Krishnarajasagar to Mettur Dam is 48 hours. The tributary Kabini draining the high intensity rainfall area of the Western Ghats and flowing through Kerala and Karnataka was bringing all its flows to the Mettur reservoir until they were interrupted by the construction of the Kabini Dam in 1959.8

The annual flows for the past 50 years have been tabulated in the bar chart appended. The inflows average out in the past five decades to 361.4 TMC annually, though as can be expected in any river basin, there are variations indicating droughts and flood years. The inflows went as low as 135.1 TMC in the year 1976-77 and swelled as high as 750.5 TMC in 1961-62. The inflow pattern after 1974 got vitiated due to the upstream obstruction in violation of the rules of regulation provided by the 1924 agreement. A bar diagram picturing the annual inflows is made and appended. Though this does not show any decisive trend as it is, the 50 years data available in good detail can serve for any statistical analysis of the availability in the river at the reservoir site. Pursuant to that agreement Krishnarajasagara was constructed and became functional in the year 1931 within Mysore and Mettur was constructed by Madras which became functional in the year 1934. The reservoirs on tributaries within the State of Karnataka and Madras / Tamil Nadu have also been constructed and they are functioning. No dispute

was raised at any stage on behalf of the Mysore or Karnataka till the expiry of the period of 50 years in 1974, in respect of any defect in the execution of the agreement of the year 1924 or that it was not binding on Mysore/Karnataka. As already referred to in the different correspondence earlier, the then State of Mysore was anxious for sanction from the then State of Madras for raising the height of the reservoir Krishnarajasagara up to 124 ft. Because of the agreement it was possible for the State of Mysore to raise the height of Krishnarajasagara and to construct reservoirs over the tributaries of Cauvery like Hemavathy etc., for the total capacity of 45,000 million cubic feet and also to put further areas under Cauvery system of irrigation in terms of the said agreement. In this background Supreme Court in 1981 held that it is no more open to the State of Mysore/Karnataka to repudiate the execution of the said agreement now after lapse of about 80 years when the said agreement had been worked out for 50 years till 1974 by the State of Madras as well as the State of Karnataka. The case of M/s. New Bihar Biri Leaves Co. and others (1981) 1 Supreme Court Cases (SCC) 537 at 558 refers wherein the Supreme Court further held that it is a fundamental principle of general application that, if a person of his own accord accepts a contract on certain terms and works out the contract he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is “qui approbat non reprobat" [one who approbates cannot reprobate]. This principle, though originally borrowed from Scots Law is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say no party can accept and reject the same instrument or transaction.

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

7 (1) As from the appointed day –

(a) His Majesty's Government in the United Kingdom has no responsibility as respect 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 transaction 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. It was said that as from the appointed date, in view of section 7 (1) (b), the suzerainty of His Majesty over the Indian States lapsed and with it all Treaties and agreements.11

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

Section 7 (1) of the Indian Independence Act 1947, all the agreements or treaties which had been entered into earlier did not lapse automatically. They continued to be in force on basis of stand still agreements. Mysore at the time of its accession to the Dominion of India executed both the Instrument of Accession and the standstill agreement under which the agreement of the year 1924 continued between the State of Madras and the State of Mysore.

According to Nariman the learned senior counsel appearing on behalf of the State of Karnataka the agreement did not survive because “Standstill Agreements” entered into by the Government of India with various Indian States were purely temporary arrangements designed to maintain the status quo ante in respect of certain administrative matters of common concern pending the accession of those States and the Standstill Agreements were superseded by Instruments of Accession executed by the rulers of those States. 12 In this connection he placed reliance on a Constitution Bench decision of six Hon’ble Judges of the Supreme Court [Shri. Hari Lal Kania, C.J. Saiyid Fazl Ali, J. Patanjali Sastri, J. Mehrchand Mahajan, J. Mukhejjea, and Das. J] in the case of Babu Ram Saksena vs. the State 1950 Supreme Court Report (SCR) 573. 13

The Supreme Court however held that the facts of the present case are different. The Mysore which was a ruling State, after accession became a Group B State under the Constitution of India. At no stage there has been any merger of the said State with any other State by which the life of the erstwhile ruling State Mysore was extinguished or relinquished as was the case of Tonk. The aforesaid Judgement of the Supreme Court is of no help to the State of Karnataka. No other decision or provision was brought to our notice in support of the contention that the Agreement of the year 1924 ceased to exist after the Indian Independence Act 1947 came into force.

