CHAPTER 3

ANALYSIS OF IRRIGATION-RELATED CASES
IN TAMIL NADU

3.1 GENERAL

Two basic kinds of law exist in common law countries: legislation and case law. The law rooted from customs and conventions recognized through the decisions of a court in contrast to legislative enactments are defined as the common law. In common law legal systems, judges have the authority and duty to decide what the law is when there is no other authoritative statement of the law.

In Sankaravadivelu Pillai v. Secretary of State for India in Council, it was pointed out that the rights and obligations between the State and the ryot in India for supplying water for irrigation purposes rest largely on unrecorded customs and practices (1904-15-MLJ-32). Hence for most of the irrigation-related cases where there are no clear cut laws or authority, in addition to the legislation available related to irrigation, judges decide based on customs and practices and such judgments pronounced in the Supreme Court and the High Court also have a binding on the latter cases as case law.

Case law, also known as precedence law, interprets prior judgments of higher courts, statutes and other legal authority – including doctrinal writings by legal scholars and law commissions. Case law is of two types: the judicial direction and the judge-made-law. Judicial direction is a court
direction given in an area where there is no existing law. To render justice the Supreme Court gives a direction till a law is enacted. Judge-made-law is an interpretation of the existing law – when there is no clarity in a provision of a law, the judiciary gives clarity. This law shall be in force till the judiciary gives further interpretation to the law.

A brief description of cases, with the Acts associated, the judgment and the adequacy of the existing Acts to deal with the cases are presented below:

Regulation and control of water by the State creates rights and obligations between the State and its subjects and also between States *inter se*. Any violation of such rights gives rise to a variety of litigation – civil and criminal (Batra 2000). If rights are affected it comes under the civil case and if an injury is caused it comes under the criminal case. Under the criminal cases punishments are given; but only injunction or compensation is given in case of the civil cases. Irrigation cases come under civil cases, where some sort of relief is granted to the affected parties. Civil cases are filed under the Civil Procedure Code (CPC), 1908.

The area of jurisdiction plays a role in enacting and enforcing a law (Matthews 1987). Cases having suit value up to one lakh shall be filed in the Munsif court. Almost all the injunction cases are filed in the Munsif court. If the suit value is more, it could be filed directly in the sub-court too. This is said to be the first appeal. A person who loses in the lower court shall make an appeal in the higher court by way of filing a second appeal in the High Court. After the appellant files an appeal, the person who has won in the lower court also could approach the court based on the points with which he was not successful in the lower court. This is said to be the cross objection. Cases can be filed in the Supreme Court which is the apex court in India only after getting a ‘fit for
approval’ from the High Court. If not, the Special Leave Petition can be filed in the Supreme Court under Article 136. ‘Leave’ means permission. The entire drafting made by the defendant and the plaintiff is said to be the pleading. The last portion of the pleading is the prayer. If the court feels that the defendant’s pleading is genuine, then the case is dismissed without costs, otherwise with costs. After filing a case, if the case is still pending in the court, the interim petition filed is said to be the Civil Miscellaneous Petition (CMP).

Judgment comprises reasons and decisions. While decree gives only the decision and is said to be the operational portion of the judgment, the speaking order and the decree together form the judgment.

Judicial remedies comprise constitutional and statutory remedies. Cases relating to water are filed under Article 21 which provides for the right to life. As per Article 32(2) of the Constitution of India, different constitutional remedies are available in the form of writs. There are five types of writs. They are: Habeas Corpus, Certiorari, Prohibition, Quo Warranto, and Mandamus. Among these the following writ petitions could be filed in irrigation-related cases. Certiorari and Prohibition are used whenever an inferior tribunal has wrongly exercised or exceeded its jurisdiction; while Mandamus is used only when the inferior tribunal has declined jurisdiction. Mandamus demands activity, prohibition, and commands inactivity (Basu 2006). Writ petitions can be filed in the Supreme Court under Article 32 only for cases relating to violation of fundamental rights. Writs can be filed in the High Court, under Article 226, which has a wider scope, relating to the violation of fundamental rights and the ordinary legal rights, only if it is against a State and only if other remedies are not available.

Statutory remedies are available by way of filing an injunction. The common law remedies are in the nature of a tort action against the violator of
the water right. For an injury caused to one’s water right, the affected person must first and foremost establish the existence of a legal right which has been violated and second, a breach of legal duty by the person against whom damages are claimed (Batra 2000).

Injunction is broadly classified into temporary (prohibitive) and mandatory (perpetual). Order 39, Rules 1 and 2 of the CPC, 1908 deals with the granting of temporary injunctions. Sections 37 to 42 of the Specific Relief Act, 1963 deals with the mandatory injunction.

The mandatory injunction is the continuance of some wrongful omission. In mandatory injunction, the decree, directs the judgment-debator to do a particular act by giving a positive consideration. This mandatory injunction can be issued under Section 38 of the Specific Relief Act, 1963, even where there is a threat or invasion over the plaintiff’s right, though the merits of such a case have to be looked into to decide whether the circumstances of the case demand mandatory injunction (Anand and Ramaswamy 2004).

Filing a case and getting a judgment involves a lot of money. Though common or ordinary litigation requires money, under Article 32 of the Constitution of India, there is another system of justice called Public Interest Litigation (PIL). Under this system, any ‘public spirited’ person or group of persons can send a public interest application to the State High Court or the Supreme Court of India (Basu 2006). Article 32 which provides scope for the PIL reads: the expression ‘public interest’ contemplates a legal proceeding for the vindication of the fundamental rights of persons who are unable to enforce them on account of their incapacity, poverty or the like (Basu 2006). If the court feels that the issue is of significant public interest, it appoints lawyers who take up the case for litigation. Applicants do not have to
pay for litigation in such cases. Many public interest cases have been filed against overexploitation of groundwater, conversion of agricultural tanks into water supply tanks, encroachment of waterbodies and water pollution.

To get a better understanding about the gaps existing in the irrigation-related laws concerning Tamil Nadu, the cases that have direct relevance to irrigation and filed before the Madras High Court have been collected and studied. As many as 30 cases which had been filed before the Madras High Court and two cases filed in the Supreme Court were collected and analyzed. Appendix 2 gives the checklist of cases taken for study, arranged in accordance with the Acts under which they have been filed in the chronological order. Grouping as given below was done according to the Acts under which cases had been filed:

A. The Tamil Nadu Irrigation Tanks (Improvement) Act, 1949 (4 Nos.)
B. The Easements Act, 1882 (9 Nos.)
C. The Specific Relief Act, 1963 (2 Nos.)
D. The Tamil Nadu Irrigation Works (Construction of Field Bothies) Act, 1959 (1 No.)
E. The Tamil Nadu Groundwater (Development and Management) Act, 2003 (1 No.)
F. The Tamil Nadu Panchayats Act, 1958 (1 No.)
G. The Customary Law (8 Nos.)
H. The Madras Irrigation Cess Act, 1865 (6 Nos.)

Among these 32 cases, 28 cases are regrouped under the following five sub-headings: rights of the State against the rights of individuals; rights
of individual/s in natural / artificial channels; sharing of groundwater from a common well; channelizing water through a common channel; and levy of irrigation cess. The remaining four cases for which back papers were available were analyzed in detail and are presented in Chapter 4.

3.2 RIGHTS OF STATE AGAINST THE RIGHTS OF INDIVIDUALS

Most of the irrigation-related cases are based for claiming water rights. When water is used for irrigation purposes, conflicts arise regarding the storing and distribution of this finite resource between individuals; or individual/s and the State. By custom the individual/s enjoy certain rights towards water flowing in rivers or stored in tanks. When the rights are infringed upon, appeals are filed in the courts claiming for declaration of rights or claiming an injunction restraining the others from performing an act. Under this subhead, seven cases are dealt with.

3.2.1 Regulation of Irrigation Supply from a River and a Tank

The first two cases had been filed under the provisions of the Tamil Nadu Irrigation Tanks Improvement Act, 1949; dealing with the rights of the State against individual/s in regulation of irrigation supply from a river and a tank. Gurunathan and Shanmugham (2006) said that the customary right of the ryots has undergone a change after the enactment of Madras Irrigation Tanks (Improvement) Act, 1949.
A1. RIGHTS OF THE OLD AYACUTDHARS IN A NEW IRRIGATION PROJECT

This is a case of the State of Tamil Nadu represented by the District Collector, Madurai v. V.A. Abdul Rahim and others, with LPA No. 166 of 1988 (1997-111-CTC-639; 1997-1-LW-592; 1997-2-MLJ-261), which deals with the rights of the old ayacutdars who claimed eligibility of growing two crops in a newly-formed water supply scheme.

The Manjalar river, which is a perennial hill stream, is the source of supply for the two villages of Batlagundu and Kanavoipatti having an ayacut (lands which are entitled to irrigation under an irrigation work) of 66.77 ha and 64.75 ha respectively. The respondents were patta dars (persons who hold a title deed to a land) of these villages and own double crop wetlands as per the revenue records. Water was taken either directly from the river or through the channels to irrigate their fields. Such an arrangement had been in practice from time immemorial.

Since the Government had found that the water was in surplus and was going waste, it proposed the Manjalar dam scheme in 1963 to collect, regulate and distribute the water to enable wet crops to be raised in a larger area of drylands in Devadanapati and other villages. Rules were framed by the State regarding the regulation of supply to the old and new ayacuts in the year 1966, assuring that only the excess water after meeting the needs of the old ayacuts (for double crops) would be impounded in the reservoir and used for the benefit of the new ayacut.

Resettlement of revenue assessment was done in the years 1968 and 1969, imposing irrigation cess to the new ayacuts and betterment assessment on old wetlands, recognizing the ancient immemorial rights to get supply for the second crop too. In 1969, the Collector introduced the turn system of
irrigation supply and the two villages got regulated supply for their double crops. In 1971, when the second crop was raised by the respondents, the Executive Engineer (EE), PWD, denied the release of water for the second crop. “There was sufficient water in the reservoir,” was the contention of the respondents who claimed a permanent injunction under Section 36 of the Specific Relief Act, 1963. Since the order of the EE amounts to the denial of lawful rights of the *pattadars*, they have filed writ petitions (Nos. 1676 and 1677 of 1971) for redress and obtained an interim direction for release of water for the second crop.

The defendant-State filed a written statement stating that since no objections were raised from any of the villagers towards the construction of the reservoir except to the entitlement to accustomed supply of water, the plaintiffs had no right to question the prerogative right of the State towards the construction of the dam. The plaintiff filed a reply statement. The trial judge decreed the suit on the following terms: “There will be a decree restraining the defendant-State from diverting the waters of the Manjalar river impounded at the Manjalar dam site without arranging for enough supply of water for the second crop to all the registered double crop wetlands every year by way of permanent injunction”.

Aggrieved by this decree, the State filed A.S. No. 945 of 1980 before the High Court and the appeal was rejected. So the State filed the LPA No. 166 of 1988 and CMP Nos. of 13707 and 13708 of 1992. The contention of the State was that it was unjust to deny water even for a single crop for Devadanapati and other villages, and the State had the responsibility to supply water to them too.

The suit was filed under the provisions of Section 2 of the Indian Easements Act, 1882, Section 4 of the Tamil Nadu Irrigation Tank
(Improvement) Act, 1949, Section 36 of the Specific Relief Act, 1963, and Article 39(b) of the Constitution of India. Section 2 of the Indian Easements Act, 1882, highlights the prerogative right of the State to regulate the supply of water. Section 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, states that, the State Government has power to regulate and distribute water for effective irrigation of agricultural lands.

So the High Court held that it was unjust and inequitable to deny others even water for one crop, while providing water to plaintiffs for raising the second crop, merely on the grounds that the lands are registered as double crop wetlands.

The policy decision was taken up by the State probably to maintain the equity. This needs to be supported by the court too. Article 39(b) of the Constitution enjoins the State also to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed at the best to subserve the common good.

The High Court held that the equitable relief of injunction against the State not to divert supply of water to other agricultural lands ought not to have been granted in view of Section 2 of the Indian Easements Act, 1882, and Section 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, besides being opposed to the policy underlined in Article 39(b) of the Constitution.

The High Court further held that the prerogative right of the Government despite the rights of the farmers to receive from the Government supply of water necessary for irrigation to regulate water in the largest interest of the society was equally beyond challenge. No injunction could be granted since the project was of public interest.
OBSERVATION

This scheme was formulated only on the grounds of using the water which was found in excess and aimed at providing water for the dry lands too. In 1969, due to scarce rainfall the district Collector introduced a turn system and the water for the second crop was denied to the plaintiffs. The rainfall in Tamil Nadu is seasonal and all the irrigation systems are designed based on the 75 percent dependable flow. This means that once in four years on an average, the dam would not get adequate supply of water. This is a built-in constraint due to the stochastic nature of rainfall. As a result, the storage in dams and tanks, and hence the deliveries from the storage structures are subject to vagaries of rainfall. It means that in a supply-based irrigation system, the deliveries are subject to changes, and the failure may be seasonal. So such sort of cases should not be entertained.

