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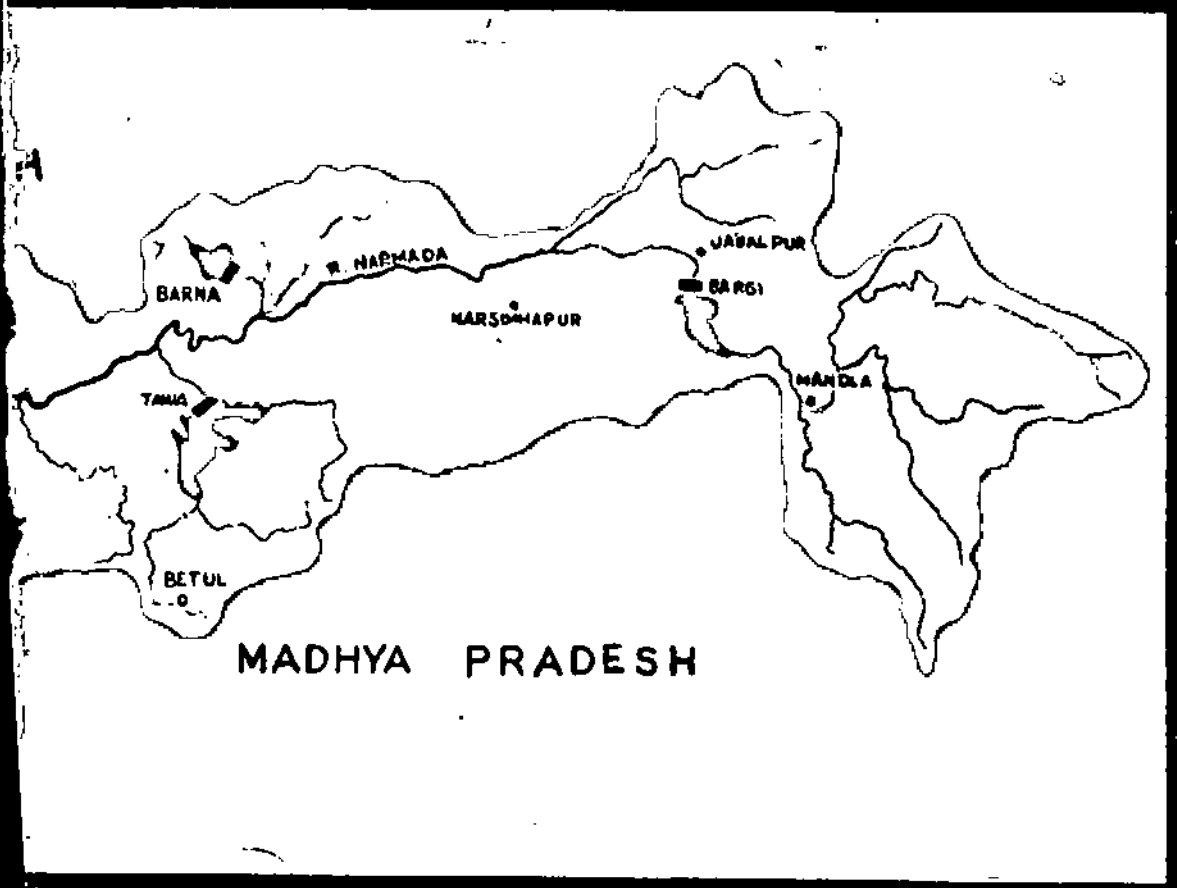
REPORT OF THE NARMADA WATER DISPUTES TRIBUNAL

VOLUME III



सत्यमेव जयते

GOVERNMENT OF INDIA
NARMADA WATER DISPUTES TRIBUNAL

THE REPORT OF THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF WATER DISPUTES REGARDING THE INTER-STATE RIVER NARMADA AND THE RIVER VALLEY THEREOF BETWEEN

1. *The State of Gujarat*
2. *The State of Madhya Pradesh*
3. *The State of Maharashtra*
4. *The State of Rajasthan*

VOLUME III

NEW DELHI
1979

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THE REPORT OF THE
NARMADA WATER DISPUTES TRIBUNAL
VOLUME III

APPENDICES

Mr. G. S. Kasliwal, Advocate General
Mr. K. K. Jain, Advocate
(appeared throughout)

For the Union of India:

Mr. Niren De, Attorney General
(appeared on 30th March, 1971)

Mr. O. P. Malhotra, Senior Advocate
Mr. Satpal, Advocate
(appeared throughout)

Miss S. Chakravarthy, Advocate
(appeared on 30th March, 1971)

ORDER

In CMP No. 13 of 1971, Maharashtra prays that out of the issues settled by the Tribunal on 28th January 1971, the following issues should be tried as preliminary issues :—

"1. Is the action of the Central Government constituting this Tribunal by the Notification No. 12/6/69-WD, dated 6th October, 1969 under the Inter-State Water Disputes Act (Act No. 33 of 1956) *ultra vires* for the alleged reason :

(a) that there was no "water dispute" within the meaning of Section 2(c) read with section 3 of the Act...

"1A. Has this Tribunal jurisdiction to entertain or decide the question as to whether the action of the Central Government in constituting this Tribunal is *ultra vires* of the Inter-State Water Disputes Act, 1956 ?

"2. Is the Notification of the Central Government No. 10/1/69-WD, dated 16-10-1969 in referring the complaint of Rajasthan to this Tribunal for adjudication under section 5 of the Act *ultra vires* for the reasons:

(a) that the complaint of Rajasthan is not a matter connected with or relevant to the water dispute between Madhya Pradesh, Maharashtra and Gujarat already referred to the Tribunal by the Central Government by its previous Notification dated 6-10-1969, and/or

(b) that no part of the territory of Rajasthan is located within the Narmada basin or its valley ?

"3. Is the State of Rajasthan not entitled to any portion of the waters of the Narmada basin on the ground that the State of Rajasthan is not a co-riparian State or that no portion of its territory is situated in the basin of the river Narmada?

"19. Whether it is legally permissible for Gujarat to execute the Navagam Project with FRL 530 or thereabouts or less and consequently submerge a portion of the territories of Madhya Pradesh and Maharashtra without the consent of those States ?"

It was contended that these issues are issues of pure law and an answer in the affirmative would preclude any further enquiry or investigation in respect of the complaint of Gujarat or the complaint of Rajasthan. It was stated that under Order 14, Rule 2 of Civil Procedure Code, read with Section 141 CPC, the Tribunal was competent to try these issues as preliminary issues of law and give its decision thereon.

In CMP No. 12 of 1971, Madhya Pradesh has made a prayer of similar character. Madhya Pradesh states that in addition to the issues contained in CMP No. 13 of 1971, the following issues also should be tried as preliminary issues :—

"1. Is the action of Central Government constituting this Tribunal by the Notification No. 12/6/69-WD dated 6-10-1969 under the Inter-State Water Disputes Act (Act No. 33 of 1956) *ultra vires* had no material for forming the opinion that the water dispute " could not be settled by negotiation" within the meaning of section 4 of the Act.

"4. Has the State of Madhya Pradesh no right to execute and complete the projects for hydro-electric development at Maheshwar I and II, Harinphal and Jalsindhi? Do any or all these projects prejudicially affect the interests of the Gujarat State or its inhabitants?

In the course of argument, Madhya Pradesh however conceded that issue No. 4 may not be tried as preliminary issue.