13 Supreme Court Report (SCR).
Article 295 -- Succession to Property Assets Rights Liabilities and Obligations in Other Cases\textsuperscript{14}

All property and assets which immediately before by 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.

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 the State.

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

In this background there is no escape from conclusion that Mysore is bound by the terms of the agreement of the year 1924 subject to the review and re-consideration of the terms of the said agreement after a lapse of fifty years since the date of the execution.

Then an alternative stand was taken on behalf of the State of Karnataka that even assuming that the agreement of the year 1924 survived after coming into force of the Constitution of India, terms of those agreements cannot be looked into in any dispute by the Supreme Court or any other court including this Tribunal because of Article 363 of the Constitution. According to the State of Karnataka that agreement had been executed by the then ruler of the princely State of Mysore and because of the bar prescribed in Article 363 of the Constitution the terms of such agreements cannot be examined in any dispute even arising between the successor State of such ruling State with another State as in the present case.

**Article 363 -- Bar to Interference by Courts in Disputes Arising Out of Certain Treaties Agreements *etc.***

(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have Jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Government was party and which has or has been continued in operation after such commencement or in any dispute in respect of any right according 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.¹⁵

(2) In this article

(a) Indian State means any territory recognized before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State.

The same is the position here. The Inter-State Water Disputes Act 1956 has not been enacted under entry 56 of the Union List of Seventh Schedule of the Constitution.\textsuperscript{16} It has been enacted under power vested in the Parliament by Article 262. Parliament may, by law, provide for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or, in any inter-State river or river valley. Article 262 (2) has non-obstante clause saying that notwithstanding anything in the Constitution. Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred in Clause (1).\textsuperscript{17} It has already been pointed out above that in exercise of this power in the Inter-State Water Disputes Act 1956 Section 11 excludes the Jurisdiction of all courts including the Supreme Court. If in Article 363 (1) there is a non obstante clause giving an over-riding effect, then even in Article 262 (2) there is non-obstante clause which read with Section 11 of the Inter-State Water Disputes Act shall exclude the Jurisdiction of supreme court or any other court in respect of a dispute relating to use distribution and control of waters of an inter-State river or river valley. It cannot be disputed that Article 262 is a special provision providing for adjudication of any dispute in respect of use, distribution or control of waters of an inter-State river or river valley. As such on the well-known rule of construction generalia special bus non derogate a special provision excludes the general provision; Article 363 cannot bar the investigation in respect of any complaint including a complaint regarding the non-compliance of terms of an agreement which had been executed by the then ruler of a princely State like Mysore which became an Indian State within the Dominion of India and later after coming into force of the Constitution a State under first schedule of the Constitution.\textsuperscript{18} The Supreme Court while answering the reference made by the President of India under Article 143 relating to this very Cauvery river dispute said about the scope

\textsuperscript{16} Ibid., P. 101.
\textsuperscript{17} India Problems 1934-35, Part II, Commons.
\textsuperscript{18} Ibid., P. 103.
of Inter-State Water Disputes Act 1956 and about the powers of this Tribunal after referring to Articles 131 and 262 of the Constitution.\(^{19}\)

It is clear from the article that this court has original Jurisdiction among other things in any dispute between two or more States where the dispute involves any question whether of law or fact on which the existence and extent of a legal right depends except those matters which are specifically excluded from the said Jurisdiction by the provision. However the Parliament has also been given power by Article 262 of the Constitution, to provide by law, that neither the Supreme Court nor any other court shall exercise Jurisdiction in respect of any dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valley. Section 11 of the Act namely the Inter-State Water Dispute Act 1956 has in terms provided for such exclusion of the Jurisdiction of the courts. Once the dispute is referred to the Tribunal which has exclusive Jurisdiction under the Constitution to examine the dispute in respect of use distribution or control of waters of any Inter-State river or river valley the said Jurisdiction cannot be controlled or curtailed by Article 363. It there is an agreement relating to sharing of the waters of Inter-State River, the Tribunal has to examine the claim of the different riparian States in the background of such agreement. Such inquiry cannot be barred by Article 363 of the Constitution. It may be mentioned that Section 2 (c) of the Inter-State Water Dispute Act 1956 defines water disputes as follows;

2 (c) water dispute means any dispute or difference between two or more State Governments with respect to

(i) The use distribution or control of the waters of or in any inter-State river or river valley.