It was contended by the State at one place that when the scheme was taken up for investigation and implementation, the existence of double crop lands in the old *ayacut* was not taken into account. This indicates that there was a technical snag in the planning stage itself.

Apart from filing the case in regular courts, cases can be filed in special courts such as consumer courts set up under the provisions of the Consumer Protection Act, 1986. Here is an example to show such an intervention made in one of the irrigation-related cases. In 2005, two farmers from Alur village, Chamarajanagar district, Karnataka, took the State Government to court for not giving water for their crops for four years after the construction of a dam in the Suvarnavati river. They approached a District Consumers’ Disputes Redressal Forum. The farmers’ contention was that the newly irrigated areas were receiving water whereas their old gardens and lands were being dried out, despite the dam had received enough water. In the
year 2002, a drought was declared in that village and water was not released. The irrigation fees were also suspended and this scenario continues up to 2005. The engineers contended that water had not reached the petitioners' fields, as they were at the tail-end of the canal and there was considerable sand quarrying in the river bed during the preceding two years of drought. The two issues brought before the court were (i) are the two farmers consumers within the meaning of the Consumer Protection Act, 1986, and (ii) if so, have the Government officials caused a deficiency of service as alleged. The court said that the public trust implies that water will be regulated and supplied to meet everybody’s needs in a fair and balanced way and the case was won by the farmers in less than a year. The court also said that the farmers who pay water fees are consumers and Government authorities are service providers. As such, if dam authorities fail to release water, they may be held up for deficiency of service (Veena 2007).

So the responsibility of the State to regulate water supply is being insisted upon.

A2.  RIGHT OF THE STATE OVER TANK SUPPLY

The case concerning the right of the State towards regulating the tank supply in the State of Tamil Nadu represented by the District Collector, Trinelveli Collectorate, Trinelveli, S.C. Maharajan and another v. Sudalaipothi Nadar (died) and others in S.A. Nos.137 and 268 of 1986 came before the Madras High Court (1999-1-LW-129).

This case was argued based on Sections 3 and 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949. The plaintiffs filed this case for themselves and on behalf of the ayacutdars of Authoor tank and channel. The plaintiffs-respondents prayed for a declaration that the ayacutdars of Authoor
tank and channel were entitled to the entire water and for consequential permanent injunction restraining the State from interfering in any manner with the supply of water to Authoor tank through the Authoor channel.

The submission by the State Government was that PWD was reconstructing only the drainage channel with self-acting shutters to allow water to drain into the Authoor supply channel from the *ayacut* of an upper tank and so the flow of water in the Authoor supply channel was in no way diminished due to the reconstruction of the drainage channel. The State contended that this was done only to improve the efficiency of the above said tank.

The court held that from the above said provisions of Sections 3 and 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, it was made clear that the Government had the absolute power to take any measure for increasing the efficiency of the tank.

**OBSERVATION**

Under Section 42 of the Specific Relief Act, 1963, any person entitled to any right as to any property may institute a suit against a person denying such right and the court may, in its discretion, make a declaration that he is so entitled. If the State Government be bound by the declaration asked for (if granted by the court), then the effect would be to restrain the State from exercising its powers under Section 3 of the Tamil Nadu Tanks (Improvement) Act, 1949. But no court shall make a declaration which would be futile. As per Sections 3 and 4 of the Tamil Nadu Tanks (Improvement) Act, 1949, a civil court cannot grant an injunction restraining the Government from doing any act intended to improve the efficiency of the Government irrigation source. The State Government had also assured the supply to the
Authoor channel and the tank, and hence the rights of the ayacutdars were preserved.

3.2.2 Customary Rights of People against the Rights of the State in Regulating Water through Channels

The next three cases discuss the rights of the State against the customary right of the people.

B1. RIGHTS OF STATE AGAINST CUSTOMARY RIGHTS IS NOT MADE AS PER THE REGISTRY

The case of the Secretary of State and others v. P.S. Naheswara Iyer and others with Appeal No. 263 of 1930 filed in the Sub-Judge court, Dindigul, came before the High Court Madras (AIR-1936-Madras 923).

In revenue papers the Varahanadi channel, near Periyakulam in Madurai district, was entered as a source of irrigation for the plaintiffs’ village and a river as the source of irrigation of the defendants’ village. The channel after filling up a tank passes through the surplus channel and then joins the river. The State was the first defendant and the other defendants were representatives of the villages which were irrigated by the lower down channel where the surplus channel joins with the river.

The State Government proposed to dig a diversion channel at a point before the channel entered the defendants’ villages. The channel water was being used by the plaintiffs for the past 100 years, and though their lands were registered as single croplands they produced two crops and claimed exclusive right of the water based on prescription and custom.
The court observed that it has generally been stated that the ryotwari holder is only entitled to claim that supply of water required for cultivation of his registered wetlands and that should not be materially diminished by an act of the State Government. Subject to this condition, the State Government in this country has claimed absolute right to change the source of irrigation or the method of irrigation by which the ryot has been supplied and to regulate the use of the waters of all public and natural streams in the best interests of the people.

The court further observed that the customary right might not give the villagers the exclusive right of all the waters of a channel to the extent of preventing the State Government from using the waters for other purposes and a right by prescription to water in a channel could be acquired as against the proprietary right of another and not as against the sovereign right of the State.

It was also held that the significance of the registry as single crop or double crop lies mainly in fixing the quantum of liability of the ryot in the matter of land revenue and when the liability has been thus fixed the ryot can only depend on the possibility of securing a remission, if the revenue authorities are satisfied that there has been a failure of crops on account of the failure of the water supply. While making it clear that it is a common knowledge that second crop is freely permitted to be raised, subject of course to the ryot taking the risk of the failure of water supply and subject to the liability to pay assessment for the second crop, it was also held that the power of the State to interfere with customary supply of water to the ryotwari holders ought not to be determined with reference to the registry, but only with reference to the nature of the accustomed use.
OBSERVATION

Since the supply was found in excess, the proposal of the State Government to divert the water was in accordance with the law. In cases like this, the proprietary right of the State Government has won against the customary rights of the villagers.

A right by prescription can be acquired as against the proprietary right of another but not as against the sovereign right, which under the Indian law the State possesses to regulate the supply of water in public streams so as to use it to the best advantage (AIR-1936-Madras-923, Section 2 of the Indian Easements Act, 1882). Though the court had tried to protect the absolute power of the State, it had recognized the customary rights of the villagers too.

B2. CONFLICT BETWEEN THE UPPER AND LOWER OWNER IN AN ARTIFICIAL WATERCOURSE

This case of Krishnaswamy Chettiar and others v. Pappi Naicker and others with Second Appeal No. 792 of 1942 came up under the provisions of Section 28 of the Indian Easements Act, 1882, concerning the rights of ayacutdars holding wetlands under a tank and how the rights to take water to the fields are to be regulated (AIR-31-1944-Madras-228).

The fields of the plaintiffs and the defendants were registered as wetlands under the same tank, which was their source of irrigation. The plaintiffs claimed that the field-to-field irrigation practice prevailed in their village. Under this system, each wetland was not provided with a separate irrigation channel. The tank water was led through a big channel taking off from a sluice and there were smaller channels leading off from the main channel to the various fields. Even these field channels, as they were called,
did not reach every wetland and in several cases after irrigating one field, the tank water flowed over the ridge of that field or by percolation or by a cut or vent in the ridge of the upper field and reached the lower field.

The tank water which came through the irrigation channel spread over the southern portion of the defendant’s fields and then flowed into the surplus channel which in turn irrigated the plaintiff’s field. The defendant-appellant raised the bed of the channel and introduced an undervent to lead the water to the northern portion of his fields too, claiming that the whole land was registered as wetland. The question raised was whether the defendant was entitled to irrigate the whole of his field before the water was allowed to go into the surplus channel, which directly irrigated the plaintiff’s field.

The plaintiff contended that in the Madras Presidency, the Government had the primary duty of regulating water supply to all fields registered under the command area of a particular tank. It also has the duty of indicating the source of supply. The Government would not be entitled to interfere with the old source of supply until a new and equally efficient source was provided.

The court held that the right to the water of a river flowing in a natural channel through a man’s land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour’s land do not rest on the same principle. The right to an artificial watercourse might be presumed from time to time, manner and circumstances under which the easement has been enjoyed.

The court also held that the defendant was entitled to irrigate the whole of his field before being obliged to let out the water into the surplus channel. The only remedy to the plaintiff was to approach the Government
and to request that his field also received an adequate supply of water and has entrusted the responsibility of regulating the tank supply to all the wetlands.

OBSERVATION

Though this case deals with the conflict between individuals, it is the responsibility of the State to regulate the supply in an artificial watercourse. In this case, the natural slope of the land of the defendant is northwards. Originally, water supplied through the irrigation channel irrigated only the southern portion of the land. The surplus channel, which took off from his plot, irrigated the plots further down, which is a typical example of a field-to-field irrigation. Later, since the defendant was paying the irrigation cess for the whole of his land, which was registered as wetland as per the revenue registers, he had raised the whole bund of the channel along his boundary so as to divert the water from south to north, to irrigate the whole of his field.

The decision of the court in AIR-31-1944-Madras-228 was relied on many cases. The court referred to the rights of the upper owner to let off the water, which he did not want onto the lower land as given in AIR-2-1915-Madras-852 and AIR-13-1926-Madras-449. It is laid down that an upper agricultural landowner is entitled to let his water flow in its natural course without any obstruction by the owner of the lower land and that the owner of the lower land is not entitled to raise any bund on his land which will have the effect of interfering with the upper owner’s cultivation. In the former case it is termed as a natural right and in the latter case a customary right.

The Indian Easements Act, 1882, recognizes both the natural right and customary right. Except in very extraordinary circumstances, the lower owner may not be entitled to insist upon the surplus being allowed to flow
onto his field. The disadvantages of this field-to-field irrigation are being overcome by the implementation of on-farm development work, which had extended the irrigation up to the field level by the construction of field channels.

G5. EQUITABLE SUPPLY OF IRRIGATION WATER IN AN ARTIFICIAL CHANNEL

This case of Lachuma Goundan, son of Pachiappa Goundan and others v. Pandiappan alias Annamalai Goundan and others filed in the District Munsif Court, Krishnagiri, which relates to the rights of the State to supply water in an artificial channel equitably for irrigation, came before the Madras High Court (1950-2-MLJ-658).

The conflict was between the villagers of Nadamuthur and Chinnamuthur against the villagers of Periamuthur over the sharing of water from an artificial channel, which took off from the South Pennar river and was vested with the Government. All the three villages were ryotwari villages. Since 1939, quarrels existed between these villages regarding the distribution of water flowing in the channel which was culminated by the order of the Sub-Collector in 1940, by which it was directed that Periamuthur village should have 12 hours of exclusive supply during day time and the other two villages should have their turn during night time for 12 hours. This order aggrieved the plaintiffs and they said that their share of the wetland was 40.50 ha and that of the defendants were only 30.35 ha. So the plaintiffs claimed for a declaration that they were entitled to the usual supply and distribution of the water from the Government channel, for 24 hours as against the 12 hours or any other fair or equitable distribution of the water in proportion to the wetland to be irrigated.
The lower courts held that since the lands on the defendants’ village were on a higher level and water has to be baled out from the channel, the distribution was fair and equitable. Both the courts below also found that there was no documentary evidence or acceptable oral evidence to prove the custom of sharing before the issuance of the Sub-Collector’s order.

The High Court held that the Government had the right to change the source of irrigation or the method of distribution by which the ryotwari proprietors have been supplied with water and also to regulate the water flowing in artificial channels constructed by or belonging to the Government so as to ensure a fair and equitable distribution of water among all the ryotwari proprietors depending on the ayacut of the channel.

It has also been held that the obligation of the Government is to supply water necessary and sufficient for the accustomed requirements of the ryotwari proprietor so long as such a supply is not adversely affected by natural causes such as deficiency of rainfall or scarcity of water in the rivers from which the supply channels take off.

It has been further held that the interference of the Government with the existing rights of irrigation from artificial channels constructed by the Government is not an actionable wrong and the ryotwari proprietor is not entitled to insist that the entire volume of water which had been flowing through the artificial channel should, for all times, be allowed to run along the channel without diminution or diversion by the Government. The ryotwari proprietor has a claim against the Government only when the Government diverts, to his prejudice, water which is available in the channel to diminish materially the supply of water that he had been accustomed to receive from the channel for the cultivation of his wetlands.
OBSERVATION

Water flowing in an artificial channel constructed by the State Government is normally allocated in proportion to the area to be irrigated. But considering the topography of the villages, equal proportion of water with respect to the area was not considered as the criteria for sharing. The village, which is at a higher elevation, was provided with irrigation supply for a longer duration though the area is less, compared with the other villages. This was done by the State to maintain equity. In fact, the equity consideration needs to be given a lot of importance because when water is being delivered from an irrigation system the head, middle and tail-end, equity needs to be maintained.