After hearing the Counsel for all the States, we are satisfied that issues 1(a), (b), 1A, 19 and 21 should be amended in the following manner to bring out the real controversy between the parties:—

"1. Is the action of Central Government constituting this Tribunal by the Notification No. S.O. 4054 dated 6-10-1969 or in making a reference of complaint of Gujarat by Notification No. 12/6/69-WD dated 6-10-1969 under the Inter-State Water

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF ADJUDICATION OF THE WATER DISPUTES REGARDING THE INTER-STATE RIVER NARMADA AND THE RIVER VALLEY THEREOF

And

IN THE MATTER OF COMPLAINT OF

1. The State of Gujarat
2. The State of Rajasthan — PETITIONERS

Against

1. The State of Madhya Pradesh
2. The State of Maharashtra — RESPONDENTS

Civil Miscellaneous Petition No. 3 *of* 1971-*NWDT filed by Madhya Pradesh*

Application dated 15-1-1971 (filed on 16-1-1971) by Madhya Pradesh, praying that the question relating to the validity of the constitution of the Tribunal may be tried as a preliminary issue relating to law along with rejoinders thereto filed by the Union of India, Gujarat and Rajasthan.

With

Civil Miscellaneous Petition No. 12 *of* 1971-*NWDT filed by Madhya Pradesh*

Application dated 12-3-1971 (filed on 15-3-1971) by Madhya Pradesh praying that an additional issue be framed as 4A and that preliminary issues be decided in the first instance.

And

Civil Miscellaneous Petition No. 13 *of* 1971-*NWDT filed by Maharashtra*

Application dated 10-2-1971 (filed on 12-2-1971) by Maharashtra praying that Issues Nos. 1(a), 1A, 2, 3 and 19 may be tried as preliminary issues along with replies thereto filed by Madhya Pradesh, Gujarat and Rajasthan.

The 26th day of April, 1971

PRESENT

Mr. Justice V. Ramaswami — *Chairman*

Mr. Justice V. P. Gopalan Nambiyar — *Member*

Mr. Justice E. Venkatesam — *Member*

For the State of Gujarat:

Mr. C. K. Daphtary, Senior Advocate
(appeared on 22nd, 23rd, 24th, 26th & 31st March, 1971)

Mr. J. M. Thakore, Advocate General
M/s. S. B. Vakil & M. G. Doshit, Advocates
(appeared on 22nd, 23rd, 24th, 25th, 26th, 30th and 31st March, 1971)

Mr. J. L. Hathi, Advocate
(appeared throughout)

For the State of Madhya Pradesh:

Mr. N. A. Palkhiwala, Senior Advocate
(appeared on 22nd March, 1971)

Mr. K. A. Chitale, Advocate General
(appeared on 22nd, 23rd, 24th, 25th; 26th, 30th and 31st March, 1971)

Mr. U. N. Bachavat, Advocate
(appeared throughout)

For the State of Maharashtra:

Mr. F. S. Nariman, Senior Advocate
Mr. B. R. Zaiwalla, Advocate
(appeared on 22nd, 23rd, 24th, 25th 26th, 30th & 31st March, 1971)

Mr. K. K. Framji
(appeared on 1st April, 1971 with the permission of the Tribunal)

For the State of Rajasthan:

Mr. A. K. Sen, Senior Advocate
(appeared on 24th, 25th, 26th, 30th & 31st March, 1971)

Disputes Act (Act No. 33 of 1956) *ultra vires* for the alleged reasons:

(a) that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the Act and/or

(b) that the Central Government had no material for forming the opinion that the water dispute "could not be settled by negotiations" within the meaning of section 4 of the Act.

"1A. Has this Tribunal jurisdiction to entertain or decide the question as to whether the action of the Central Government in constituting this Tribunal under the Notifications No. S.O. 4054 dated 6-10-1969 and in referring the complaints of Gujarat and Rajasthan by Notifications No. 12-6-69-WD dated 6th October, 1969 and No. 10/1/69-WD dated 16th October, 1969 *ultra vires* of the Inter-State Water Disputes Act, 1956?

"19(i): Whether the proposed execution of the Navagam Project with FRL 530 or thereabouts or less involving consequent submergence of a portion of the territories of Maharashtra and/or Madhya Pradesh can form the subject matter of a "water dispute" within the meaning of section 2(c) of the Inter-State Water Disputes Act (Act No. 33 of 1956).

19(ii): If the answer to 19(i) is in the affirmative, whether the Tribunal has Jurisdiction:

(a) to give appropriate directions to Madhya Pradesh and/or Maharashtra to take steps by way of acquisition or otherwise for making the submerged land available to Gujarat in order to enable it to execute the Navagam Project with FRL 530 or thereabouts or less;

(b) to give consequent directions to Gujarat or other party States regarding payment of compensation to Maharashtra and/or Madhya Pradesh and/or share in the beneficial uses of Navagam Dam; and

(c) for rehabilitation of displaced persons.

Issue No. 21

To what reliefs and directions, if any, are the parties entitled ?

Section 2(c) of the Inter-State Water Disputes Act (Act No. 33 of 1956) (hereinafter referred to as the "Act") defines a "water dispute" to mean "any dispute or difference between two or more State Governments with respect to—

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

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

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

Section 3 of the Act provides as follows:

"If it appears to the Government of any State that a water dispute with the Government of another State has arisen or is likely to arise by reason of the fact that the interests of the State, or of any of the inhabitants thereof, in the waters of an inter-State river or river valley have been, or are likely to be affected prejudicially by—

(a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other State; or

(b) the failure of the other State or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters, or

(c) the failure of the other State to implement the terms of any agreement relating to the use, distribution or control of such waters, the State Government may, in such form and manner as may be prescribed, request the Central Government to refer the water dispute to a Tribunal for adjudication.

Section 4(i) enacts: "When any request under Section 3 is received from any State Government in respect of any water dispute and the Central Government is of opinion that the water dispute cannot be settled by negotiations, the Central Government shall, by notification in the Official Gazette constitute a Water Disputes Tribunal for the adjudication of the water dispute."

Section 5(1) and (2) reads as follows:—

(1) When a Tribunal has been constituted under section 4, the Central Government shall, subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the Tribunal for adjudication.

(2) The Tribunal shall investigate the matters referred to it and forward to the Central Govern-

ment a report setting out the facts as found by it and giving its decision on the matters referred to it."

The question was much discussed in the course of argument as to whether this Tribunal is "a Court of Civil Jurisdiction" within the meaning of section 141 of Civil Procedure Code and whether the provision of Order 14, Rule 2 C.P.C. becomes consequently applicable. We do not think it is necessary to decide this question at this stage for, in our opinion, the principle underlying Order 14, Rule 2 of C.P.C. is applicable to the proceedings before this Tribunal even on the assumption that the Tribunal is not a Court of Civil Jurisdiction under section 141 of C.P.C. It is true that the Act has not expressly empowered this Tribunal to decide preliminary issues separately but there is nothing in the scheme or language of the Act which precludes the Tribunal from applying the principle underlying Order 14 Rule 2 of C.P.C.

Order 14 Rule 2 of C.P.C. states:

"Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".

An issue of jurisdiction can be an issue of law or an issue of fact or a mixed issue of law and fact. It is manifest that under Order 14 Rule 2 of C.P.C. an obligation is laid on the court to try the issue of jurisdiction as a preliminary issue only if it is an issue of law, and in that event the court would be justified in postponing its decision on the other issues. Where, however, the issue of jurisdiction is either an issue of fact or a mixed issue of law and fact, the proper procedure is set out in the Judgement of BEAUMONT, C.J. and RANGNEKAR, J. *Sowkabai Pandharinath* v. *Tukojirao Holkar* A.I.R. 1932 Bombay 128, as follows:—

"Under 0.14, Civil P.C., it is the duty of the Judge at the first hearing of the suit to frame issues based upon the differences between the parties which appear to exist from the pleadings, and under R. 2 of that Order the Judge may frame a preliminary issue of law. That R. 2 seems to be intended to introduce the practice which used to be known in England before the passing of the Judicature Act, 1873, as "*demurrer*". That means that the defendant may say that, assuming the truth of all the allegations in the statement of claim nevertheless the statement of claim in point of law discloses no cause of action, and therefore the suit should be dismissed. Strictly speaking under 0.14, I do not think there is any power in the Court to frame something in the nature of a preliminary issue of fact. No doubt when the court has framed the issues which properly arise, the Judge may come to the conclusion that one or more of those issues should be tried first and independently because the evidence on such issue or issues can be conveniently separated from the rest of the evidence and the finding on that issue or those issues may render the trial of other issues unnecessary".