(ii) The interpretation of the terms of any agreement relating to the use distribution or control of such waters or the implementation of such agreement.

(iii) The levy of any water rate in contravention of the prohibition contained in Section 7.

Not only Section 2 (c) (ii) but also Section 3 (c) clearly provide and contemplate a dispute regarding interpretation of the terms of any agreement relating to the use distribution or control of water of any inter-State river in respect of which such State may request the central Government to refer the water dispute to a Tribunal for adjudication. Under Section 4 of the Act the Central Government if being of the opinion that such water dispute cannot be settled by negotiation, it shall refer the dispute to Water Disputes Tribunal for adjudication. In this background it is very difficult to hold that Article 363 of the Constitution shall govern or control the inquiry and investigation by the Tribunal in respect of a water dispute relating to interpretation of the terms of any agreement or failure of any State to implement the terms of such agreement relating to the use, distribution or control of such waters.\textsuperscript{20}

The stand of the Karnataka is that each of the aforesaid projects in respect of which grievances have been made on behalf of the State of Tamil Nadu had been contemplated under the Agreement of 1924 and for starting the construction of those projects no separate consent was required. Reference in this connection was made to Clauses 10 (iv) and 10 (vii) of the Agreement of 1924 under which the Mysore Government was at liberty to carry out future extension of irrigation in Mysore under the Cauvery and its tributaries to an extent of 1,10,000 acres.\textsuperscript{21} This was in addition to the permissible area of 1,25,000 acres as mentioned in Rules of Regulation of Krishnarajasagara [Annexure 1 to the agreement]. The same has

\textsuperscript{20} \textit{Ibid.}, P. 107.
been reiterated in clause 10 (vii) saying Mysore Government on their part agreed that extension of irrigation in Mysore as specified in Clause 10 shall be carried out only by means of reservoirs constructed on Cauvery and its tributaries mentioned in Schedule of 1892 Agreement. Such reservoirs were to have an effective capacity of 45,000 million cubic feet in aggregate.

According to the Tamil Nadu, the Mysore Government did not furnish the full particulars and details of such reservoir schemes and of impounding there, as required by Clause X (viii). According to Tamil Nadu Rules of Regulation in respect of such reservoirs had to be settled first before the construction was to start. The apprehension on the part of the then State of Madras was that impounding in such reservoirs was bound to affect the flow at Upper Anicut as stipulated in Clauses 7 and 10 of the Rules of Regulation of Krishnarajasagara (Annexure 1 to the Agreement of 1924) on the other hand the case of Karnataka is that attitude of the then State of Mysore was not indifferent. The then Madras Government always objected whenever Mysore State purported to exercise its power under Clauses 10 (iv) to 10 (vii) (i.e.) constructing reservoirs on the tributaries like Kabini, Hemavathy and others. In this connection reference was made to a letter dated 28th June 1933, by which the project proposals on Kabini, Hemavathy and Lakshmanathirtha were forwarded to Madras for joint verification in terms of the agreement aforesaid correspondence continued from 28th June 1933 to 21st May 1945. Such correspondences are on the record. It was urged by Karnataka that from the aforesaid correspondence it shall appear that Madras initially took objections to the proposals of Hemavathy and Lakshmanathirtha on the ground that the data given was meager and Madras was unable to make any useful suggestions or criticism. Regarding Kabini project the objection of Madras was that the proposal of Mysore for transfer of half of power storage from Krishnarajasagara to Kabini was not permissible although according to the State of