3.2.3 Rights of the State to Prioritize Allocation of Water

This penultimate case was regarding the rights of the State in prioritizing the drinking water supply as against the agriculturists’ interest.

G2. STATE’S PRIORITY FOR DRINKING WATER SUPPLY

This case of Rai Sahib C.N. Madhuranayakam Pillai v. Secretary of State deals with the claim made by the ryots for accustomed irrigation supply for two crops as against the State scheme implemented for the supply of drinking water to the city of Madras (1939-1-MLJ-176). The city of Madras has now been renamed ‘Chennai’.

The Cholavaram and the Red Hills tanks were originally irrigating the nearby lands and both of them remained as isolated rain-fed tanks. After increasing the storage capacity of the tanks, during 1870, the State Government undertook a scheme to connect the Cortelliar river with the two
tanks, with the primary objective of supplying water to the city of Madras. Extension of the irrigated areas was also thought of as part of the scheme to collect the land revenue from it to meet the cost incurred. The scheme was completed in 1872 and an additional area was brought under cultivation, as a result of increased water supply. The question raised was with regard to the rights of the cultivators in the old ayacut as they existed in 1870.

The appellant was one of the landowners belonging to the old ayacut area of the Red Hills tank. He made a complaint that in 1926-27 and 1927-28, the crops on the lands were damaged as a result of the Government withholding from him the water to which he was entitled. He prayed for the declaration of his rights and claimed for damages.

The State contended that the Government has an absolute right to regulate the distribution of water or to withhold it both with regard to lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme.

The trial was made by Judge Wadsworth and he dismissed the claim made by the appellants for damage incurred stating that the State had the power to control the distribution of water with reference to (i) the need for conserving water in the interests of the whole ayacut and (ii) the need for economizing water in seasons of shortage so that a perennial supply might be available in the tank for the use of the municipality.

The sequence of actions that were taken regarding the implementation of the scheme is as follows.

To avoid pumping and allowing water to reach the city of Madras by gravity, a head of 11.58 m of water above mean sea level need to be
maintained in the Red Hills tank. In 1908, the State Government ordered for the complete stoppage of issue of water for irrigation purposes during the months of July and August, even if the water level was in excess of plus 11.58 m. In the year 1926, the rainfall was below normal, and in November 1927, the Government ordered that no water should be drawn from either of the tanks, till the water level in the Red Hills tank reached plus 13.62 m, which was its full tank level. Again in August 1928, rules for the issue of water were changed and it was then ordered that so long as the level of water in the tank was at plus 38 or lower, no water would be issued for irrigation.

Again an appeal was made by the affected ryot. The court was called upon to decide what the powers of the State Government were with regard to the distribution of water in the above said tanks, which supplied drinking water to the city of Madras.

The State’s submission was that in pursuance to the policy of safeguarding the supply of water to the city of Madras, the supply to the appellant was cut off altogether in 1926-27 and 1927-28.

Answering to the question of the changes in rights, the State contended that the ryots of the old ayacut undertook a risk and surrendered their rights. The court observed that the ryots were not even consulted with regard to the scheme but had continuously protested against the preference given to the city.

After hearing the arguments the court held that the need of the city of Madras was of very great importance and there could be no complaint about the policy of the Government in giving the large city a preference in the supply of water. But at the same time, the acquired rights of the ryots should be respected. The Government is not entitled to economize in seasons of
shortage, so that a perennial supply might be available from the tank for the use of the city if this economy means that the ryots in the old ayacut will have their customary supply diminished. The appellant will have a declaration that he is entitled to enough water for the cultivation of one crop a year without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprise the old ayacut. It was also held that the ryots in the new area are in a different position to the ryots in the old area, and it may very well be that their rights to water too are subject to the requirements of the city of Madras.

OBSERVATION

In the case of Robert Fischer v. Secretary of State for India in Council through the Collector of Madura (1908-19-MLJ-131) which was concerned with the rights of riparian owners, it was held that the Government had power, by customary law of India, to regulate in public interest the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in public interest, for purposes of irrigation, provided that they did not thereby inflict sensible injury on other riparian owners and diminish the supply they had hitherto used.

The ryot has a claim against the Government when it withholds from him the water which he has a right to demand considering the supply available. It is the obligation of the Government to make an equitable distribution of water.

The National Water Policy, 2002, gives the topmost priority to drinking water supply. It is true that in peri-urban areas the command area is
shrinking day by day due to various reasons such as the expansion of the city and rise in land value. During a bad year, the State might take a policy to meet the demand of water by diverting the water allocated for irrigation or by drawing more groundwater from the peri-urban areas. Under such circumstances, the customary rights of the old ayacutdars get affected. When the Poondi reservoir was taken up for supplying water to Chennai city, the State Government has bought the water rights from the farmers.

The court while approving the preference given to drinking water supply, has also respected the acquired rights of the farmers of the old ayacuts. But there are no clear norms for compensating the customary users, when they loose their water rights.

3.2.4 Construction of Field Bothies by the State

The last case was a writ petition filed under the provisions of the Tamil Nadu Construction of Field Bothies Act, 1959 as against the Land Acquisition Act, 1894.

D1. ACQUISITION OF LAND FOR THE CONSTRUCTION OF FIELD BOTHIES

The case of Swarnathachi v. Special Tahsildar, Land Acquisition, Pattukottai and others came before the High Court of Madras (AIR-1976-Madras-83).

The Writ Appeal No. 203 of 1973, dated 3.3.1975, was filed under Article 226 of the Constitution of India, to quash the land acquisition proceedings on the ground that Proviso 2, Section 6(1) of the Land Acquisition Act, 1894, had not been complied with.
A small piece of land in Udayamudayan village in Pattukottai taluk was acquired by the district Collector for the construction of field bothies. The entire money for the acquisition was recovered from the users who were going to be benefited by the construction of the field bothies after completing the enquiry under Section 5A of the Land Acquisition Act, 1884.

The petitioner questioned, under the Land Acquisition Act, 1894, the validity of the declaration of the acquisition of land for purposes contemplated by the Madras Irrigation Works (Construction of Field Bothies) Act, 1959, under Section 6(1), without the contribution from the public revenue.

The court held that the Madras Irrigation Works (Construction of Field Bothies) Act, 1959, was an independent enactment not related to the acquisition but to the provision of the construction or digging of field bothies by the Government and by the owners of lands entitled to irrigation under certain irrigation works in the State of Madras. But Section 6(1), Proviso 2 of the Land Acquisition Act, 1894, was mandatory regarding the acquisition of lands for public purposes. Since no contribution on any part of the cost was made from the public revenue, the declaration was clearly invalid. But since this is a public purpose, the notification made under Section 4(1) and also the enquiry made under Section 5A of the Land Acquisition Act, 1894, would be saved.

OBSERVATION

This case is an example to show that the irrigation-related Acts are in piecemeal and the official authorized to take up the irrigation-related works needs to understand the various irrigation-related Acts, which exist in the State of Tamil Nadu to function effectively.
Field *bothies* means small channels which run from outlets in the Government channels and which convey and distribute water to individual fields, as per the definition given in the Madras Irrigation Works (Construction of Field Bothies) Act, 1956.

The land was acquired by the Government for the construction of field *bothies*, and the entire money for the acquisition was recovered from farmers who are going to be benefited, after completing the enquiry as contemplated by the Madras Irrigation Works (Construction of Field Bothies) Act, 1956. This was questioned under Section 6(1) of the Land Acquisition Act, 1894, which makes it mandatory that a part of the contribution for the construction should come from public funds.

In Tamil Nadu irrigation systems, the State Government is considered as the owner and the farmers the caretakers. The State constructs and maintains the main irrigation system which has an *ayacut* area of more than 1619 ha. (4,000 acres). The distribution system below (up to the field bothies) is maintained by the farmers. The field *bothies* are constructed as the final links in the irrigation network delivering water to the fields. The WUAs may be empowered to take up the construction of field *bothies*, after imparting proper training.

### 3.3 RIGHTS OF INDIVIDUAL/S IN NATURAL / ARTIFICIAL CHANNELS

Five cases have been discussed under this. These cases deal with the rights claimed by the individuals (upper and lower land owners) in natural and artificial channels.
3.3.1 Rights to Interfere with the Natural Flow

The following two cases deal with the rights of individuals to interfere with the natural flow, filed under the provisions of the Indian Easements Act, 1882.

G3. CUSTOMARY RIGHTS OF RYOTS TO CULTIVATE IN THE BED OF THE TANK

The case of T.K. Nallamuthu Pillai and others v. R.K. Thirumalai Ayyangar and others (AIR-29-1942-Madras-258), which deal with the rights that could be claimed by custom for cultivating in the bed of the tank, with LPA No. 45 of 1940 filed in the court of the District Munsif of Srivaikuntam, came before the Madras High Court.

The parties in this appeal were ryots cultivating lands in the neighbourhood of Kadamba tank in Tinnevelly district, which was fed by a river through a channel. From time immemorial the lands cultivated by the defendants had been submerged for several months in a year due to rain. The drawing of water from the tank for the purpose of cultivation of the plaintiffs’ lands caused the water to recede gradually from the defendants’ lands and made the lands fit for cultivation. Later on the defendants erected bunds to prevent the submersion of their lands. This caused some of the water in the tank to escape and lessened the supply, which the plaintiffs in the ayacut were accustomed to receive.

The plaintiffs contended that they were entitled by prescription and custom to prevent the defendants interfering with the spread of the water in the tank.
The court held that (i) the principles of English common law could not be applied in India to questions affecting the rights of *ryots* to the customary supply of water for the purpose of cultivation; the conditions in England being entirely different, the law on such matters being determined in India by the custom and customary right and (ii) the action of the defendants in reality amounted to interference with the bed of the tank because their lands for several months in the year formed part of the bed of the tank. Generations ago the plaintiffs and the other *ryots* of the *ayacut* had become entitled to have their lands irrigated by it and anyone who interfered with their customary supply was interfering with rights recognized by law and, therefore, subject to the injunction of the court and the plea that the defendants were merely protecting their own property could not be accepted.

**OBSERVATION**

In many parts of the Madras Presidency, the tanks serve as important water harvesting structures. Customary rights prevail in these systems regarding the storage and distribution of water. The foreshore and bed of the tank may be cultivated during the low storage conditions. But this intermittent practice, though practised for a longer time, could not acquire rights to them though by custom they are not permitted to interfere with the natural spread of water during the monsoon season over the foreshore and bed of the tank.

The defendants had been facing this problem from time immemorial. The fact was that their lands happened to lie in the foreshore of the tank. Now the bund raised by the defendants had lessened the supply, which the plaintiffs in the *ayacut* were accustomed to receive, which was an infringement to the customary supply. It cannot be denied that if the appellant-defendants were allowed to prevent the Kadamba tank from reaching its full capacity during the rains, the *ayacut* would lose water.
The action of the appellants amounts to the interference with the bed of the tank because their lands for several weeks in the year form part of the bed of the tank.

Submergence of lands on the foreshore of a tank when it is at its full tank level is no uncommon occurrence and is a feature of the recognized irrigation system. When such submergence is a matter of the customary conditions, no cause of action would arise.

G7. RIGHTS AT TIMES OF EXTAORDINARY FLOODS

The case of Patneedi Rudrayya v. Velugubantla Venkayya and others concerning the question whether a riparian owner could impede the natural flow of water (AIR-1961-SC-1821) came before the Supreme Court. This was an appeal by special leave from the judgment of the Madras High Court in a second appeal reversing the decree of the court below. The plaintiff-appellant was the owner of survey number 159 of Vemulavada village while defendants 1 and 2 were owners of survey number 158 lying to the north of survey number 159. The defendant number 3 was the owner of a field lying to the north of survey number 158. To the south of survey number 159 was survey number 160 belonging to the brother of the plaintiff. Immediately beyond this field and to the south was a parallel drain, into which flow the waters of the Vakada drain and the Tulyabhaga drain both running west to east. It would appear that the parallel drain was an artificial drain while the Tulyabhaga was a natural drain. The parallel drain ends abruptly at the eastern end of survey number 150 to the east of survey number 160.

According to the plaintiff, rainwater falling on survey numbers 160 and 159 flows in the northern direction over survey number 158 and then
enters into the Kongodu drain, at the northern side. During normal times, the water in this drain flows towards the south and empties itself in the Tulyabhaga drain. Some time before the institution of the suit, the defendants 1 and 2 constructed a bund running approximately east-west on their own land. Its height, according to the Commissioner’s report, varied between 1 m and 2.44 m and its width was 4.88 m. Its length was reported to be 48.16 m. Apparently, the bund was not continuous and there were a few gaps in it. About 1.52 m to the south of the bund, the defendants had dug several trenches 4.57 m in width and between 61 cm and 1.21 m in depth. These trenches ran along a footpath which separated the fields of the parties.

The plaintiff’s grievance was that as a result of what the defendants 1 and 2 had done, the floodwater flowing from his field could not find an outlet in the northerly direction and stagnated on his land thus causing damage to his crops. Further, according to him as a result of the digging of the pits the level of his land adjoining the footpath was gradually decreasing with the result that the topsoil of his field was being washed away. So he sought a mandatory injunction directing the defendants to fill up the trenches and demolish the bunds raised by them. The plaintiff claimed the right of drainage of all water falling on or invading his land including the floodwater on the basis of immemorial user.