Applying the principle to the present case, we are of the opinion that the following issues as amended should be tried as preliminary issues of law:

"1. Is the action of Central Government constituting this Tribunal by the Notification No. S.O. 4054 dated 6-10-1969 or in making a reference of complaint of Gujarat by Notification No. 12/6/69-WD dated 6-10-1969 under the Inter-State Water Disputes Act (Act No. 33 of 1956) *ultra vires* for the alleged reasons:—

(a) that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the Act and/or

(b) that the Central Government had no material for forming the opinion that the water dispute "could not be settled by negotiations" within the meaning of section 4 of the Act.

"1A. Has this Tribunal jurisdiction to entertain or decide the question as to whether the action of the Central Government in constituting this Tribunal under Notification No. S.O. 4054 dated 6-10-1969 and in referring the complaints of Gujarat and Rajasthan by Notifications No. 12/6/69-WD dated 6th October, 1969 and No. 10/1/69-WD dated the 16th October, 1969 *ultra vires* of the Inter-State Water Disputes Act, 1956 ?

"2. Is the Notification of the Central Government No. 10/1/69-WD dated 16-10-1969 in referring the complaint of Rajasthan to this Tribunal for adjudication under section 5 of the Act *ultra vires* for the reasons:

(a) that the complaint of Rajasthan is not a matter connected with or relevant to the water dispute between Madhya Pradesh, Maharashtra and Gujarat already referred to the Tribunal by the Central Government by its previous Notification dated 6-10-1969; and

(b) that no part of the territory of Rajasthan is located within the Narmada basin or its valley?

"3. Is the State of Rajasthan not entitled to any portion of the waters of the Narmada basin on the ground that the State of Rajasthan is not a co-riparian State or that no portion of its territory is situated in the basin of the river Narmada?

"19(i). Whether the proposed execution of the Navagam project with FRL 530 or thereabouts or less involving consequent submergence of a portion of the territories of Maharashtra and/or Madhya Pradesh can form the subject matter of a "water dispute" within the meaning of section 2(c) of the Inter-State Water Disputes Act (Act No. 33 of 1956?

"19(ii). If the answer to 19(i) is in the affirmative, whether the Tribunal has jurisdiction:

(a) to give appropriate directions to Madhya Pradesh and/or Maharashtra to take steps by way of acquisition or otherwise for making the submerged land available to Gujarat in order to enable it to execute the Navagam project with FRL 530 or thereabouts or less;

(b) to give consequent directions to Gujarat or other party States regarding payment of compensation to Maharashtra and Madhya Pradesh and/or giving them a share in the beneficial uses of Navagam dam; and

(c) for rehabilitation of displaced persons."

The States of Gujarat and Rajasthan contended that the above issues cannot be tried as preliminary issues, as they,—or at least some of them—cannot be said to raise pure questions of law, but involve mixed questions of law and fact, and that the disposal of these issues cannot dispose of the whole or part of the case. It was also said that far from shortening the proceedings, the piecemeal trial of these issues will only protract the proceedings. After giving proper consideration to the matter, we feel that the interests of justice require that the issues that we have selected should be set down for hearing as preliminary issues.

Issue 1(*a*)

Madhya Pradesh and Maharashtra agree that this issue will be argued on the assumption that the facts stated in the complaint of Gujarat and in Statement of Case of Gujarat (including documents referred to therein) and in the documents disclosed in the three lists of Gujarat are correct.

Issue 1(*b*)

Madhya Pradesh agrees that this issue will be argued on the assumption that the facts stated in the complaint of Gujarat and in the Statement of Case of Gujarat (including the documents referred to therein and the documents disclosed by Gujarat in the three lists subsequently filed) and also the facts contained in the affidavit of the Union of India and the documents annexed thereto are correct.

Maharashtra agrees to argue this issue on the same assumption.

Issues 2 *and* 3

Madhya Pradesh and Maharashtra agree to argue these issues on the following basis:—

(i) All statements of fact including the documents referred to in the pleadings of Rajasthan (but not statements of law or inferences of law drawn from facts) are taken as true for the purpose of deciding these issues;

(ii) all statements with regard to previous practice contained in paras 9 to 16 of part 2 volume I of Rajasthan's Statement of Case are admitted as correct by Maharashtra and Madhya Pradesh for the purpose of deciding these issues;

(iii) Madhya Pradesh and Maharashtra agree to admit in evidence without formal proof the documents mentioned in the three lists of documents already filed by Rajasthan for the purpose of deciding these issues.

The preliminary issues are set down for hearing on 26th July, 1971 and succeeding dates.

Sd/-
(V. RAMASWAMI)
Chairman

Sd/-
(V. P. GOPALAN NAMBIYAR)
Member

Sd/-
(E. VENKATESAM)
Member

New Delhi;
Dated the 26th April, 1971.

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF ADJUDICATION OF THE WATER DISPUTES REGARDING THE INTER-STATE RIVER NARMADA AND THE RIVER VALLEY THEREOF

And

IN THE MATTER OF COMPLAINT OF

1. The State of Gujarat
2. The State of Rajasthan — PETITIONERS

Against

1. The State of Madhya Pradesh
2. The State of Maharashtra — RESPONDENTS

The Twentythird day of February, 1972

PRESENT

Mr. V. Ramaswami — *Chairman*

Mr. Justice V. P. Gopalan Nambiyar — *Member*

Mr. E. Venkatesam — *Member*

For the State of Gujarat:

Mr. C. K. Daphtary, Senior Advocate, Mr. J. M. Thakore, Advocate General and Messrs J. L. Hathi, S. B. Vakil and M. G. Doshit, Advocates.

For the State of Madhya Pradesh:

Messrs N. A. Palkhiwala and K. A. Chitale, Senior Advocates and Mr. U. N. Bachavat, Advocate.

For the State of Maharashtra:

Mr. F. S. Nariman, Senior Advocate and Mr. B. R. Zaiwala, Advocate.

For the State of Rajasthan:

Mr. A. K. Sen, Senior Advocate and Mr. G. C. Kasliwal, Advocate General and Mr. K. K. Jain, Advocate.

For the Union of India:

Mr. Niren De, Attorney General, Mr. O. P. Malhotra, Senior Advocate and Mr. Satpal and Miss S. Chakravarthy, Advocates.

DECISION ON PRELIMINARY ISSUES 1(a), 1(b), 1A, 2(a), 2(b), 3, 19(i) and 19(ii).