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22 The Report of the CWDT, Vol. III.
Karnataka it was permissible under Clause 10 (ix) of the agreement. Apart from objection regarding the transfer of power storage with regard to Kabini, other objections had also been raised from the notes of discussion between the then engineers of the two States on 11th and 12th March, 1940.\textsuperscript{23} It appears that the two Chief Engineers of Madras and Mysore Governments finally agreed on the impounding in reservoir to be built on Kabini during the critical months from June to January applying the Rule 10 of Rules of Regulation of Krishnarajasagara. The notes of discussions and agreements between the two Chief Engineers were duly signed by them and no further action was taken by the State of Madras. Any agreement between the two chief engineers was subject to the approval of the State of Mysore and the Government of Madras. Then by letter dated 21\textsuperscript{st} May, 1945 the secretary to Maharaja of Mysore made a request to the Resident in Mysore to obtain the concurrence of the Madras Government. There was no reply from Madras Government although the contents of the aforesaid letter had been communicated to the Government of Madras. No explanation was furnished as to why when the Chief Engineers of two States had fixed and settled the impounding formula in terms of the agreement of 1924, for the reservoir on Kabini, the State of Madras was not communicating its approval. Because of that the project on Kabini as planned by Mysore in 1933 under Clause 10 (iv) of the agreement remained unimplemented.

The Madras Government had taken up the construction of a reservoir on Bhavani in 1948. When no approval of the State Government in respect of reservoir on Kabini in terms of Clause 10 (iv) was received by the Mysore Government, after the construction of Bhavani started an attempt was made by Mysore to get the project on Kabini sanctioned under Clause 10 (xiv) of the agreement of 1924. In this connection a letter was addressed on 21\textsuperscript{st} May 1953, from the Government of Mysore to the Madras pointing out that in view of

\textsuperscript{23} \textit{Ibid.}, P. 148.
construction of the reservoir on Bhavani which was nearing completion, in terms of Clause 10 (xiv) of the 1924 agreement the Government of Mysore could construct a reservoir on Kabini which will be within the permissible limit of 60% of the capacity of the reservoir built by Madras Government on Bhavani, Amaravathy and Noyyal rivers in Madras; then by a letter dated 17th March 1954 the Madras conveyed its objection to the said proposal saying that taking up the project of Kabini under Clause 10 (xiv) was not proper because it had to be taken up under Clause 10 (iv). Some other objections were also raised in the said letter. By a letter dated 24th February 1955, Mysore Government asserted that it was at liberty to take up the work under Clause 10 (xiv) and reminded the Madras Government that it had already constructed Bhavani reservoir utilizing the provision of Clause 10 (xiv) without furnishing the details of the project to Mysore Government. As such Mysore was justified in taking up Kabini project under Clause 10 (xiv) of the agreement. Madras Government objected by its letter dated 28th September 1955, that it was not necessary for the State of Madras to inform Mysore before construction of Bhavani reservoir in terms of the agreement. It was also asserted that Bhavani reservoir was not likely to affect the flow of river Cauvery, but reservoir at Kabini which was situated at a higher level was likely to affect the supply to which the Madras was entitled. By a letter dated 30th May, 1956 Government of Mysore stated that there was no reason to modify the project as had already been stated in their earlier letter. From perusal of the correspondence referred to above between 1933 to 1956 it was contended by Karnataka that the then States of Madras and Mysore had agreed in clear and specific terms in respect of construction of reservoirs on different tributaries in the then State of Mysore and the State of Madras including as an off-set reservoir as contemplated by Clause 10 (xiv).

24 Tamil Nadu, Vol. VIII, P. 97.
25 Ibid., P. 98.
26 Ibid., P. 99.
After the year 1974, when according to the State of Karnataka the agreement of the year 1924 came to an end, the State started impounding waters in different reservoirs, constructed over the tributaries of Cauvery within the State of Karnataka without following any Rules or any of the terms of Agreement of 1924. The areas which were to be put under irrigation from such reservoirs and other diversion works like anicuts were increased every year. It has been pointed out that rules of regulation of Krishnarajasagara were observed up to 1973-74 by Karnataka but thereafter the areas under irrigation was increased from 1,25,000 acres to 2,35,616 acres in 1973-74. Charts have also been filed in respect of different reservoirs on Hemavathi, Kabini, Suvarnavathy and Harangi as to how the impounding of water in such reservoir increased. It appears to be an admitted position that the reservoirs on the aforesaid tributaries of the Cauvery within Karnataka became functional after 1974. This obviously led to the dispute which ultimately has been referred before this Tribunal for adjudication.