The lower court held that the inundation of the appellant’s land in the further flow of water northwards was not unusual, abnormal or occasional due to extraordinary floods but was an event which occurred every year in the usual course of nature.

But the Madras High Court concluded that the flooding of field Nos. 153 to 160 because of the swelling of the Vakada drain was not something which had been happening from time immemorial. According to
the court, the plaintiff had no right to prevent the defendants from taking the steps that they were taking and that a custom to allow the floodwater to flow over the neighbour’s land had not been so far established.

The Supreme Court observed that the High Court, following certain English decisions, concluded that every owner of land had a right to protect himself against it and in particular from the ravages of such an unusual phenomenon as floods. The High Court seems to be of the opinion that the floods, as a result of which the plaintiff and the defendants suffer damage, are an unusual phenomenon. Here again, the High Court has gone wrong because the lower appellate court has found that these floods were an usual occurrence. Where a right is based upon the illustration (i) to Section 7 of the Indian Easements Act, 1882, the owner of higher land can pass even floodwater received by him onto the lower land, at any rate where the flood is a usual or periodic occurrence in the locality.

The Supreme Court held that the only right which a riparian owner may have is to protect himself against extraordinary floods. But even then he would not be entitled to impede the flow of the stream along its natural course. The finding here was that the floods from which the defendants 1 and 2 were seeking to protect themselves were not of an extraordinary type. In the circumstances, therefore, the bund erected by them and the trenches dug up by them must be held to constitute a wrongful act entitling the plaintiff to the relief claimed by him.

The court held that the right of the riparian owner was to protect himself from extraordinary floods though he could not be entitled to impede the flow of the stream along its natural course.
OBSERVATION

The riparian owner should not interfere with the natural flow under any circumstances.

3.3.2 Rights of an Individual to Store Water in a Private Tank

The next two cases deal with the right of an individual to store water in a pond for agricultural purposes.

C1. OWNERSHIP OF WATER IN A TANK IS INTERDEPENDENT OF LAND

The Second Appeal No. 866 of 1925, decided on 9.8.1928 under Section 54 of the Specific Relief Act, 1877, of Venkatramana Sastri and another v. Venkatanarasayya and others came up before the Madras High Court (AIR-16-1929-Madras 25; 29-MLW-613).

The dispute in this case relates to the use of the water in a tank situated in an agraharam. It has been customary from time immemorial to use the water of the tank for cultivating certain area of land classified as wet ayacut under the tank. The co-sharers who owned lands in the agraharam were entitled to the water of a tank in the same proportion as the extent of their lands. The water of the tank was not even enough for the wet ayacut. One of the co-sharers used the water of the tank to convert some of his dry lands into wetlands and thereby caused detriment to the other co-sharers’ rights. It has been found that the defendants removed the original channels and constructed new ones. So the affected co-sharers sued for an injunction and claimed for damages.
The main contention on behalf of the defendant was that the various sharers of the *agraharam* were entitled to water of the tank in certain defined shares. They were at liberty to use the water of which they were the owners, in any manner they chose without exceeding the quantity to which he was entitled to.

The court held that since the *ayacut* which was owned by the co-sharers was fixed, it was not open to one of the co-sharers to divert the water of the tank to the lands not included in the *ayacut*. Taking into account the accustomed user of the water for the lands under the *ayacut*, it is a legitimate inference to draw that the right to the water is intimately connected with the ownership of the lands comprised in the *ayacut* owned by him. The court has directed the defendant to remove the newly erected channels and to restore the old ones and the co-sharers could therefore get damages as well as injunction to restrain such use under the provisions of Section 54 of the Specific Relief Act, 1877, (corresponds to Section 38 of the Specific Relief Act, 1963).

**OBSERVATION**

The argument placed by the defendant was that the ownership of the water has no necessary connection with the ownership of the lands which form part of the tank *ayacut*, as long as the quantity does not exceed the quantity to which one is entitled to. But based on the evidences, the judgment rested on the ground that since water was hardly enough even for the actual extent of the *ayacut* to be irrigated, any extension of the area would cause great prejudice to the *ayacutdars*. So it was decided that the ownership of water is not independent of the land.

The fact that the water was owned proportionately to the land does not follow that the ownership of water was independent of the ownership of
the land. So the use of water for lands other than the wet ayacut was illegal. One co-owner using water for another land amounts to infringement of another’s right. The affected party can sue for damages as well as for an injunction to restrain unauthorized use.

G1. CUSTOMARY RIGHT OF AN INDIVIDUAL TO EXTEND THE AREA OF CULTIVATION UNDER A TANK


The suit was instituted by the plaintiff claiming for a permanent injunction restraining the defendant from flooding his land. The defendant-appellants owned a tank in survey number 823, and the plaintiff’s lands were situated to the south of the tank. The plaintiff’s contention was that the tank ayacut was 18 kulies and the defendants extended the northern and eastern bunds of the tank, increased the height of the bunds and shifted the position of the surplus weir. Because of this the plaintiff’s land was flooded and he had suffered damage.

The defendants contended that the ayacut of the tank was 53 kulies and not 18 kulies, and it was within their proper rights in effecting improvements of the tank for storing more water to irrigate the entire ayacut and if in consequence of the exercise of their natural right the plaintiffs’ lands were flooded, no cause of action arises against them.

It was held by the court that the storing of water for agricultural purposes is a natural and lawful use and is not actionable, unless there was negligence proved.
In this case, the defendants’ claim of 53 kulis ayacut area was not proved. The court had observed from the evidence shown that the defendants had bought some garden lands and had converted the same as part of the tank itself. Their idea was to increase the storage capacity of the tank so that they might cultivate more lands, which does not lie in the prescribed ayacut.

The court ordered the defendants to restore the tank to its original condition and then to think of making the necessary alterations if so advised for enabling them to cultivate the prescribed or customary ayacut. The injunction claimed by the plaintiff was issued.

OBSERVATION

Referring to Seshadri v. Narasimhachari in 1932-36-MLW-408, the court held that submergence of lands on the foreshore of a tank when it is at its full tank level is not an uncommon occurrence and is a feature of the recognized irrigation system. When such submergence is a matter of the customary conditions, no cause of action would arise.

If the ryot is holding his land falling within the ayacut of a tank, under the customary conditions, then the custom would be preserved. Even in a private tank, the unauthorized expansion of the ayacut area by improving the storage capacity of the tank would not fall in the purview of acquiring the customary rights.

3.3.3 Rights over Percolating Waters

This case deals with the right of an individual to interfere with the percolating water from a defined channel.
B3. EASEMENT RIGHTS IN PERCOLATING WATER FROM DEFINED CHANNELS


The suit channel passed towards the east of the lands of the plaintiff and the defendant. Rights to use the water from the channel were acquired by them according to the karar (compromise) that was entered in the year 1913. After the compromise the defendant dug a pond on his land and converted some more lands into garden lands. This resulted in the diminution in the supply of the channel water, which the plaintiff was entitled to use for his lands lower down. The plaintiff prayed for an injunction for the complete closure of the pond.

The defendant contented that the pond had got its own springs and only a part of the water in the pond comes by means of percolation from the defined channel.

The court held that in drawing subterranean water from the adjoining fields, a man could not draw off water flowing in a defined channel through that adjoining land. So the defendant should not be asked to fill up or obliterate the pond altogether by mandatory injunction, but should be asked by an injunction directing him to cover with cement mortar only that portion of it from which water of the defined channel percolated.
OBSERVATION

The easement rights towards defined channels are dealt with in Section 7(b) of the Indian Easements Act, 1882. According to it as a general rule, “The owner of land containing underground water, which percolates by undefined channels and thus finds its way into the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it.” But in case of defined channels, one should not do so; if one does, it amounts to actionable wrong”. Subterranean flow was considered as the flow in undefined channel and hence the customary easement could not be claimed by the lower land owner. But the decision of the court in this case had recognized the percolating water as the flow in a defined channel. As the pond had the effect of tapping the water flowing in the channel, it is an actionable wrong that must be prevented by the issue of a mandatory injunction.

There are provisions made in specific rules, which are meant for large irrigation systems, such as the Palar Irrigation System Rules, which restrict the distance that need to be maintained between the canals and the neighbouring wells. The Government of Tamil Nadu in its Policy Note on Building and Irrigation for 2006-07 has given the procedure for drawing groundwater from Government sources. As per this, sinking of new wells and deepening of existing wells will be permitted beyond a distance of 50 m from the toe of the bund of main canals and branch canals and 25 m from the bund of distributaries. But no such restriction was mentioned in this case and so only the provisions under the Indian Easements Act, 1882, apply. It is necessary to define the distance and depth based on the capacity of the defined channel.
Lining a portion of the channel at the sides does not prevent percolation throughout. It can arrest only the seepage (horizontal infiltration). By definition, deep vertical infiltration is percolation, which cannot be arrested even if the lining is made for a shorter distance of the pond. This shows that the groundwater concept is not understood fully. Knowledge about the difference among infiltration, seepage and percolation, which are some of the components of the hydrological cycle, is necessary even for lawyers who argue irrigation-related cases.

3.4 SHARING OF GROUNDWATER FROM A COMMON WELL

This subhead deals with an important aspect of rights of co-owners in the sharing of the groundwater from a common well. Philippe (2007) states that in case of groundwater the common law principles will be increasingly challenged. Out of the four cases analyzed, the first three cases were based on the provisions of the Indian Easements Act, 1882 and the last one on the provisions of the Specific Relief Act, 1963, which deal with the rights exercised by the co-sharers over sharing a common well.

G4. APPROVAL OF NEW BAILING STAND AND FIXING THE TURNS IN A COMMON WELL

The Second Appeal No. 1984 of 1944, dated 28.3.1945 of Lingappa Goundan and another v. Ramaswami Goundan and others (AIR-32-1945-Madras-244), deals with the case of restraining the action of erection of a new bailing stand in a common well.

In this case a well was reserved in common among three brothers who divided the rest of their common properties. There were two *picottas* on
the eastern side of the well and all the common co-sharers were using those *picottas* for bailing out water from the well. One of the co-owners, who had one-sixth share experienced some trouble in bailing out water and therefore wanted to construct a new *picotta* on the land wholly belonging to him towards the southern side of the well. The trial court held that if the new *picotta* was allowed it would interfere with the common right reserved under the partition document and so the erection of new *picotta* was not approved. In the subordinate court a decree was given to put up a new *picotta* subject to the condition that the execution of turns should be fixed by having a commissioner appointed.

The Second Appeal was filed against the decree of the subordinate court. The High Court held that if the partition is not feasible or possible, the courts have undoubtedly the right to prescribe the method in which the common well could be enjoyed by the parties. It also held that in the nature of things the well cannot be cut into three parts and one portion given to each sharer, the best method of providing for the right of all parties is to fix the turns during which each sharer can bale out water from the well.

The court upheld the right of the plaintiff to erect an additional *picotta* which he was not allowed to use except in accordance with the turns fixed by the court.

**OBSERVATION**

In this case there is no question of one co-owner trying to irrigate any other land; the only question was whether the co-owner was compellable to follow a particular method of irrigation.
Approving the new bailing arrangement, the court said it is not always necessary to restrict the original number of *picottas* and new ones could be added based on the main ground that the land belongs to the one who is appealing.

Regarding fixing the turns, not only the turns should be looked into but also method of sharing in the paddy and non-paddy seasons. The duration of bailing has a bearing on the others’ share and the neighbouring areas depending on the aquifer characteristics.

Groundwater flow does not coincide with the land boundary. The drawdown in the water level in a well depends on factors like the number of wells, depth of wells, mode of drawing water, and capacity and type of lifting device used, apart from the aquifer characteristics. Overexploitation from a single well affects the share of others.

G6. **EXTENDING THE AREA CULTIVATED FROM A COMMON WELL**

The Second Appeal No. 2091 of 1947, dated 3.2.1950 of Nanjappa Goundan v. Peria Ramaswamy Goundan and others (AIR-38-1951-Madras-459) deals with the issue of drawing water from a common well to a newly-bought land.

As per the partition arrangement made in 1927, it was arranged that both the parties should enjoy the water of the well in equal shares, one party drawing water from the southern side and the other from the northern side. Of late, the defendant bought another land and tried to take water from the common well to irrigate the newly-bought land. Objecting to this action, the plaintiffs filed this case.
The contention of the plaintiff was that the defendant was trying to draw the water of the common well to an adjacent field, which was bought by him later. The plaintiff claimed for a permanent injunction restraining the defendant from drawing water from a common well to the newly-bought lands located in the same village. Both the lower courts had dismissed this appeal.

The High Court held that the well was intended for the use of the lands mentioned in the partition agreement, and it was intimately connected with the ownership of that property. The rights in a well could not be considered to be dissociated from the land to which the well was attached.