The following decision of the Tribunal is delivered by:

MR. V. RAMASWAMI, *Chairman*—On the 6th July, 1968, the Government of Gujarat made a complaint to the Government of India under section 3 of the Inter-State Water Disputes Act (33 of 1956) stating that a water dispute had arisen between the State of Gujarat and the Respondent States of Madhya Pradesh and Maharashtra over the use, distribution and control of the waters of the Inter-State river Narmada. In substance, the allegation was that executive action had been taken by Maharashtra and Madhya Pradesh which had prejudicially affected the State of Gujarat and the inhabitants of the State of Gujarat. The Government of Madhya Pradesh had proposed to construct Maheshwar and Harinphal Dams over Narmada in its lower reach and Madhya Pradesh had also entered into an agreement with the Government of Maharashtra to jointly construst Jalsindhi dam over Narmada in its course between those two States. The Government of Gujarat objected to the proposals of the Governments of Madhya Pradesh and Maharashtra on various grounds, the principal ground being that implementation of these projects would prejudicially affect the rights and interests of Gujarat State by compelling the Gujarat State to restrict the height of the dam it proposed to construct across the river at Navagam at FRL 210 or less. It was said that this would mean a permanent detriment of irrigation and power benefits that would be available to the inhabitants of Gujarat and this would also make it impossible for Gujarat to reclaim the desert area in the Ranns of Kutch. It was alleged that the limitation of FRL would drastically reduce the irrigation potential of Navagam Dam to 12 lakh acres or even less and the equitable share of Gujarat in Narmada waters would be denuded to the permanent prejudice of the rights and interests of Gujarat. According to the State of Gujarat, the principal matters in dispute are:—

(i) the right of the State of Gujarat to control and use the waters of the Narmada river on well-accepted principles applicable to the use of waters of inter-State rivers;

(ii) the right of the State of Gujarat to object to the arrangement between the State of Madhya Pradesh and the State of Maharashtra for the development of the Jalsindhi dam;

(iii) the right of the State of Gujarat to raise the Navagam Dam to an optimum height commensurate with the efficient use of Narmada waters including its control for providing requisite cushion for flood control; and

(iv) the consequential right of submergence of areas in the States of Madhya Pradesh and Maharashtra and areas in the Gujarat State.

Acting under section 4 of the Inter-State Water Disputes Act, 1956 (hereinafter referred to as the 1956 Act) the Government of India constituted this Tribunal for adjudication of the said water dispute by Notification No. S.O. 4054 dated 6th October, 1969. On the same date, the Government of India made a reference of the water dispute to this Tribunal by their Reference No. 12/6/69-WD which states:

"In exercise of the powers conferred by subsection (1) of section 5 of the Inter-State Water Disputes Act, 1956 (33 of 1956), the Central Government hereby refers to the Narmada Water Disputes Tribunal for adjudication of the water dispute regarding the inter-State river, Narmada, and the river valley thereof, emerging from letter No. MIF-5565/C-10527-K, dated the 6th July, 1968, from the Government of Gujarat."

On 16th October, 1969, the Government of India made another reference of certain issues raised by the State of Rajasthan under section 5(1) of the 1956 Act by Reference No. 10/1/69-WD dated the 16th October, 1969 which states:

"WHEREAS by notification of the Government of India in the Ministry of Irrigation and Power No. S.O. 4054, dated the 6th October, 1969, the Central Government has constituted the Narmada Water Disputes Tribunal for the adjudication of the water dispute regarding the inter-State river, Narmada, and the river valley thereof;

"AND WHEREAS the water dispute regarding the inter-State river, Narmada, and the river valley thereof emerging from the Government of Gujarat's letter No. MIP-5565/C-10527-K, dated the 6th July, 1968 has been referred to the said Tribunal.

"AND WHEREAS certain matters connected with and relevant to the said water dispute have been raised by the Government of Rajasthan in their letter No. F. 9(1)/Irrg/69 dated the 20th September, 1969;

"NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of section 5 of the Inter-State Water Disputes Act, 1956 (33 of 1956), the Central Government hereby refers the said matters also to the said Tribunal for adjudication."

On 24th November, 1969, the State of Madhya Pradesh filed a Demurrer before the Tribunal that the action of the Government of India in constituting the Tribunal by Notification No. S.O. 4054 dated 6th October, 1969 and in making a reference of the complaints of Gujarat and Rajasthan by their References No. 12/6/69-WD dated the 6th October, 1969 and No. 10/1/69-WD dated the 16th October, 1969 were *ultra vires* of the 1956 Act. The contention of Madhya Pradesh was that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the 1956 Act and also that the Government of India had no material for forming the opinion that the water dispute could not be settled by negotiation within the meaning of section 4 of the 1956 Act. It was said that Maheshwar, Harinphal and Jalsindhi projects were purely power projects and would not diminish the flow of water prejudicially affecting the interests of Gujarat. It was said that the implementation of these projects would not reduce the irrigation potential to 12 lakh acres or less as alleged by Gujarat. Madhya Pradesh also objected that Gujarat had no right to construct the Navagam Dam above FRL 210. It was alleged that the claim of Gujarat to construct Navagam Dam at FRL 530 was beyond its competence as the construction of such a dam will submerge the territories of Maharashtra and Madhya Pradesh and three important projects of Madhya Pradesh at Jalsindhi, Harinphal and Maheshwar would be sub-merged. It was also contended that the State of Rajasthan not being a co-riparian State had no legal right to set in motion the machinery of the Inter-State Water Disputes Act. It was claimed that Rajasthan not being a basin State had no right to share the waters of river Narmada. The problem had also not been discussed between Rajasthan and Madhya Pradesh and the conditions precedent laid down in sections 3 and 4 of the Act have not been satisfied. After the party States filed their

respective statements of case and their respective rejoinders, to each other's statement, the Tribunal framed 24 issues at the seventh meeting on 28-1-1971. In C.M.P. No. 13 of 1971, Maharashtra prayed that out of the issues framed issues 1(a), 1A, 2, 3 and 19 may be separately tried as preliminary issues. In C.M.P. No. 3 of 1971, Madhya Pradesh prayed that issues 1(b) and 4 may also be similarly tried. By its Order dated 26th April, 1971 on C.M.P. Nos. 3, 12 and 13 of 1971, the Tribunal held that the following issues out of the issues already settled on 28th January, 1971 and as amended should be tried as preliminary issues of law.

"1. Is the action of Central Government constituting this Tribunal by the Notification No. S.O. 4054 dated 6-10-1969 or in making a reference of complaint of Gujarat by Reference No. 12/6/69-WD dated 6-10-1969 under the Inter-State Water Disputes Act (Act No. 33 of 1956) *ultra vires* for the alleged reasons :

(a) that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the Act and/or

(b) that the Central Government had no material for forming the opinion that the water dispute "could not be settled by negotiations" within the meaning of section 4 of the Act?

"1A. Has this Tribunal jurisdiction to entertain or decide the question as to whether the action of the Central Government in constituting this Tribunal under Notification No. S.O. 4054 dated 6-10-1969 and in referring the complaints of Gujarat and Rajasthan by References No. 12/6/69-WD dated 6th October, 1969 and No. 10/1/69-WD dated the 16th October, 1969 *ultra vires* of the Inter-State Water Disputes Act, 1956?

"2. Is the Reference of the Central Government No. 10/1/69-WD dated 16-10-1969 in referring the complaint of Rajasthan to this Tribunal for adjudication under section 5 of the Act *ultra vires* for the reasons :

(a) that the complaint of Rajasthan is not a matter connected with or relevant to the water dispute between Madhya Pradesh, Maharashtra and Gujarat already referred to the Tribunal by the Central Government by its previous Reference dated 6-10-1969, and

(b) that no part of the territory of Rajasthan is located within the Narmada basin or its valley?

"3. Is the State of Rajasthan not entitled to any portion of the waters of the Narmada basin on the ground that the State of Rajasthan is not a co-riparian State or that no portion of its territory is situated in the basin of the river Narmada?

"19(i). Whether the proposed execution of the Navagam Project with FRL 530 or thereabouts or less involving consequent submergence of a portion of the territories of Maharashtra and/or Madhya Pradesh can form the subject matter of a "water dispute" within the meaning of section 2(c) of the Inter-State Water Disputes Act (Act No. 33 of 1956)?