It was urged on behalf of both the States that the terms and conditions of the agreement of 1924 were violated. After 1956 the Mysore Government took a decision to make construction on different tributaries mentioned in the Agreement of 1924 of its own without waiting for any sanction from the planning commission. It is not necessary to go into those details because any finding as to who is at fault and responsible for such breaches or violations shall be now academic and of no practical use. But one thing is clear that Mysore State observed the Rules of Regulation of Krishnarajasagara till the expiry of the period of fifty years from the date of the execution of the agreement of 1924.27 Thereafter the State of Mysore-Karnataka started asserting its territorial right over the water flowing from Cauvery within the territory of Mysore. It had the same attitude in respect of the tributaries referred to above on the plea that the Agreement of 1924 had come to an end. But now the clock cannot be put anti-

clockwise to punish or penalize anyone of them. The injury caused to each State at one stage or the other by the conduct of the other State has become a matter of history. It is not easy to assess any injury in an irrigation dispute. How the damages caused year-wise to one State or other can be computed or calculated? No concrete material has been brought on record by either side, on the basis of which, any such attempt can be made. During the hearing of the dispute it was more or less an admitted position that even the State of Tamil Nadu had increased its acreage under the Cauvery irrigation system from about 16 lakhs to 28 lakhs. Similarly the State of Karnataka increased the areas under irrigation from Cauvery system including from the tributaries of Cauvery. In this background the issue regarding non-compliance and violation of the terms of the agreement of the year 1924 by two States does not require to be examined any further.

The claim of the State of Kerala regarding sharing of the waters of river Cauvery has been made primarily because of the areas transferred to the said State from Madras. The Malabar district which was transferred from Madras State not only included a part of the Cauvery basin but also part of the two important tributaries of Cauvery namely Kabini and Bhavani. The Kabini and Bhavani after the aforesaid transfer of the Malabar district flows through the State of Kerala. Kabini later enters into the then State of Mysore now Karnataka. Bhavani enters into the then State of Madras now Tamil Nadu and they [Kabini and Bhavani] join the river Cauvery in Karnataka and Tamil Nadu respectively. There is another tributary of Cauvery known as Pambar which was within erstwhile State of Travancore-Cochin. But after the catchment area of Kabini and Bhavani became part of the State of Kerala the total area of Cauvery basin in the State of Kerala increased to 2,866 sq.km.29

The State of Kerala started examining the possibility of utilizing the waters of Kabini and Bhavani for purposes of irrigation and hydro-electricity. The erstwhile State of Travancore-Cochin was not a party to the agreement of the year 1924 entered into between the then State of Madras and the State of Mysore on basis of which the States of Madras and Mysore were sharing the waters of inter-State Cauvery river. State of Kerala after 1956 started claiming apportionment of the waters of river Cauvery saying that the agreement of the year 1924 aforesaid between the then States of Madras and Mysore was not binding and as such should be ignored so far sharing of the water of river Cauvery was concerned. In this connection our attention was drawn to the different correspondence and proceedings. By a letter dated 21st March 1959, addressed by the Government of Kerala to the Government Madras, Kerala objected to the project of Madras for diverting the water to the Kundah basin and requested for full details of the said project because the land in Attappady valley was likely to be affected. The next letter is dated 19th July 1961 to the State of Mysore saying that the completion of Kabini dam by Mysore was likely to submerge the areas in Wynad in Kerala. The same was reiterated by letter dated 8th September 1961 pointing out that the State of Kerala was interested in the implementation of project in such a manner as not to affect any part of its territory. A reminder was sent on 26th October 1961. Thereafter on 24th March 1962 Kerala addressed a letter to the Ministry of Irrigation and Power, Central Government giving its concurrence for setting up a River board for Cauvery river basin as it was admittedly an inter State river. It also requested to be consulted before nomination or appointment of the members on the Board is made. In the letter dated 9th May 1962 addressed to the Secretary, Government of India, Ministry of Irrigation and Power, a specific claim was made for sharing water of the river Cauvery and its tributaries for irrigation and hydro-electric schemes.

30 Ibid., P. 118.
The Minister for Irrigation and Power, Government of India, on 5th August, 1968 addressed a communication to the Chief Minister of Kerala informing that Upper Bhavani Project proposal of Government of Madras had not yet been received by Central Water Commission and assured that the Government of Kerala shall be consulted when any project proposal was received. The Chief Minister on 23rd August 1968 again informed the Central Minister for Irrigation and Power, K.L. Rao regarding Kundah Project saying that the Government of Madras was going ahead with construction of the dam without concurrence of the Kerala Government. Such acts should have been prevented by Government of India. The same was reiterated by another communication dated 21st January 1969 by the Chief Minister of Kerala in a communication to K.L. Rao, the Minister for Irrigation and Power.\footnote{ibid., P. 121.}

On 11th February 1970 K.L. Rao the Irrigation and Power Minister, Government of India, while addressing a letter to the then Chief Minister of Kerala, enclosed a note suggesting further line of action in respect of different projects in Mysore after a meeting of the Ministers of Tamil Nadu and Mysore and representative of the Government of Kerala regarding Cauvery waters.