The court further held that the rights of the parties to water in the well co-existent with the rights to irrigate the respective shares in the land. They could not be permitted to increase the extent of area and any diversion of water of the well for irrigating lands other than the agreed upon ones would be an infringement of the other co-sharer’s right.

OBSERVATION

In the case of sharing a common well, it is not possible to put a construction in the middle of the well and divide it into two halves since it is not the same as sharing a common land. Regarding the fixing of turns, the slope of the terrain also needs to be considered.

A question may arise that if the portion of the land which was entitled to water from the well was less fertile, is it not possible for diverting the water to a more fertile land which one buy later. Consideration of the soil characteristics are also necessary while deciding on the lands to be irrigated.
from a common well because the aquifer characteristics like the porosity and permeability of the soil have a bearing on the yield of the well.

The court in certain cases has suggested the sharing of water in turns as a solution to the sharing of water from a common well. But in case the pumpset is used for drawing water there are no norms available to have a check on the extraction. By analyzing this case law, it was made clear that the water right from a well is intimately connected with the ownership of that property and that the landowner is entitled to tap any amount of water.

Normally, the extent of the lands that is irrigated by a well is fixed. The co-sharers right to water is proportionate to the extent of the share of land. The co-sharers are not permitted to increase their share.

When a well or some other source of water irrigates the lands belonging to several persons, the source of irrigation cannot be dissociated from the lands. It is not open to one of the co-sharers to use the water of the well for other lands than those agreed upon in the agreement.

B4. RIGHT FOR IRRIGATION FROM WELL WATER IS QUASI-EASEMENT

The case of Ramaswami and others v. Muniswami and others under Section 13 of the Indian Easements Act, 1882, regarding the right of irrigation from a well came up before the Madras High Court (AIR-1960-Madras-124).

The well in the controversy, was the substantial source of irrigation for the lands which were then held by the defendants and which at one time along with the lands now were held by the plaintiffs. The argument was
whether right to the well, which was a substantial source of irrigation in the defendants’ lands, is based on easement of necessity or quasi-easement.

The district court had decided that since the well water being a discontinuous supply, the defendants could not claim quasi-easements.

In the Second Appeal No. 589 of 1957, dated March 31, 1959, the High Court held that apparent and continuous easement which are necessary for the enjoyment of the dominant tenement in the state in which it was enjoyed at the time when it was severed from the servient tenements are called quasi-easements. Right of irrigation being both apparent and continuous it emerges as a quasi-easement on the severance of tenements.

The court further held that the decrees and judgments of the courts below have proceeded upon a wrong construction of quasi-easements under the Indian Easements Act, 1882, namely the right to irrigate well water was discontinuous though apparent and hence not a quasi-easement cannot be supported.

OBSERVATION

The existence of vents is enough evidence of the easement being apparent and continuous. For some reason, the vents may be closed as a temporary measure after irrigating the field. The closure of a drain for clearing silt or effecting repairs will not make an easement discontinuous. So, right for irrigation from well water is quasi-easement.
C2. RIGHTS TO WATER IN A COMMON WELL IS CLOSELY ASSOCIATED WITH LAND

The Second Appeal No. 1770 of 1965, dated October 29, 1969 under Section 38 of the Specific Relief Act, 1963, of Sivarama Pillai and others v. Marichami Pillai (AIR-1971-Madras-230), deals with the issue of taking away water from a common well to a newly-bought land.

There was a common property which was divided equally into two parts among the brothers in accordance with the partition agreement of 1952. As an integral part of this partition agreement both the parties had equal rights in the common well and shared the water in three days turn. The contention made by the plaintiff/respondent was that in 1960 the defendants had newly bought some lands and irrigated the same from the common well, and this action had resulted in the diminution of water to the plaintiff during his turns. The defendants/appellants accepted the fact but rested their claim on a Panchayat hearing at which it was settled that the defendant would be entitled to take water for irrigating both the old and the newly-acquired lands.

The appellants’ counsel contended that as long as the defendants did not exceed the three days in their turn they could use the water not only for irrigating the old lands allotted to them but also the newly-bought ones. The plaintiff was asked to produce the proof of the actual injury or damage, but could not do so.

The court held that any infringement to this joint rights or ownership must be prohibited by an injunction even though no damage be proved as per Section 38 of the Specific Relief Act, 1963.
The High Court held that in the nature of things, a well cannot be divided by metes and bounds and persons who own joint-rights of a well for the right of water can enjoy the right jointly or separately only by resorting to a workable arrangement safeguarding and securing the right to irrigate the lands allotted to the respective branches. In such a situation, the right to take water from the well cannot be dissociated from the land and it is necessarily implicit in the partition arrangement that the water in the well was intended to be used only for the lands which were previously irrigated by the common well prior to the partition and none of the parties would be entitled to take water from the well to irrigate any other land.

OBSERVATION

The case was decided on the basis of the terms of agreement at the time of partition. It was implicit in such arrangements that the common source of irrigation, the well, was kept in common for the only purpose of irrigating the lands which were allotted to the respective branches and to serve that purpose only.

The decision of the court relied upon some of the previous case laws. Some of the important cases referred to are discussed below:

The court held that in the case of public channels or tank, no individual ayacutdar has a right to complain unless there is a material diminution in the accustomed supply of water. The principle of this decision will not apply to a case of co-owners of lands with joint rights in a well (AIR-1931-Madras-284).

If any right of the co-owner to irrigate the other lands were to be recognized it would virtually amount to an infliction of a burden or an
obligation in the nature of an easement in favour of the co-owner as against the other and that there is no warrant in law for any such burden or obligation being imposed. This was laid down in second appeal numbers 1640 of 1943 (Madras) and quoted in (AIR-1971-Madras-230).

With regard to the common enjoyment of the common property in the best manner possible without detriment to the enjoyment of the owner is that, so long as the property does not suffer any injury or result in any loss, the co-owner cannot make any complaint. This will not apply to such cases where the co-ownership is not only in respect of lands but in respect of wells which are inseparably connected with the lands (AIR-1962-Madras-498). Sharing of common land cannot be compared with that of a common well.

Referring to AIR-1971-Madras-230, Shohin (2004) observes that, “It will be seen that the uniform trend of the decision of the Madras High Court is all one way that is not to permit the co-owner to irrigate any land newly acquired by him.”

3.5 CHANNELIZING WATER THROUGH A COMMON CHANNEL

This is a common issue that occurs when a common water carrying channel passes through the lands of adjacent property owners. Its source could be either a watercourse or a well. Five cases are dealt with under this sub-head. All the cases rely on the provisions of the Indian Easements Act, 1882.
3.5.1 No Exclusive Right over Water Flowing through a Common Channel

Out of the five cases studied under this sub-head, the first two cases were related to the claiming of exclusive right over the common channel.

B8. RIGHTS OF CO-SHARERS IN A COMMON CANAL

This is a case regarding the rights of co-sharers towards the water flowing in a channel based on the Indian Easements Act, 1882 (2003-2-LW-352).

The Second Appeal No. 1995 of 1985 of Adhinnatha Pandithar (died) and his legal heirs v. A. Sukumara Pandithar and others came before the High Court of judicature at Madras. The suit land was under the common ownership originally. Later the land was divided among the brothers. These lands were irrigated by a common channel. The respondent filed a suit for a declaration of the title in respect of the suit channel, for restraining the first appellant from interfering with his enjoyment contending that the common channel passes exclusively through his lands after partition.

It was contended that the first appellant had no other source of irrigation except the suit channel. The sale deed in favour of the respondent did not convey any right of irrigation through the suit channel to the appellant. Based on the facts and evidences, the trial court passed the decree stating that exclusive rights over the channel could not be claimed by the respondent.

Aggrieved by this judgment the respondent approached the district court with the same contention. The district court decreed that the channel
flowed through his land and so the respondent’s right to exclusive title over
the suit channel was accepted.

Later on it was found that the suit channel lay in the lands
belonging to both parties and not through the respondent’s lands alone. The
High Court held that the suit canal must be treated as common one conferring
both the parties to have the irrigation facility and that exclusive title could not
be claimed by one party.

OBSERVATION

According to paragraph 11 of the judgment, once the ancestor’s
common land is divided among the legal heirs, at a later point of time each
legal representative or co-sharer will take his / her respective share along with
the easementary right of pathway, cart track, irrigation facility, water
right, etc.

This is yet another problem we are experiencing in the irrigation
systems of south India in general and Tamil Nadu in particular. The land
fragmentation creates sharing problem, since water rights are attached with
land rights. Sharing of an irrigation facility needs a better understanding of
the surface water and groundwater concepts.

B9.  RIGHT OF WAY IN IRRIGATION CHANNELS

The Second Appeal No. 1455 and 1456 of 1999 of Chinnapillai v.
Perumal is a case concerning the sharing of water from the Krishnagiri
Reservoir Project Channel (2004-1-LW-469). This case was filed under the
provisions of Section 15 of the Indian Easements Act. According to this
Section, “Where a right of way has been peacefully and openly enjoyed by
any person claiming title thereto as an easement and as of right, without interruption for 20 years, the right would be established”.

A common channel was irrigating the lands of both the parties obtained from the same person. Later on, both the parties had bought new lands which were brought under irrigation. The defendant had put an obstruction in the portion of the channel running through his lands which had resulted in denial of water to the plaintiff and caused failure to the crops. So the plaintiff had claimed for easementary right to use the canal water which she was enjoying for the last 20 years. The trial courts decree was in favour of the plaintiff.

The appellant-defendant preferred the second appeal in the High Court. The appellant in his written statement has denied the he had made the obstruction to the flows and contended that there was yet another channel from which the respondent was taking water and therefore she must not be entitled to take water from the channel running through the appellant’s lands.

The court held that both parties could enjoy the common channel and asked the appellant to remove the obstruction.

**OBSERVATION**

Both the parties have their respective rights to enjoy the water from the channel. The appellant has obstructed the flow which is against the easement right. There was a point raised regarding the claiming of easement of necessity by the respondent. This was negatived by the court stating that according to Section 13(a) of the Indian Easements Act, 1882, they had an alternative facility for irrigation.
3.5.2 Channelizing Water from a Well through a Common Channel

The last three cases deal with the case of channelizing water from a common well through a common channel.

B5. RIGHT TO TAKE WATER FROM A COMMON WELL IN TURNS

The case of Subbiah Goundan v. Ramaswamy Goundan and others under Section 18 of the Indian Easements Act, 1882, came up before the Madras High Court (AIR-1973-Madras-42).

In the Second Appeal No. 272 of 1970, dated February 24, 1972, the plaintiff sued for injunction to prevent the defendants who wanted to use the common channel for drawing water to their fields from their exclusively owned well in restricted turns.

The lands in survey numbers 33, 31 and 35 were shared equally by the plaintiff and the defendants. A common well which was situated in survey number 33 was irrigating these lands by a common channel running through the east of survey number 33. This common channel was shared equally by both the parties in turns of six days. The defendants also owned lands in survey number 24, which had an exclusive well, fitted with an electric pumpset. From that well, the defendants laid a channel that joined the common channel and by such connection they drew water to irrigate their fields in survey numbers 33, 31 and 35.

The plaintiff appealed for the declaration of permanent injunction restraining the defendants from carrying the water from their exclusive well through the common channel, but submitted that the exclusive well belonging
to the defendants was deeper than the common well and by pumping water with electric motor the water in the common well was being drained, and so the suit. The plaintiff was asked to prove the damage. But the plaintiff had not proved that.

The High Court held that each of the co-owners of the common property is entitled to use the property in the way most advantageous and beneficial to him without causing any injury or detriment to the other co-owners. It is not for the other co-owners to dictate in what manner the other co-owners should enjoy the common property so long as the user of the common property by one co-owner does not materially interfere with the use of the property by the other co-owners or affect their rights or in any way weaken, damage or injure the common property. The defendants were permitted to use the common channel to carry water from their exclusive well through the common channel during their prescribed turns.

OBSERVATION

Each co-owner is entitled to use the common pathway in a way most beneficial to him or her. If he or she happens to acquire a new land adjacent to his or her share and if that land can be approached through the common pathway, he cannot be prevented from using the common pathway, provided the common pathway does not interfere with rights of the other co-owner in the common pathway. The same approach was being adopted to tackle the problem of providing entitlement to the common channel shared.

One more aspect which was looked into was about the common channel’s physical condition. It was stated that the use of the channel by the defendant would in no way damage or weaken the common channel. But the objection raised by the plaintiff regarding the depth of the well and the
method of drawing water was not dealt with seriously by the court. In the second appeal it was contended that as the defendants drew water by pumping with electric contrivance, some safeguard must be provided by fixing turns; which was negated by the court, stating that there was no proof to show that the rights of the plaintiff were affected. The physical condition of the channel and the fixing of turns were considered, but the quantity of water that could be drawn which was not considered.