"19 (ii). If the answer to 19(i) is in the affirmative, whether the Tribunal has jurisdiction:

(a) to give appropriate directions to Madhya Pradesh and/or Maharashtra to take steps by way of acquisition or otherwise for making the submerged land available to Gujarat in order to enable it to execute the Navagam project with FRL 530 or thereabouts or less;

(b) to give consequent directions to Gujarat or other party States regarding payment of compensation to Maharashtra and/or Madhya Pradesh and/or giving them a share in the beneficial uses of Navagam dam; and

(c) for rehabilitation of displaced persons."

We now proceed to give our decision on these preliminary issues of law.

Issue 1A

On behalf of Maharashtra Mr. Nariman stressed the argument that the jurisdiction exercised by the Tribunal was of such a character as to constitute it into a Special Court and therefore it had inherent power to determine the limits of its own jurisdiction. Mr. Nariman specially referred to the repeated use of the word "adjudication" in Article 262 of the Constitution, in the title of the 1956 Act and in sections 3, 4 and 5 of the 1956 Act. In Ballentine's Law Dictionary (1948 edition) the word "adjudication" is defined thus: "A solemn or deliberate determination of an issue by the judicial power, after a hearing in respect to the matters claimed to have been adjudicated. See *Sams* v. *City of New York*"[1]. In Bourvier's law Dictionary (8th edition) the word "adjudication" is defined as "A judgement, giving or pronouncing judgement in a case. Determination in the exercise of judicial power. *Street* v. *Benner*;[2] *Joseph C. Irwin & Co.* v. *US*"[3] Mr. Nariman also relied upon section

1. 31 N. Y. Misc. Rep. 559, 560, 64 N. Y. Supp. 681.
2. 20 Fla. 700.
3. 23 Ct. Cl. 149.

6 of the Act which empowered the Tribunal to give a final and authoritative judgement. Reference was made to the decision of the Supreme Court, *Brajnandan Sinha* v. *Jyoti Narain*[4], in which the question arose as to whether the Commissioner appointed under Public Servants (Inquiries) Act, 1850 (XXXVII of 1850) was a court within the meaning of the Contempt of Courts Act, 1952 (XXXII of 1952). Bhagwati, J. held in that case that in order to constitute a Court in the strict sense of the term, an essential condition was that the Court should have, apart from having any formal trappings, power to give a decision or a definitive judgement which had finality and authoritativeness which are the essential tests of a judicial pronouncement. The same principle had been stated earlier in *Bharat Bank Limited* v. *Employees of Bharat Bank Limited*[5] and *Maqbool Hussain* v. *The State of Bombay*[6] where the test of a judicial tribunal as laid down in a passage from *Cooper* v. *Wilson*[7] was adopted by the Supreme Court:—

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites (1) The presentation (not necessarily orally) or their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law; the submission of legal arguments by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

Mr. Nariman also cited the decision of the Supreme Court in *Thakur Jugal Kishore Sinha* v. *Sitamarhi Central Co-operative Bank Limited*[8] in which it was held that the Assistant Registrar of Co-operative Societies acting under section 48 of the Bihar and Orissa Cooperative Societies Act, 1935, was acting as a Court in deciding the dispute in question. The Argument put forward by Mr Nariman is that the essential tests of a Court laid down in these authorities are satisfied in the present case and this Tribunal therefore has inherent power to determine the limits of its own jurisdiction. The same argument was adopted by Madhya Pradesh.

The contention of Mr. Nariman was controverted by the Advocate General of Gujarat, who said that the Tribunal cannot be treated as a Court endowed with the inherent power to determine its own jurisdiction. We do not, however, think it is necessary to express a concluded opinion in this case as to whether the Tribunal is constituted as a Court. We shall assume that the Tribunal is not a Court. But we are definitely of the opinion that it is Statutory Judicial Tribunal on which the adjudicating power is conferred by the Statute and which has been invested with the part of the State's inherent judicial power (to adopt the language of Gajendragadkar, C.J. in *Associated Cement Companies* v. *P. N. Sharma*[9]).

It was contended on behalf of Gujarat that for the exercise of judicial power, the essential condition was not merely that the Tribunal should have authority to make a final and binding order against one or more of the parties but in addition the Tribunal must have the power to take steps to enforce the order. In support of this proposition, Mr. Thakore relied upon the decision of the Australian High Court in *Rola Company (Australia) Proprietary Ltd. & The Commonwealth and another*[10]. It was held by Latham, C.J. in that case that though Regulation 5C of the Women's Employment Regulations gave power to Committees of Reference to decide controversies and made the decisions of the Committees binding and authoritative, still the regulation did not purport to confer judicial power upon the Committees of Reference. The reason was that the Committees were not able to take action so as to enforce their decision. In support of this proposition Latham, C.J. referred to the definition of "judicial power" given by Griffith, C.J. in *Huddart Parker & Co. Pvt. Ltd.* v. *Moorhead*[11] and relied upon the words "is called upon to take action" in that definition as showing that the

4. (1955) 2 Supreme Court Reports, p. 955.
5. (1950) SCR 459.
6. (1953) SCR 730.
7. (1937) 2 K.B.D. 309.
8. (1967) 3 S.C.R. 163.
9. (1967) 3 S.C.R. 163 at page 332.
10. 69 C.L.R. 185.
11. 8 C.L.R. 330.

power to enforce the decision is an essential element of judicial power. It was argued by Mr. Thakore that the Tribunal constituted under the 1956 Act has not been invested with judicial power because it has no authority to take steps to enforce its judgement. We are unable to accept the argument of Mr. Thakore as correct. In the first place, the authority of the decision in Rola's case has been shaken by the subsequent decision of the Australian High Court in *QUEEN* v. *DAVISON*[12] wherein the Australian High Court held that the making of a voluntary sequestration order under the Federal Bankruptcy Act involved the exercise of judicial power and that, in consequence, it could not be performed by a Registrar in Bankruptcy, who, in the circumstances of the legislation as amended following the decision in *Le Mesurier* v. *Connor*[13] was not an officer of the Court. Dixon, C. J. and McTiernan, J., after examining the facts of the case and referring to *Le Mesurier's* case and *Bond's case*[14] and the resultant peculiar relation of the Registrar or want of relation, to the Court said that while means other than a judicial order could be provided for the making of voluntary sequestrations, if the legislature chose the means of judicial order (as under the Bankruptcy Act it had chosen)—"an order which by its nature, description or the character given to it by the legislation involves the exercise of the judicial power of the Commonwealth" Chapter III of the Constitution came into play. Dixon, C.J. and McTiernan, J. then considered the nature of the judicial power in detail. The definition of Griffith, C.J. in the *HUDDART PARKER'S case*[15] had emphasised the existence of a controversy between the parties and was defective in this respect because this element was lacking from many proceedings falling within the jurisdiction of English Courts of Justice. The definition of Palles C.B., in the *Queen* v. *Local Government Board*[16] had emphasised the element of determination of existing rights as distinguished from the creation of new ones and was open to similar objections, e.g. orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court. In the United States, Miller J. had emphasized the attributes of adjudication, submission of parties and enforcement but enforcement could not be a necessary attribute of a court exercising judicial power. For example, the power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of judicial power. At page 367, Dixon, C.J. and Mc Tiernan J. state as follows:—

"It will be seen that the element which Sir Samuel Griffith emphasized is that a controversy should exist between subjects or between the Crown and a subject, that which Palles C.B. emphasized is the determination of existing rights as distinguished from the creation of new ones, and those elements emphasized by Miller J. are adjudication, the submission by parties of the case for adjudication and enforcement of the judgement. It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various Courts of Justice in English Law. In the administration of assets or of trusts, the Court of Chancery made many orders involving no *lis inter partes,* no adjudication of rights, and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English Law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English Law. Again the enforcement of a judgement or judicial decree by the court itself cannot be a necessary attribute of a court exercising judicial power. The power to award execution might not belong to a tribunal, and yet its determination might clearly amount to an exercise of the judicial power. Indeed it may be said that an order of a court of petty sessions for the payment of money is an ex-

12. 90 C.L.R. 353.
13. (1929) 42 C.L.R. 481.
14. (1930) 44 C.L.R. 11.
15. (1909) 8 C.L.R. 330 (357).
16. (1902) 2 I.R. 349.

ample. For warrants for the execution of such an order are granted by a justice of the peace as an independent administrative act."