In respect of Kabini Project in the note it was said that a committee was to be appointed to consider the requirement of Kerala from Kabini apart from other questions mentioned therein. It was also said in the communication that Government of India shall be writing to all State Government reiterating that construction of new Projects should not be taken up or proceeded with, without the clearance of the Planning Commission.

On 12th February 1970\footnote{Report of the Secretary, Ministry of Irrigation and Power, Government of India, CFFC, New Delhi, 1972, P. 16.} the Kerala Government informed the Joint Secretary to the Government of India that the Tamil Nadu was considering
modernisation scheme which had to be examined in order to ensure that interests of the upper riparian State of Kerala in Kabini and Bhavani rivers which are tributaries of Cauvery were not jeopardized. It was again asserted that Kerala had the right to utilize the waters of Kabini and Bhavani which had to be protected. When nothing positive came out the Chief Minister of Kerala, by his letter dated 19th March 1970 to K.L. Rao the Minister for Irrigation, suggested that the dispute regarding the sharing of water of inter State Cauvery river should be treated with regard to the entire Cauvery basin. As such it was necessary to have accurate data for which a fact finding commission should be constituted. On 17th April, 1970 a discussion was held on the Cauvery waters which was attended to by K.L. Rao, Union Minister for Irrigation and Power, the Chief Minister of Kerala the Chief Minister of Mysore, the Chief Minister of Tamil Nadu and others. A Summary record of the discussion was forwarded by K.L. Rao to the Chief Minister of Kerala and the same is at Page 92 of Kerala compilation – 1. The proceeding mentioned that after discussion a consensus emerged on different questions enumerated in the said note. The Chief Minister of Kerala by a communication dated 14th May 197033 pointed out that there was no agreement in the aforesaid discussion and Kerala had never agreed for clearance of the three projects mentioned in the said Paragraph (4). It appears another meeting was held by the Union Minister for Irrigation and Power with the Chief Ministers of Kerala, Mysore and Tamil Nadu along with other Minister of the States on 16th May 1970. The general trend of discussion was summarized. It will be proper to reproduce a part of it.

The general trend of the discussions can be summarized as follows:

1. The three State Governments have expressed their respective view points with regard to the Cauvery waters. These views are to be given in the enclosures to the agreement.

33 Ibid., P. 123.
2. It has been agreed that the details of the Hemavathi and Kabini Projects should be in accordance with the provisions of 1924 Agreement and that the rules regulations and the method of impounding of waters in the proposed reservoirs should be worked out by the Chairman Central Water and Power Commission within three months in consultation with the concerned Chief Engineers of the three States.

3. It has also been agreed that this settlement is without prejudice to the contentions of the respective parties that may be raised in a dispute regarding sharing of Cauvery waters. The limit flows prescribed in the 1924 agreement will be maintained till the sharing of the waters by the three States is resettled later on, either by mutual agreement or by a decision of a tribunal under the Inter-State Water Disputes Act 1956 as amended in 1968.34

Ultimately a suit was filed on 24th September 1971 before the Hon’ble Supreme Court of India [Original Suit No.2/71] under Article B1 of the Constitution on behalf of the State of Kerala. The Union of India the State of Mysore and the State of Tamil Nadu were defendants to the said out.

In the said suit more or less same grievances which had been made in different correspondence were made.

1. To refer the dispute to the Tribunal constituted under the Inter-State Water Disputes Act 1956.

2. Pending the disposal of the reference to the Tribunal to restrain.

(a) The Union of India from giving clearance both to the States of Tamil Nadu and Mysore to construct any project on Cauvery and its tributaries or giving financial aid for the said purpose.