B6. RIGHTS OF CO-OWNER TO CHANNELIZE WATER THROUGH A COMMON CHANNEL FROM A WELL LOCATED IN AN EXCLUSIVE LAND

This case of Ayyaswami Gounder and others v. Munnuswamy Gounder and others, concerning the right to draw water from a common well situated in a private property, came before the Supreme Court (AIR-1984-SC-1789; 1984-4-SCC-376). The appeal of the plaintiffs-appellants by special leave was directed against the judgment of the Madras High Court reversing the judgment and decree of the two courts below and dismissing the suit.

The parties were descendants of a common ancestor and they owned joint properties. A partition took place between the parties during 1927 where survey nos. 95 and 96 fell to the share of the plaintiffs and 15 cents of land in plot no. 96/5 in which the common well W.2 was situated and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. Water from well W.2 situated in plot no. 96/5 was found insufficient to irrigate the lands acquired by both the parties in the said partition.
The appellants channelized the water from their exclusive well W.1 situated in a plot exclusively belonging to them in the survey no. 103/2, through a portion of the common channel to their plots at survey nos. 95 and 96. The defendants objected to the use of the common land in survey no. 96/5 and the common channel running in survey no. 96/5 for taking water from the plaintiffs’ exclusive well in survey no. 103/2. No contract had been entered between the parties for fixing the mode of duration of use of the well.

The plaintiffs prayed for a consequential relief of permanent injunction restraining the defendant-respondents from interfering with the enjoyment of the plaintiffs’ right to draw water from W.1 through the aforesaid common channel.

The trial court found that the plaintiffs being co-owners of the common property were entitled to use the property in the way most advantageous to them and the defendants not having pleaded or proved any damage or loss to the common property could not obstruct the plaintiffs from drawing water to their lands from their exclusive well through the common channel. On appeal by the defendants, the first appellate court substantially concurred with all the findings of the trial court.

The defendants felt aggrieved and took up the matter in a second appeal before the Madras High Court. The High Court reversed the judgments and decrees of the two courts below, holding that the plaintiffs did not acquire any right either by grant or by prescription by way of easement. But the court found that the plaintiffs, by drawing water from their exclusive well through the common channel would be throwing additional burden on the common channel and common land which was not and could not have been intended by the parties at the time of the partition when they kept their well W.1 and
the lands situated around it and the common channel for the common enjoyment of the parties. So the plaintiffs-appellants approached the Supreme Court and reiterated the same arguments as advanced by them in the two courts below.

The plaintiffs-appellants claimed their right on the basis of admitted co-ownership rights which includes unrestricted use, unlimited in point of disposition, and the High Court was not justified in holding that the plaintiffs’ right to draw water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights the High Court had lost sight of.

It was further contended that the Illustration (c) to Section 8 of the Indian Easements Act, 1882, relied on by the High Court, had no application to the facts of the present case in as much as the plaintiffs’ case mainly hinged on their right as co-owners and not on the basis of prescription by easementary right. But in this case, the plaintiffs claimed easementary right only as an alternative ground but the main ground on which they based their claim was on the right of co-ownership.

Counsel for the defendants-respondents on the other hand contended that the well W.1 was built after the partition by the plaintiffs on their exclusive land and, therefore, no additional burden could be put by the plaintiffs on the common channel, and if the plaintiffs acquired new land then they could not have any right to irrigate from the common well or channel.

The Supreme Court held that in the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents, the plaintiffs have every right to use the common land and common channel.
OBSERVATION

When the water from the common well was found not sufficient to irrigate the plaintiffs’ fields, they used the common channel to carry the water from their exclusive well to irrigate their share of lands.

Illustration (c) to Section 8 of the Indian Easements Act, 1882, applies only when a co-owner seeks to impose an easementary right on the land or any part thereof. But in this case the main contention was that the only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment.

G8. CHANNELISING WATER FROM A WELL THROUGH A COMMON CHANNEL

This case deals with the right of an individual to channelize water from a well through a common channel (2002-4-LW-520). The Second Appeal No. 1066 of 1993 of Chinnappan v. Veerasmalai came before the High Court of judicature at Madras.

The plaintiff and the defendant owned adjacent lands. According to the defendant, they were joint owners. These lands were irrigated by the suit channel leading from the old common well, where both the parties had rights to draw water as per the oral agreement made. There was no water in the common well for the past 25 years. So, both the plaintiff and the defendant had put up borewells in their respective lands and used the common channel for channelizing water to their fields. The plaintiff claimed that the suit channel was running only through his lands. He contended that the defendant
tried to channelize water from his well through the suit channel and hence the suit.

The plaintiff appealed before the district munsif court, claiming an exclusive right in the common channel and for a permanent injunction asking the defendant to stop channelizing water through the common channel. The trial court dismissed the suit but the lower appellate court gave a decree in favour of the plaintiff.

The defendant had submitted in the High Court that the suit channel runs through the lands of both the parties and except the suit channel there was no other channel for irrigating their respective lands. On the above said grounds the court has denied the exclusive right claimed by the plaintiff on the common channel.

OBSERVATION

In the patriarchal system, a common land owned by the father, which may be having a single irrigation source, gets partitioned into two or more fragmented pieces of land, among his legal heirs, where they become the joint-owners of the property. But the irrigation source remains the same and each one of them has equal rights towards the water from the well as per the Indian Easements Act, 1882. The division of property and the sharing of water rights lead to a number of conflicts. Fragmentation of land as part of inheritance settlement put a hindrance block for efficient irrigation management. Efforts should be made towards land consolidation.

Legal evidence is sought for in all cases for giving a judgment. So it calls for well-prepared documents incorporating technical intricacies available at the local level. If things become transparent, conflicts can be
minimized. In the above case, the old common well was fitted with a pumpset and both the joint owners were sharing water originally. At one stage, the well became dry. So each party had dug separate wells in their respective shares of lands. According to the Commissioner’s (appointed by the court) report, both wells were adjacent to each other. There are no norms available for restricting the distance that needs to be maintained between two irrigation wells. Later there might be a possibility that either of the wells goes dry as the old common well. So the reasons for the failure of the common well might have been identified. The fixing up of the distance between two wells depended on many factors such as the permeability of the soil, the type of the aquifer, and the lithology of that particular area. This issue is common and it indicates the lack of understanding of the intricacies of groundwater.

3.6 LEVY OF IRRIGATION CESS

Totally seven cases have been dealt with under this sub-head. All the cases were in regard to challenging the legality of the State levying irrigation charges for the services rendered by them.

3.6.1 Right to Levy Water Cess

The first six cases discussed under this sub-head have been filed based on the provisions under the Madras Irrigation Cess Act, 1865.

HI. BREACH OF SLUICE Owing TO NATURAL CAUSES – NOT LAIBLE FOR PENAL ASSESSMENT

This was the case of Bhogaraju Kanakamma v. Secretary of State and others, S.A. No 1332 of 1924 dated April 8, 1927 (AIR-1928 -
Madras-147), dealing with the levy of penal assessment for unauthorized irrigation questioning the grounds of assessment.

The plaintiff / appellant was a registered pattadar of some wetlands. Water was supplied to these fields through a pipeline from a channel. The pipeline was closed for repair by the revenue officials for four or five days. But during that time a breach had occurred in the channel. The water that flowed through the breach entered into the fields of the plaintiff after filling the neighbouring field. Penal assessment was collected by the revenue authorities.

So the plaintiff filed a case against the State claiming for the recovery of the money collected as penal assessment for the water that flowed into the field without the plaintiff doing anything to aid the flow. The case was argued on the basis of Section 1 of the Madras Irrigation Cess Act, 1865, which reads as: “Provided also that no cess shall be leviable under this Act in respect of land under ryotwari settlement which is classified and assessed as wet unless the same be irrigated using, without due authority, water from any source hereinbefore mentioned and such a source is different from or in addition to that which has been assigned by the revenue authorities or adjudged by a competent civil court as a source of irrigation.”

The district Munsif court gave a decree in favour of the plaintiff. The State was not convinced with this decision and has approached the subordinate court contending that during the closure of the pipe the plaintiff was not entitled to get the supply and so penal assessment was levied for the unauthorized irrigation. The subordinate Judge held that the water, which flowed through a breach, aided in the cultivation of the plaintiff’s lands, justifying the collection of penal assessment. Aggrieved by this the plaintiff approached the High Court.
The High Court held that the flow of water through the breach of sluice, which gave way owing to natural causes, could not make a registered tenant liable to penal assessment.

OBSERVATION

Under the second proviso to Section 1 of the Madras Irrigation Cess Act, 1895, the ryotwari landholders were not liable to pay water cess except when the user of the water was ‘voluntary’ on his part. This has given way to lot of misuse. So, aiming at levying penalty charges legal on all kinds of lands that were benefited by irregular irrigation, the Madras Irrigation Cess (Amendment) Act, 1940, was enacted. This amendment provided for the levy of an enhanced water cess in case of irregular irrigation of wetlands irrigated ‘voluntarily or involuntarily’, since the net produce of lands were likely to be generally higher.

H2. SURPLUS WATER STORED IN NATURAL DEPRESSIONS OF ZAMINDARI LANDS IS LEVIABLE

This is the case of Kondepati Ayyanna v. Secretary of State and others at the Madras High Court (AIR-1933-Madras-646). In LPA Nos. 42 to 51, 93 to 96 and 108 of 1929 and 11 of 1930, this case questioned the provision of the Madras Irrigation Cess (Amendment) Act, 1900, making irrigation free of charge in a zamindari village, for the water stored in a natural depression.

The lands of the plaintiff were situated in a zamindari village, which adjoins another Government village. The lands in the Government village were irrigated from a channel known as the Ananthapalli channel,
which took off from a natural stream and was maintained by the Government. The surplus water of the Government lands flowed into the plaintiff’s lands either by distribution channels or by drainage from the Government lands and was then stored in either ponds or mere natural depressions situated in the zamindari village, which was later used for irrigation.

The plaintiff based his contention on the fact that since it was a natural depression, he was entitled for free irrigation, since it was located in the zamindari lands. He made his contention under the provisions of Illustration (j) to Section 7 of the Indian Easements Act, 1882, which reads: “The right of every owner of land abutting on a natural stream, lake or pond to use and consume the water for irrigating such land ... provided that he does not thereby cause material injury to other like owners”,

Both the trial court and the first appellate court held that the plaintiff was entitled to irrigation free of charge in respect of the suit lands as he had cultivated them from time immemorial and had not extended the area of cultivation.

This decision was questioned by the State in the High Court. The court held that the small ponds and depressions were reservoirs as per the provisions of the Madras Irrigation Cess (Amendment) Act, 1900, and so the zamindari lands were liable to be charged water cess.

It was further held that the surplus water from Government lands was stored in small ponds or natural depressions and used for irrigation, and so no easement to use such water can be acquired as per Section 7(j) of the Indian Easements Act, 1882, as it is applicable only for water overflowing from higher land to land lying lower.
Regarding the question of the right of the Government to levy the water charges, by custom the zamindari lands were entitled to irrigation free of charges. But the Madras Irrigation Cess (Amendment) Act, which was amended in the year 1900, provided for the levy of charges for indirect flow or percolation or drainage from irrigation sources. It said that it was lawful for the Government to prescribe rules under which such a charge for water should be levied as per the Revenue Board’s Standing Order Nos. 4 and 5, which deal with the levy of water cess on dry land and for the second crop on single crop wetland respectively.

Coming to the rights of the zamindari lands over the stored waters, the plaintiff had used only the overflow from the upper lands. So the supply remained precarious and not continuous. The customary rights could not be acquired. The court had required that if custom was to uphold it as a right, it should be immemorial in origin, certain and reasonable in nature, and continuous in use, which was not true in this case. So the plaintiff could not acquire a prescriptive right (which is a right to receive uninterrupted flow) and could not insist that sufficient quantity of water come down to his fields.

This was also about the water stored in the natural depressions and about a natural flow, which may aid in acquiring the riparian right, provided under Section 7(j) of the Indian Easements Act, 1882.

H3. FIXING THE EXTENT OF FREE WATER SUPPLY FROM A TANK TO A GRANTED LAND

The Second Appeal No. 1932 of 1931, dated April 8, 1936 of the Secretary of State v. Prayag Dossjee Varu and others under the provision of
Section 1 of the Madras Irrigation Cess Act, 1865, came up before the Madras High Court (AIR-1936-Madras-794).

The suit relates to the lands irrigated by Sholingur tank, which was located in an estate. The State had carried out improvement works to the tank in 1873. The lands were irrigated without any charges till 1920, and in 1921 the State Government had levied water cess as against the free supply given till then. The plaintiff had filed a suit in the subordinate court claiming for absolute right to one-third of the supply from the tank, and for perpetual injunction restraining the Government from levying water cess and for the refund of the cess already collected. But the plaintiff had failed to prove his claim to one-third water. From the facts it was inferred by the subordinate court that the measure of grant must be the amount of water which the tank could supply before the improvements were effected, and this amount could be ascertained from material contained in cultivation accounts for the years previous to the improvements were made, to be the quantity which could irrigate 80 acres. The subordinate court had passed a decree limiting the refund and the injunction to the quantity of water so ascertained.