This case, therefore, is authority for the proposition that is not essential to the exercise of judicial power that there should be a controversy between the parties or that there should be a power of enforcement in the Tribunal exercising the power. The truth is that no inclusive and exclusive definition of "judicial power" can be formulated in a universal sense and each case must be determined upon its own facts and circumstances. In the present case, section 4 of the 1956 Act empowers the Central Government to constitute a Water Dispute Tribunal by notification in the official gazette for the *adjudication* of a water dispute. Section 5(2) states "that the Tribunal shall investigate the matters referred to it and forward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it." Section 6 enacts that the decision shall be final and binding on the parties to the dispute and shall be given effect to by them. The use of the word "adjudication" in the 1956 Act clearly shows that the Tribunal is judicial in character. We have already referred to the definition of "adjudication" in Bourvier's Law Dictionary as "a determination in the exercise of judicial power". The same definition of "adjudication" is given in Ballentine's Law Dictionary. Section 9(1) confers on the Tribunal the powers of a civil court under the Civil Procedure Code 1908 in respect of summoning and enforcing the attendance of witnesses and examining them on oath, in respect of discovery and production of documents and issue of commissions for examination of witnesses or for local investigation. Section 9(3) of the 1956 Act also enacts that the decision of the Tribunal as regards apportionment of costs may be enforced as if it was an order of the Supreme Court. It was also pointed out by Mr. Nariman on behalf of Maharashtra that in the absence of Parliamentary legislation like the 1956 Act, the subject matter of the dispute would fall within the original jurisdiction of the Supreme Court under Article 131 of the Constitution. Mr. Nariman referred in this connection to the judgement of the Supreme Court in *State of Bihar* v. *Union of India*[17]. It was said that the jurisdiction of the tribunal under the 1956 Act was carved out of the jurisdiction of the Supreme Court under Article 131 and was of a similar and analogous character. In view of these considerations, we are of opinion that this Tribunal is a judicial Tribunal on which the adjudicating power of the State is conferred by the Statute. It is also necessary to emphasise that the decisions of the Australian High Court are strictly speaking not applicable to the Indian Constitution. The reason is that though our Constitution is based on a broad separation of powers, there is no rigidity or exclusiveness involved in it as in section 71 as well as other provisions of Chapter III of the Australian Constitution. In *Associated Cement Companies Ltd.* v. *P. N. Sharma*[18], Gajendragadkar C.J. has pointed out that technical considerations which flow from separation of powers in the Australian Constitution would not be applicable in deciding the question whether a Tribunal is vested with judicial power of the State under Article 136 of our Constitution. We have already referred to the tests of a judicial tribunal laid down by the English Court of Appeal in *Cooper* v. *Wilson* and adopted by the Supreme Court in *Bharat Bank's* case. It is manifest that all the four requisites laid down by the Supreme Court are satisfied in the present case.

We are of opinion that a statutory judicial tribunal of this description is not precluded from deciding or determining questions as to its own jurisdiction (when it is challenged) in order to exercise the powers granted to it under the Act. Such a power is implicit and necessary for without determining the limit of its jurisdiction the Tribunal cannot embark on the statutory enquiry at all. The problem is sometimes called the problem of "jurisdictional fact", though this is a misleading expression since the question upon which the jurisdiction of a tribunal depends is often a question of law rather than a question of fact. To put it differently, the proper question to be asked is: Has the statutory authority the prerogative of determining the facts or questions of law upon which its own jurisdiction depends? The legal position is stated in Halsbury's Laws of England[19] as follows:—

"116. *Collateral facts and the jurisdiction of inferior tribunals*. The orders cannot be used to give an appeal from the decision of an inferior court, or of a person or body which is under a duty to act judicially where the legislature has not granted the right of appeal. The primary function of the three orders is to prevent any excess of

17. (1970) 2 S.C.R. 522 at 531.
18. (1965) 2 S.C.R. 366.
19. Halsbury's Laws of England, 3rd ed., Vol. II, p. 59.

Jurisdiction (*Prohibition* and *certioari*), or to ensure the exercise of jurisdiction (*mandamus*). The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent (such as notice) or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact, when, at the inception of an enquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision or whether it has jurisdiction or not."

The decision of the Court of Appeal in *Rex*. v. *Fulham Hammersmith and Kensington Rent Tribunal*[20] is an illustrative case. The Landlord and Tenant (Rent Control) Act, 1949, section 1, provided that where, apart from the section, the standard rent of a dwelling house would be the rent at which it was let on a letting beginning after September 1. 1939, the landlord or the tenant may apply to the Tribunal to determine what rent is reasonable and the tribunal shall determine that rent. A landlord let two rooms in his house to a tenant at a weekly rent of 35sh. The tenant referred the letting to a rent Tribunal. At the hearing the landlord produced to the tribunal a document signed by the tenant and referring to the letting as a furnished one, and he relied on that document as proving that the rooms were let furnished, so that the reference was out of order because not made under the Furnished Houses (Rent Control) Act, 1946. The tenant stated that the rooms had been let to him unfurnished by an earlier oral agreement, but that when he arrived with his furniture to take possession of them the landlord refused to admit him unless he agreed to hire his furniture to the landlord for a year and to execute the document on which the landlord relied. No alteration in the agreed rent was suggested by the landlord. The tribunal, being of the opinion that the written agreement was not valid, decided that the rooms had been let unfurnished, and that they therefore had jurisdiction to hear the reference, and they reduced the rent to 15sh a week. On the application of the landlord for an order of *certiorari* for the quashing of their determination on the ground that, as there was a written agreement describing the letting as a furnished one, the tribunal had no jurisdiction to hear the reference and could not inquire into the *bona fides* of the transaction, the Court of Appeal (Lord Goddard C.J., Humphreys J. and Delvin J.) held that the Tribunal was entitled to satisfy themselves that the letting was for the purpose of Rent Restriction Acts, of furnished or unfurnished rooms; that, since by those Acts a letting was not to be regarded as furnished unless the amount of rent which was fairly attributable to the use of furniture formed a substantial part of the whole rent, the letting in question was an unfurnished one because no part of the 35sh rent, which had been fixed as for an unfurnished letting, was attributable to the use of the furniture; and that tribunal therefore had jurisdiction to hear the reference.

The same principle is expressed in the decision of the Supreme Court in *Addanki Tiruvenkata Thata Desika Charyulu* v. *State of Andhra Pradesh* [21]. The question in that case was whether the determination of the Settlement Officer that an "inam village" was an "inam estate" was exclusively within the jurisdiction of the Settlement Officer or whether the Civil Courts had jurisdiction to determine the question or retry it. Section 2(7) of the Madras Estates (Abolition & Conversion into Ryotwari Act) (Act 20 of 1948) defined an "Inam Estate" to mean "an estate within the meaning of section 3, Cl. 2(d), of the Estates Land Act but did not include an inam village which became an estate by virtue of the Madras Estate Land (Third Amendment) Act, 1936." Section 3(2)(d) of Madras Estates Land Act, 1908 provided as follows:

"3. In this Act, unless there is something repugnant in the subject or context—

2. 'Estate' means .....