34 Ibid., P. 126.
(b) Pending the suit and the disposal of the reference by the tribunal to restrain the State of Mysore the 2\textsuperscript{nd} defendant by an injunction from proceeding in any manner with or execution of the following projects or schemes or in any manner utilizing the water.

there of:

(i) The Kabini Reservoir project on the Kabini
(ii) The Hemavathi reservoir project on the Hemavathi river.
(iii) The Swarnavathi Reservoir projects on the Swaranavathi river.
(iv) The Harangi Reservoir Project on the Harangi river.
(v) Other reservoirs across other tributaries of the Cauvery river.

Union Minister of Irrigation and Power stated that river problems are best settled through negotiations and this was the course the Central Government was adopting for the last few years in settling the differences on the use of waters of Cauvery. Earlier it was aimed to arrive at an interim agreement to be valid till 1974. When the earlier Agreement of 1924 would have come up for review after 50 years as provided in the agreement. Now as 1974 is near this attempt has been given up in favour of finding an overall approach to solve the problem amicably amongst the several States. The discussion amongst the Chief Ministers revealed general consensus on the three following points.

The centre may appoint a Fact Finding Committee consisting of Engineers, retired Judges and if necessary Agricultural Experts to collect all the connected data pertaining to Cauvery waters, its utilization and irrigation practices as well as projects both existing under construction and proposed in the Cauvery basin. The committee will examine adequacy of the present supplies or excessive use of water for irrigation purposes. The Committee is only to collect the data and not
make any recommendations. The committee may be asked to submit its report in three months time.\textsuperscript{35}

Union Government will assist in arriving at such a settlement in six months and in the meanwhile no State will take any steps to make the solution of the problem difficult either by impounding or by utilizing water of Cauvery beyond what it is at present enjoying.

Pursuant of the aforesaid decision taken on 29\textsuperscript{th} May 1972\textsuperscript{36} a fact finding committee was constituted on 12\textsuperscript{th} June 1972 which submitted its report on 15\textsuperscript{th} December 1972.\textsuperscript{37} It also looked into the claims of the different riparian States in respect of the waters within the Cauvery basin and as to what were the requirements of different States. It was pointed out on behalf of the State of Kerala that on 29\textsuperscript{th} April 1973 a meeting of the Chief Ministers including the Chief Minister of Kerala was held along with Minister for Irrigation, Government of India and it was said in the proceedings that the assessment of the yield in the Cauvery basin at 740 TMC\textsuperscript{38} by the committee was generally agreed by all States. A direction was also given to the Chief Engineer of the States to meet and discuss with regard to the contribution of Kerala portion of the Kabini sub-basin. The Chief Engineer of three States after examining the different statistics and materials on 25\textsuperscript{th} May 1973 arrived at a conclusion that the contribution from Kerala catchments area of the Kabini-sub-basin was 96 TMC.

A draft of the agreement dated 29\textsuperscript{th} November 1974 which was to be signed by the three States was circulated mentioning the total yield in the Cauvery basin and the proposed distribution-thereof. It is not necessary to examine the suggested apportionment among the different States here.

\textsuperscript{35} Report of the Secretary, Ministry of Irrigation and Power, Government of India, New Delhi, 1972, P. 25.
\textsuperscript{36} Cauvery the Haunting Distress, Karnataka, P. 9.
\textsuperscript{37} Ibid., P. 72.
\textsuperscript{38} Ibid., P. 93.
Again on 25th August 1976 a draft of the agreement which contained the proposals for sharing of the water in the States was circulated. But none of the agreements could be signed and the matter remained pending. In the meantime, an attempt was made on behalf of the State of Kerala to get its projects sanctioned by the Central Water Commission and Central Electricity Authority. In respect of Bamasurasagar Irrigation Project the Central Water Commission by a letter dated 04th June 197939 advised the State of Kerala to take concurrence of Tamil Nadu and Karnataka. Similarly in respect of Mananthvady Multipurpose Scheme, the Central Electricity Authority by a letter dated 23rd May 1980 asked the State of Kerala to take the concurrence from Tamil Nadu and Karnataka. Regarding Attapady Irrigation Project the Central Water Commission on 06th January 1984 directed the State of Kerala to take concurrence of Tamil Nadu and Karnataka. About Pamber Hydro Electric Project similarly on 12th March 1990. The Central Electricity Authority said that it cannot be entertained unless concurrence is given by the Tamil Nadu and Karnataka States.