Neither of the parties was satisfied by this decree. The plaintiff had appealed in the district court and made the contention that the condition of the tank was much better at the time of permanent settlement in the early years of the nineteenth century, compared to the condition after the 1873 improvement works, where the tank had been restored only partly. The State filed a memo of cross objections. The district court agreed with the one-third water but differed in the method of estimating the extent of the plaintiff’s right for free water. The district court held that the irrigation prior to improvements was limited to an average of 80 acres was not conclusive, and other factors like the apathy, conservation and lack of expertise of the ryots had restricted this extent. The court suggested that the Government allow free irrigation to the
whole area for the single crop and levy charges for the later crops. This was also not accepted by both parties.

The Government had filed the second appeal and the plaintiff filed a memo of cross objections in the High Court. The plaintiff has contended that though the actual area of cultivation was recorded as 80 acres, as per the original record, the area of wetland was 200 acres.

The High Court held that as per the provisions of Section 1 of the Madras Irrigation Cess Act, 1865, to get the irrigation free, one has to prove and define clearly the extent of one’s right.

Regarding the method of deciding the extent of plaintiff’s right to free supply, the court tried to ascertain the method of ascertaining the volume of water available in the tank before the improvements were effected. In the absence of any other recorded proof, the only practically possible way of measuring the area irrigated as the proof as decided by the sub court’s decree was supported by the High Court too.

The court held that before holding that the increase in irrigation was not due to the increased use of water, strict proof of change in character of ryot or their improved methods of using water should be insisted upon. This strict proof was lacking in the present case.

OBSERVATION

Referring to the case 1917-40-Madras-886 (PC) it was found that sluices and channels which took water from a river were granted to a zamindar along with the land through which the channels run, and the zamindar’s right to water, to quote the words of judgment on p.904, “… must
be measured by physical conditions such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant.” This was the technical solution offered for estimating the extent of water right.

Most of the irrigation systems (canal and tank) lack the provision of measuring structures and old records are rarely archived, and if available not easy to access. Under such conditions, the extent of area cultivated remains as the only practical solution. But as held in the district court, improved irrigation supply may not be the only factor that contributes to the increase in the extent of area. If some other factors like application of fertilizers, using high yielding varieties, improving soil properties, improving the method of application, etc., have aided in improving the extent of area, then one has to have a valid proof for that.

H4. PENAL ASSESSMENT FOR IRRIGATION FROM A PRIVATE RESERVOIR FED BY AN AUTHORIZED SOURCE

The case of Nainalasetti Veera Raju v. Secretary of the State came before at the Madras High Court (AIR-1940-Madras-521). S.A. No. 510 of 1936 concerns whether the Government was entitled under the Madras Irrigation Cess Act, 1865, Section 1(b) Proviso 2, to levy penal assessment in respect of the irrigation of a land from a private storage work which in turn was fed by a Government source.

The plaintiff owned a registered land under the Mallu Dora tank, which was the authorized source of irrigation for that land. Within the boundaries of this land there existed a private reservoir for many years. It
received water flowing through the fields higher up from the Mallu Dora tank. The Government had penalized the plaintiff for the irrigation from the private reservoir. So the plaintiff had appealed to the court.

The High Court held that the penal charge was not leviable by reason of the detriment to the others but by reason of the source from which the water was taken. In this case the source is an authorized Government tank and a private reservoir.

The court further held that impounding of water in private land flowing onto that land from the registered source in an authorized manner could not be held to create a different or additional source other than the one authorized by the revenue authorities. Such penal charges could not be levied.

OBSERVATION

In this case, the plaintiff had irrigated his lands from a private reservoir, which received water from an authorized Government tank. So he was liable to pay the water cess as per Section 1 of the Madras Irrigation Cess Act, 1865. Discussing the levy of penal charges, the Government claimed the right to penalize this irrigation on the ground that the plaintiff was using the water from a different source, which was not authorized by the revenue authorities and so liable to pay the penal charges.

The plaintiff was authorized to irrigate the entire field by the tank water, which was the authorized source. By way of storing the water in the reservoir, he might aim at assuring the supply to his crops. The storing of water in the reservoir by an individual in low flow conditions may detriment the flow in the downstream, since it was a tank system and not an isolated
tank. But the court did not consider this aspect for the levy of the penal charges and was bothered only about the source.

Some of the actions which may lead to the levy of penal assessment includes: breaking of sluice, using two pipes instead of a single authorized pipe, forcible removal of shutters, breaking of bunds, etc. No direct provision was available to tackle such issues.

H5. LEVY OF IRRIGATION CESS IN A ZAMINDARI LAND FED BY A STREAM

This case of the Secretary of State v. Srimanthu zamindar and others (AIR-30-1943-Madras-610) came before the High Court under the provisions of Section 1 Proviso 1 of the Madras Irrigation Cess Act, 1865, with second appeal Nos. 33 and 60 of 1938. This case deals with challenging the legality of the Government’s demand to levy of irrigation cess in a zamindari land, which was irrigated by a natural stream.

The plaintiff was the proprietor of an estate land. The stream which irrigated the estate lands was continuous over the Government lands too. In the year 1854, the Government built an anicut across this stream and levied water cess for the estate lands. The plaintiff appealed for the refund of the already collected cess, for a declaration of rights in the stream and for an injunction restraining the Government from interfering with his rights.

In accordance with the existing provisions of the Madras Irrigation Cess Act, 1865, the estate lands were exempted from the irrigation charges, if the source is a natural flow. So, in the trial court, both sides tried to prove what proportion of the water had come from the anicut and what proportion could be attributed to rainfall. Based on the arguments, the trial court held that
the plaintiff had rights in the stream within the limits of the estate and was entitled to use the water, subject to the liability to pay cess in respect of water used in excess of what was required to irrigate the area exempted from payment of cess in the year 1867, and refused to grant a decree for the refund of the cess but granted the injunction.

Aggrieved by this, the State Government preferred an appeal from the decree passed by the subordinate court, contenting that the plaintiff was not eligible for exemption, since the suit stream was connected to an anicut and hence liable to pay the irrigation cess. The subordinate court also agreed to the decree of the trial court.

So a second appeal was made in the High Court. The court held that the owner of a land upon a bank of a seasonal stream had all the rights of a riparian owner. But if an anicut is built by the Government and the whole of the water in the stream or a part of that comes from the anicut, the Government is entitled to levy irrigation cess. It is immaterial for the purposes of the Act whether the water has or has not become the property of the person using it. The State has won the case.

OBSERVATION

As per Section 1 of the Madras Irrigation Cess Act, 1865, the zamindari lands were exempted from payment of irrigation cess, for their lands irrigated by natural streams by virtue of the engagements with the Government.

Estimation of the amount contributed by the rainfall and from the anicut separately is a feasible technical solution.
In some previous case laws, the courts have recognized that the word ‘source’ covers not merely the river, stream, channel or tank but also the particular passage by which the water leaves the source. In view of this the distributary system of the private lands had also been taken to be the source.

The State’s contention was that even if across a seasonal river the Government built an anicut and water was being used for irrigation, water cess need to be paid. It is immaterial whether the stream gets water from the anicut, at times or continuously. This means that if it is a natural stream and there is no State interference in terms of building the structures, then the estate owner is entitled to use the water without any payment.

H6. LEVYING WATER CESS FOR RAISING OF TANK BUND IN AN INAM VILLAGE

This case of Sri Ekambareswaraswami Temple of Sirukambayar by Trustee A.R.L. Kuppuswami Servaigarar and another v. Provincial Government of Madras represented by the Collector of Tanjore and others came up before the Madras High Court. A.S. No. 228 of 1942 concerns Section 1 of the Madras Irrigation Cess Act, 1865, regarding the levy of water cess for inam village lands which were irrigated by a tank, which in turn was being supplied by a Government channel (1945-1-MLJ-317).

The plaintiffs were the inamdars of Adambur village in Tanjore district. Adambur tank was situated wholly inside this village and had irrigated the fields within the village. The tank was fed by a Government channel, part of which was flowing inside the estate. The Government’s contention was that the inamdars raised the height of the surplus weir of the Adambur tank, thereby increasing the capacity of the tank. By this act some of the villagers had raised two crops in single crop lands. This action
interfered with the supply to the Sadayamangalam tank, which irrigated the Government village below with the surplus supply received from the Adambur tank. So, the levy was justified by the State.

The court held that the State might have resorted to some other remedies such as compelling the plaintiffs to restore the surplus weir to its original height, and that the levy of cess was not justified.

OBSERVATION

‘Inam’ is an Arabic word which means reward or gift. The inam lands were not charged for the water which had been settled by the Government with an engagement. But in this case there was a Government channel which was feeding two tanks in chain. The upper one, which was in the inam land, irrigated the inam lands and the lower one irrigated the Government lands. The Government said that since the inamdars had increased the capacity of the tank, it might diminish the quantity of water that would be coming to the lower tank, and so levied a cess. The court held that since the inam lands were permitted free supply, levying the cess was not the correct decision. The court had clearly decided that it was not a question of levying cess but infringing with the rights of the downstream riparian. By restoring the original capacity of the tank, the supply to the lower tank would be maintained.

3.6.2 Understanding the Term Land Revenue

The seventh case is a writ petition filed mainly under the Tamil Nadu Panchayats Act, 1958, as against the provisions available in the Madras Irrigation Cess Act, 1865, regarding the inclusion of irrigation cess in the assessment of land revenue.
INCLUSION OF WATER CESS IN LAND REVENUE


A writ petition was filed based on Sections 115(1), 116 of the Tamil Nadu Panchayats Act, 1958; Section 1(2) of the Madras Irrigation Cess Act, 1865, as amended by Act 3 of 1945 and Entries 17, 49 and 66 of the Constitution in Schedule VII under List II questioning the constitutional validity of inclusion of water cess within the term ‘land revenue’.

The petitioner owned lands in Singampatti village, Bhavani taluk, Coimbatore district. He contended that water cess leviable under Section 1(2) of the Madras Irrigation Cess Act, 1865, was not a tax on land but was only a fee for the water supplied or used for irrigation of the land. His contention was that the words ‘land revenue’ should be equated to ‘land tax’.

Section 115(1) of the Tamil Nadu Panchayat Act, 1958, prescribed the levy of local cess (LC) at a particular rate of 45 paise of land revenue (this land revenue includes water cess too) payable on it. The maximum rate of local cess surcharge (LCS) referred to in Section 116 had been fixed at Rs.1.50 on every rupee of land revenue by G.O. Ms. No.1475, Rural Department and Local Administration dated 1.8.1970. The petitioner was asked to pay the local cess and the local cess surcharge, which included the water cess as per the provisions of Sections 115(1) and 116 of the Tamil Nadu Panchayats Act, 1958. So the petitioner questioned the validity of the above demand made by the State Government.
The split up of the total charges claimed by the State Government from the petitioner is as shown in Table 3.1.

**Table 3.1 Total Charges Assessed on the Land**

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Patta No.</th>
<th>Land revenue (Rs)</th>
<th>Water cess payable (Rs)</th>
<th>Total (Rs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>18</td>
<td>1.94</td>
<td>19.90</td>
<td>21.84</td>
</tr>
<tr>
<td>2</td>
<td>13</td>
<td>2.93</td>
<td>32.10</td>
<td>35.03</td>
</tr>
<tr>
<td>3</td>
<td>413</td>
<td>22.17</td>
<td>256.25</td>
<td>278.42</td>
</tr>
<tr>
<td>4</td>
<td>416</td>
<td>2.10</td>
<td>22.95</td>
<td>25.05</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>Grand total 360.34</strong></td>
</tr>
</tbody>
</table>

Local cess (LC in Rs) = \(360.34 \times 0.45\) = 162.15

Local cess surcharge (LCS in Rs) = \(360.34 \times 1.50\) = 540.51

Total charges payable = Rs.702.66

(The water charges works out to Rs. 331.20 as against the total charge of Rs.702.66)

The contention of the respondent / State was that the inclusion of the water cess in the definition of the term ‘land revenue’ was not unconstitutional. According to Section 115(1) of the Tamil Nadu Panchayat Act, 1958, water cess comes under the explanation of land revenue.

The High Court held that the term ‘land revenue’ has a wider connotation than the tax and the State Government is competent to define land revenue as it has done under the explanation to Section 115(1), including water cess. It further held that though water cess is not treated as land tax proper for certain purposes under Section 1(2) of the Madras Irrigation Cess
Act, 1865, it is still a revenue due on the land in one’s occupation and may clearly fall within the ambit of land revenue.

OBSERVATION

The Madras High Court in a particular case has held that water cess under the Madras Irrigation Cess Act, 1865, was levied on a land which was irrigated and so it was a form of land tax, and so the cess was not liable in the case of lands held free of all land tax. So the Government decided to make it clear that water cess is a fee levied for the water supplied or used for the irrigation of land, and hence the Madras Irrigation (Amendment) Act, 1945. This Act made it clear that water cess levied under the Act was not a tax on land but was a fee levied for the water supplied or used for irrigation.