(d) any inam village of which the grant has been made, confirmed or recognised by the Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees".

"Explanation (1)—Where a grant as inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purpose."

20. (1951) 2 K.B.D. 1.
21. A.I.R. (1964) (Supreme Court) 807.

Section 9(1) and (4) of the Madras Act 20 of 1948 stated:—

"9(1) As soon as may be after the passing of the Act, the Settlement Officer may *suo motu* and shall, on application, enquire and determine whether any inam village in his jurisdiction is an inam estate or not.

(4) (a) Any persons deeming himself aggrieved by a decision of the Settlement Officer under sub-sec. (3) may, within two months from the date of the decision, or such further time as the Tribunal may in its discretion allow, appeal to the Tribunal.

*** *** ***

(4) (c) The decision of the Tribunal under this sub-section shall be final and not be liable to be questioned in any Court of Law."

As pointed out by the Supreme Court, the determination by the Settlement Officer under section 9(1) as to whether "any inam village" was "an inam estate or not" involved two distinct matters in view of the circumstances that every "inam village" was not necessarily "an inam estate" viz., (1) whether a particular property is or is not an "inam village" and (2) whether such a village is "an inam estate" within the definition of section 2(7) of the Act. The first of these questions whether the grant is of an "inam village" is referred to in section 9(1) itself as some extrinsic fact which must pre-exist before the Settlement Officer can embark on the enquiry contemplated by that provision and the Abolition Act as it stood at the date relevant to the appeal, made no provision for this being the subject of enquiry by the Settlement Officer. Where, therefore, a person appearing in opposition to the proceedings initiated before the Settlement Officer under section 9 questions the character of the property as not falling within the description of an "inam village" the Settlement Officer has of necessity to decide the issue, for until he holds that this condition is satisfied, he cannot enter on the further enquiry which is the one which by section 9(1) of the Act he is directed to conduct. On the terms of section 9(1) the property in question being an "inam village" is assumed as a fact on the existence of which the competency of the Settlement Officer in determining the matter within his jurisdiction rests and as there are no words in the Statute empowering him to decide finally the former, he cannot confer jurisdiction on himself by a wrong decision on this preliminary condition to his jurisdiction. Any determination by him of this question, therefore, is (subject to the result of an appeal to the Tribunal) binding on the parties only for the purpose of the proceedings under the Act, but no further. The correctness of that finding may be questioned in any subsequent legal proceeding in the ordinary courts of law where the question might arise for decision. The determination by him of the second question whether the "inam village" is an "inam estate", is however within his exclusive jurisdiction and in regard to it, the jurisdiction of the Civil Courts is clearly barred.

In discussing the question as to how far the decision of the Statutory Tribunal was conclusive, the Supreme Court adopted the principle expressed by *Lord Esher in Queen* v. *Commissioners for Special Purposes*[22].

The same principle is enunciated by the Supreme Court in *The Management of Express Newspapers Ltd.* v. *Workers & Staff employed under it and others* [23], with regard to the determination of a jurisdictional fact by the Tribunal constituted under Industrial Disputes Act, 1947 (XIV of 1947). At page 549 of the Report, Gajendragadkar J. states :—

"It is also true that even if the dispute is tried by the Industrial Tribunal, at the very commencement the Industrial Tribunal will have to examine as a preliminary issue the question as to whether the dispute referred to it is an industrial dispute or not, and the decision of this question would inevitably depend upon the view which the Industrial Tribunal may take as to whether the action taken by the appellant is a closure or a lockout. The finding which the Industrial Tribunal may record on this preliminary issue will decide whether it has jurisdiction to deal with the merits of the dispute or not. If the finding is that the action of the appellant amounts to a closure, there would be an end to the proceedings before the Tribunal so far as the main dispute is concerned. If, on the other hand, the finding is that the action of the appellant amounts to a lockout which has been disguised as a closure, then the Tribunal will be entitled to deal with the reference, the finding which the Tribunal may make on this preliminary issue is a finding on a jurisdictional fact and it is only when the jurisdictional fact is found against the appellant that the Industrial Tribunal would have jurisdiction to deal with the merits of the dispute."

22. (1888) 21 Q.B.D. 313 at 319-320.
23. (1963) 3 S.C.R. 540.

Mr. Thakore also pressed the argument that a statutory tribunal has only such powers as are expressly conferred by the Statute creating it and no powers other than those contained in the four corners of the Statute can be exercised by it. Mr. Thakore said that the power of the Tribunal cannot be deduced as a matter of necessary implication and referred to the decision of the Supreme Court in *K. S. Venkataraman* v. *State of Madras.*[24] In our opinion there is no substance in this argument and the decision of the Supreme Court in *Venkataraman's* case does not support the argument of Mr. Thakore. On the contrary, the Supreme Court has held in *Income Tax Officer* v. *M. K. Mohammed Kunhi*[25], that the Income Tax Appellate Tribunal has the jurisdiction by implication to order the stay of recovery of the penalty as an incidental and ancillary power to its appellate jurisdiction. It was true that neither the provisions of the Income Tax Act, 1961 nor the Income Tax Appellate Tribunal Rules, 1963, conferred express power upon the Appellate Tribunal to stay proceedings relating to the recovery of penalty or tax due from an assessee. It was argued on behalf of the Income Tax Officer in that case that in the absence of any express provision under sections 254 and 255 of the Income Tax Act relating to stay of recovery during the pendency of an appeal, it must be held that no such power can be exercised by the Tribunal. The argument was rejected by the Supreme Court and it was held that as a matter of necessary implication of its appellate jurisdiction the Tribunal had the power to stay recovery of the penalty. The Supreme Court observed that when section 254 of the Income Tax Act, 1961 conferred appellate jurisdiction on the Tribunal, it carried with it the implied power in proper cases to make such orders for stay of proceedings as would prevent the appeal, if successful, from being rendered nugatory.

It was suggested by the Advocate General of Gujarat that there was a distinction between a case where the jurisdiction of the Tribunal is questioned in the matter of its constitution and a case where its jurisdiction is questioned in regard to the validity of the reference by the Central Government. In our opinion, there is no warrant for this distinction and there is no difference in principle between these two kinds of challenge. In the present case, we are concerned with a statutory jurisdiction in the sense of an authority conferred by the Statute upon the Tribunal to decide after enquiry the dispute of the kind described in the Statute. That statutory authority also carries with it by necessary implication the power of decision whether or not there exists a situation of a kind described in the Statute, the existence of which is a condition precedent to the enquiry. As pointed out by Diplock L. J. in *Anisminic Ltd.* v. *Foreign Compensation Commission.*[26]

"The authority or 'jurisdiction' to determine whether a situation of a kind described in a Statute exists is limited in a number of respects :

(1) The person or persons by whom it is exercised must possess the qualifications laid down in the Statute. In addition, unless it is otherwise provided in the Statute either expressly or by necessary implication, the presumed intention of Parliament is that one of the qualifications is absence of bias.

(2) The determination must be preceded by inquiry. The nature of the inquiry, any conditions precedent to the inquiry may be laid down expressly in the Statute. In the absence of express provision to the contrary, the presumed intention of Parliament is that the enquiry shall be conducted in accordance with the rules of natural justice.

(3) The case in which the determination is made must be one of the kind described in the Statute. The Statute may define the kind of cases in which it confers authority upon a person to determine in a number of different ways. The description will necessarily include words identifying the person or class of persons who are entitled to initiate the inquiry leading to the determination, and probably the other person or class of persons (if any) who are entitled to be parties to the inquiry. It will also necessarily contain a description of the subject matter of the determination, that is, of the kind of dispute or claim to be determined.