Entry 17 under List II of Seventh Schedule of the Constitution of India makes water mostly a State subject. Entry 49 under List II relates to the power of the State to levy taxes on land and buildings. Entry 66 deals with the power of the State Government to levy fees in respect of any of the matter in List II, for the services rendered by the State, which includes water. But the court held that the word ‘revenue’ has a wider connotation than the word ‘tax’.

The local cess and local cess surcharges were introduced first through the enactment of the Tamil Nadu Panchayats Act, 1958. Currently, the revenue for irrigation is linked with LC at Re 1 and LCS Rs. 5 to Rs. 10 for every rupee of land revenue, levied under the Tamil Nadu Panchayats (Amendment) Act, 1992, with effect from July 1, 1992. This linking acts as a hurdle against the raising of water cess, because farmers who are not aware of these laws will assume that they are paying a lot for irrigation. The increase in water rates
would be counterproductive, if bureaucratic mindset of officials hinders proportionate increase in the service rendered (Arul et al 2000).

3.7 OVERALL COMMENTS

Most of the irrigation-related cases rally around the assigning of rights to the individual/s or group/s or to the State. The water rights issue is not well settled in the laws either with respect to surface water or groundwater. Conflict exists between the customary easements / rights enjoyed by the individual / public and the absolute right exercised by the State over the surface water.

According to Bruns (2006), duration, security, flexibility, transferability, divisibility and exclusivity are stated as the six dimensions of right. But the philosophy of surface water regulation by the State is not clear—for instance, whether the riparian rights are followed or the prior appropriation rights, each of which have their own demerits. Decisions should not be made arbitrarily and there should be some rationalization (based on some principles / doctrines) behind that to unveil the biases. Water should be treated as a common good and the State should also shoulder certain responsibilities as the custodian of the public, which is more suited to the present-day context.

The technical snag found in the quantification of supply to the different right holders should be avoided. The authority has the responsibility of assuring the time and quantity of water supplied to the command area irrigated. In supply-based irrigation systems, during low storage conditions, rotational system is followed. Thus the quantity of water supply linked to the rights will vary. Standing Orders of the Board of Revenue provide that in seasons of short water supply Collectors have the right to restrict the area of
cultivation of the lands registered as wet under any particular system or source (RSO 84, Rule 3).

During the 1950s, the State aimed at expanding the command areas of the irrigation systems and providing equitable water supply to the farmers. A number of cases have been filed by either the individual/s or groups claiming their customary easements / rights against the absolute right of the State. All the civil cases filed against the right of the State towards aiming at improving the efficiency of canal / tank irrigation systems are barred under Section 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949.

In India, irrigation practices are based on long traditions (or customs). Custom governs both customary right and customary easement. The Indian Easement Act, 1882, has codified the customs existed in India. It was first extended to the Madras Presidency and until now it governs the irrigated-related issues like the right of the Government to regulate the supply of water (Section 2), easement in artificial watercourses (Section 4), percolating water and groundwater (Section 7), rights in case of partition (Section 13), sharing of water from a well (Section 15), rights which cannot be acquired by prescription (Section 17) and claiming injunction (Section 35). Illustration (j) to Section 7 of the Indian Easements Act, 1882, recognizes the natural right of the riparian owner and the riparian owner is permitted to take reasonable quantity of water for purposes of irrigation.

Section 2 of the Indian Easements Act, 1882, entitles the revenue officials to exercise any right to regulate the distribution of water of rivers and channels. Cases filed up to the early 1950s mainly relied on the revenue officials for solving the irrigation conflicts. Irrigation officials would be able to solve these conflicts in a better way.
3.7.1 Rights of State against the Rights of Individuals

Section 2 of the Indian Easements Act, 1882, highlights the prerogative right of the State to regulate the collection, retention and distribution of irrigation water in public interest in natural watercourses. The same Section provides that a right by prescription can be acquired as against the proprietary right of another but not as against the sovereign right, which under the Indian law, the State possesses to regulate the supply of water in public streams so as to use it to the best advantage. The policy decision taken up by the State to regulate and distribute water to ensure equitable distribution in the larger interest of the people as enshrined in Article 39(b) of the Constitution of India is supported by the court. The relief of injunction claimed by the individual ayacutdar was not granted in view of Section 2 of the Indian Easements Act, 1882, and Section 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, besides being opposed to the policy underlined in Article 39(b) of the Constitution, for a new irrigation project.

In respect of tanks, the provisions of Sections 3 and 4 of the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, make it clear that the State has absolute power to take any measure for increasing the efficiency of a tank as against the customary rights claimed by a group of individuals.

In irrigation systems the tail-enders are mostly deprived of their water rights. The ryot has a claim against the State when it withholds from him the water which he has a right to demand considering the supply available. The economical and social background coupled with the lack of awareness does not allow the tail-enders to appeal in the court. Equity is positive discrimination. To bring out equality, equity is needed. In fact, the equity consideration needs to be given a lot of importance, because when water is being delivered from an irrigation system, the head, middle and tail-
end equity needs to be maintained. It is the obligation of the Government to make an equitable distribution of water.

As per the Indian Easements Act, 1882, easements can be acquired either by prescription (Section 15) or by virtue of local custom (Section 18). The power of the State to interfere with the customary supply of water to *ryotwari* holders did not go with the registry made in the revenue registers and it was only with reference to the nature of the accustomed user. The method of proving a custom (immemorial existence, certain, reasonable, and continuous in use) is really difficult and impossible in most of the irrigation-related cases. Slowly, the riparian rights and the customary rights enjoyed by the people were overcome by the proprietary right of the State over surface water. All the cases filed by the individuals against the State were won by the State.

Although the priority of allocation is fixed in the Water Policy of Tamil Nadu, 1994, giving top priority for drinking, when it comes to the part of compensating the customary users, there are no clear-cut norms. Section 7 of the Act provides that the *ryot* is entitled to receive such supply of water as is necessary and sufficient for the irrigation of his registered wet fields and the *ryot* must accept the method or machinery by which the State Government supplied that water. The denial of the farmers’ rights against the priority of the State Government to supply drinking water to the State capital was questioned. The court while approving the preference given to city water supply has respected the acquired rights of the *ryots* of the old *ayacuts* too.

In case the State plans to convert an agricultural tank into a drinking water supply tank, the State buys the water rights from the agriculturists. The other approach followed by the State is to withdraw slowly
the irrigation supply to the command areas and allow urbanization to take place on its own, so that agriculture becomes defunct.

Section 6(1), Proviso 2 of the Land Acquisition Act, 1894, has a bearing on the acquisition of land for the construction of field bothies, and it makes it mandatory that a portion of the money should be from public revenue. So the officials should have knowledge about the bunch of irrigation-related laws existing in the State.

3.7.2 Rights of Individual/s in Natural / Artificial Channels

The riparian owner should not interfere with the natural flow under any circumstances. But in accordance with Section 7 of the Indian Easements Act, 1882, the easement to divert water through the defendant’s land could be acquired by prescription in an artificial watercourse and it provides that except in very extraordinary circumstances, the lower owner may not be entitled to insist upon the surplus being allowed to flow in his field.

Section 27 of the Indian Easements Act, 1882, says that even in a private tank, the unauthorized expansion of the ayacut area by improving the storage capacity of the tank would not fall under the purview of acquiring the customary rights.

Under Section 7 of the Indian Easements Act, 1882, submergence of lands on the foreshore of a tank when it is at its full tank level is not an uncommon occurrence and is a feature of the recognized irrigation system. When such submergence is a matter of the customary conditions, no cause of action would arise.
Section 15 Clause D of the Indian Easements Act, 1882, says that no easement right can be acquired over percolating water unless it runs in a defined stream. As per Illustration (g) to Section 7 of the Indian Easements Act, 1882, in drawing subterranean water from the adjoining fields, a person could not draw water flowing in a defined channel through that adjoining land. So the defendant should not be asked to fill or obliterate the pond altogether by mandatory injunction.

3.7.3 Sharing of Groundwater from a Common Well

Cases filed under the Indian Easements Act, 1882, relate to sharing of water from a common well and the mode of drawing water from the well. Illustration (g) to Section 7 of the Indian Easements Act, 1882, states that, “the right of taking underground water and, in exercise of that right, of abstracting all the water that may percolate into one’s land in undefined channels from the surrounding lands belongs to the owner of the soil and can only be exercised by work done by one’s own property.”

As per Section 13 of the Indian Easements Act, 1882, the right of irrigation from a well is apparent, continuous and necessary to enjoy the tenement as it was enjoyed before and hence a quasi-easement.

Groundwater-related cases (sharing water from a common well) mostly go with the customary law and cling on to the Indian Easements Act, 1882. Such cases are more in number even in recent times compared to the other irrigation-related cases. Groundwater rights remain attached to the land rights. Normally, the extent of the lands irrigated by a well is fixed. The co-sharers’ right to water is proportionate to the extent of the share of land. The fact that water is owned proportionately to the land does not follow that the ownership of water is independent of the ownership of the land. The co-shares
are not permitted to increase their share of water for irrigating other lands which are not associated with the well. This amounts to infringement of other’s right and so the affected party can sue for damages as well as for an injunction to restrain unauthorized use. So it was well settled in all the cases related to sharing of water from a common well that the rights in a well could not be considered dissociated from the land to which the well was attached.

Sharing of common land cannot be compared with that of sharing a common well. If the partition is not feasible, the courts have taken up the right to prescribe the method in which the common well could be enjoyed by the parties. In some cases, sharing of water in turns has been suggested as a solution.

The water right from a well is intimately connected with the ownership of that property and the landowner is entitled to tap any amount of water. If a pumpset is used for drawing of water there are no norms available to have a check on the extraction. The court is much bothered about the source of water, but not the manner in which water is drawn and the quantity drawn.

In case of conflicts the affected parties are asked to prove the damage caused. It is much harder for the right holder to identify who is interfering with the groundwater flow and hence with the damage caused. Only the area irrigated is shown as proof for more usage (but selling to third parties is not considered). Sharing of water from common wells needs a better understanding about the aquifer characteristics, the nature of soil, and the existing wells. Only then, questions like who is drawing more water, and how much diminution has occurred can be answered.
The case filed under Section 38 of the Specific Relief Act, 1963, were based on the rights that can be exercised by an individual for taking the share of water from a common well to irrigate the newly-bought lands. It was decided that the irrigation source cannot be dissociated from the lands and water in the well was intended to be used only for the lands, which were originally irrigated by the common source. Any infringement to the joint right or ownership must be prohibited by an injunction though no damage is proved.

3.7.4 Channelizing Water through a Common Channel

Cases filed under the Indian Easements Act, 1882, relate to claiming exclusive right over the water flowing in a common channel either running through a particular owner’s land or through a common land and regulating the water from a common well or a private well through a common channel. According to the Indian Easements Act, 1882, if the ancestors’ property is divided among the legal heirs each co-sharer can take his / her share of the property along with the easement right of irrigation facility and water right. The common canal must be treated as common conferring both the parties to have their irrigation facility, and exclusive title cannot be claimed by one party if the suit channel runs through the lands of both parties and if no other channel was available to irrigate their respective lands. Obstructing the channel from the peaceful enjoyment by the others is not encouraged. In cases based on sharing a common channel, the court has instructed the State to look into the manner (or turns) of sharing.

Illustration (c) to Section 8 of the Indian Easements Act, 1882, says that a co-owner can impose an easement right on the land or any part thereof only with the consent of the other co-owners. As per the Indian Easements Act, 1882, the co-owner of the common property is entitled to use the
property in the way most advantageous and beneficial to him without causing any injury or detriment to the other co-owners. It is not for the other co-owners to dictate in what manner the other co-owners should enjoy the common property so long as the user of the common property by one co-owner does not materially interfere with the use of the property by the other co-owners or affect their rights, or in any way weaken, damage or injure the common property.

3.7.5 Levy of Irrigation Cess

The suits filed under the Madras Irrigation Cess Act, 1865, were related to the water cess that was levied by the Government as a fee for the irrigation services provided by the State. Cases that have been analyzed under the Madras Irrigation Cess Act, 1865, show that they have been brought before the enactment of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, and are related to the lands irrigated by the zamindars or the inamdars claiming absolute rights for the water in a channel or in a tank situated in their lands and also asking for a perpetual injunction restraining the Government from levying water cess, and if levied asking for refunds. The last amendment to the parent Act of 1865 was brought about in the year 1949. After the 1950s, not many cases have been filed under the Madras Irrigation Cess Act, 1865.

Definition of ‘source’ has been elaborated in the Madras Irrigation Cess Act, 1865, to encounter all direct and indirect irrigation sources including percolation. Regarding the penal charges, there is no direct law governing the unauthorized irrigation. This is being governed by the Standing Orders of the Board of Revenue. The levy of penal assessment is not in proportion to the infringement.
According to Section 1(2) of the Madras Irrigation Cess Act, 1865, water cess is treated as a fee and not as a tax. But under Section 115(1) of the Tamil Nadu Panchayats Act, 1958, the State Government is competent to define land revenue, which has a wider connotation than the tax and so water cess has been included as a part of land revenue.