(4) The determination must state whether a situation of the kind described in the Act exists or not in the case of the individual to whom the determination relates.

24. (1956) 2 S.C.R. 228 at 247.
25. (1969) 2 S.C.R. 65.
26. (1968) 2 Q.B.D. 862 at 890.

If any of these conditions is not complied with, the determination is not a 'determination within the authority conferred by the Statute, and effect will not be given to it by the executive branch of Government."

"The person authorised to make the determination must necessarily form an opinion as to whether each of those conditions is complied with in order to embark upon and to proceed with the inquiry and to make the determination." (The decision of the Court of Appeal was reversed by the House of Lords in 1969 Appeal Case 147, but nothing was said in the House of Lords Judgement to detract from the authority of the above statement of the law.)

Applying the principle to the present case, we hold that the authority of the Tribunal to decide the preliminary question of jurisdiction extends not merely to the subject matter of the determination but also to the validity of the Notification constituting the Tribunal.

The Advocate General of Gujarat referred to the decision of the Supreme Court in the case of *K. S. Venkataraman & Co.* v. *State of Madras* [27] but the ratio of the decision has in our opinion no bearing on the question presented for determination in the present case. The principle laid down in that case was that a statutory Tribunal cannot declare the provision of a Statute under which it is functioning as *ultra vires* of the Constitution. If, for instance, an assessee raises a question that a section of the Income Tax Act is *ultra vires* the Appellate Tribunal can only reject it on the ground that it has no jurisdiction to entertain the objection or decide upon it. As no such question can be raised or can arise on the Tribunal's order, the High Court also cannot possibly give any decision on the question of *ultra vires*. But the decision in *Venkataraman's case* does not say that a statutory Tribunal cannot determine the limits of its own jurisdiction. In the earlier case *Kamala Mills* v. *State of Bombay* [28] a Special Bench of seven Judges held that the Sales Tax Officer had jurisdiction to decide whether a particular sale was an inside sale or an outside sale and as the said officer held the sale to be an inside sale, it was subject to Sales Tax, and if that finding was wrong, the Bombay Sales Tax Act provided an effective machinery for correcting the said mistake. For these reasons the Special Bench held that the assessment was one made under the Bombay Sales Tax Act 1946 within the meaning of section 20 of that Act, and therefore the suit was not maintainable. In *Venkataraman's case* [29] Subba Rao, J. states:

"We have considered these decisions (*including Kamala Mills case*) in some detail as it was contended that the present question was finally decided by some of the decisions of this Court. But a perusal of the judgements discloses that the said question, namely, whether a suit would lie when an assessment was made on the basis of a provision which was *ultra vires* of the Constitution was left open." It is a matter of significance that in the still later case *Dhulabhai* v. *State of Madhya Pradesh*[30], Hidayatullah, C. J. has attempted to reconcile the decision in *Kamala Mills case* and *Venkataraman's case* on the very same line of reasoning.

We accordingly hold that this Tribunal has jurisdiction to entertain and decide the questions as to whether the action of the Central Government in constituting this Tribunal by its Notification dated 6th October 1969 and in referring the complaints of Gujarat and Rajasthan by references dated 6th October, 1969 and 16th October, 1969 are *ultra vires* of the inter-State Water Disputes Act, 1956. Issue No. 1A is answered in the affirmative.

Issues 2(*b*) *and* (3)

In the approach to these issues it is necessary to keep in view the legislative history of Article 262 of the Constitution and the 1956 Act enacted in pursuance of that Article. Under the Government of India Act, 1935, entry No. 19 of List II—"Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power" was a subject falling in the Provincial Legislative List. Section 49(2) of that Act provided that the executive authority of the Province was co-extensive with its legislative authority. If there was no other limiting or restrictive provisions in the Act, each Province could, by virtue of entry 19 of List II read with section 49, sub-section (2), be entitled to do what it liked with all water supplies within its territories. But sections 130 to 132 of the Government of India Act, 1935, imposed certain important restrictions on the Provinces in the matter. If any legislative or executive action taken or proposed to be taken by one Province affected or was likely to affect prejudicially

27. (1966) 2 S.C.R. 229.
28. (1966) 1 S.C.R. 64.
29. (1966) 2 S.C.R. 229 (247).
30. (1968) 3 S.C.R. 662.

the interests of another Province, or any of its inhabitants, the Government of the latter Province may complain to the Governor General under section 130. Thereupon, after appointing a Commission of investigation and considering its report, the Governor General may make such orders as he may deem proper in the matter. Under section 131, sub-section (6) of the Act, the orders of the Governor General were binding upon the Provinces affected. Section 131 also provided that if, before the Governor General has given any decision, the Government of any Province or the Ruler of any State requests him to do so, he shall refer the matter to his Majesty in Council and His Majesty in Council may give such decision and make such order in the matter as he deems proper.

Articles 239—242 of the draft Constitution of India appeared under the heading, "Interference with Water Supplies."

Draft Article 239: *Complaints as to interference with Water Supplies*

If it appears to the Government of any State for the time being specified in Part I or Part III of the First Schedule that the interests of that State or of any of the inhabitants thereof, in the water from any natural source of supply in any State have been, or are likely to be affected prejudicially by:—

(a) any executive action or legislation taken or passed or proposed to be taken or passed; or

(b) the failure of any authority to exercise any of their powers, with respect to the use, distribution or control of water from that source, the Government of the State may complain to the President.

Draft Article 240: *Decision on complaints*

(1) If the President receives such a complaint as aforesaid, he shall, unless he is of opinion that the issues involved are not of sufficient importance to warrant such action, appoint a Commission consisting of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law as he thinks fit, and request that Commission to investigate in accordance with such instructions as he may give to them, and to report to him on the matters to which the complaint relates, or such of those matters as he may refer to them.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3), (4), (5)

*** *** ***

(6) After considering any report made to him by the Commission, the President shall, subject as hereinafter provided, make orders in accordance with the report.

(7) If upon consideration of the Commission's report the President is of the opinion that anything therein contained involves a substantial question of law, he shall refer the question to the Supreme Court under Article 119 of this Constitution and on receipt of the opinion of the Supreme Court thereon shall, unless the Supreme Court has agreed with the Commission's Report, return the report of the Commission together with the opinion and the Commission shall thereupon make such modifications in the report as may be necessary to bring it in accord with such opinion and present the report as so modified to the President.

(8) Effect shall be given, in any State affected, to any order made under this article by the President, and any Act of the Legislature of a State which is repugnant to the order shall, to the extent of the repugnancy, be void.

Draft Article 242: *Jurisdiction of Courts excluded.*

Notwithstanding anything in this Constitution, neither the Supreme Court nor any other Court shall have jurisdiction to entertain any action or suit in respect of any matter, if action in respect of that matter might have been taken under any of the three last preceding articles by the Government of a State or the President.

In the Constituent Assembly on 9th September, 1949, Dr. Ambedkar proposed an amendment inserting draft Article 242(a) in the draft Constitution:—

"242-A. Adjudication of disputes relating to waters of inter-State rivers or river valleys:—

(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything contained in this Constitution Parliament may, by law, provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1) of this Article."

The reasons which Dr. Ambedkar gave for the amendment are as follows:—

"Sir, originally this article provided for Presidential action. It was thought that these disputes regarding water and so on may be very rare, and consequently they may be disposed of by some kind of special machinery that might be appointed. But in view of the fact that we are now creating various corporations and these corporations will be endowed with power of taking possession of property and other things, very many disputes may arise and consequently it would be necessary to appoint one permanent body to deal with these questions. Consequently, it has been felt that the original draft or proposal was too hide-bound or too stereo-typed to allow any elastic action that may be necessary to be taken for meeting with these problems. Consequently, I am now proposing this new article which leaves it to Parliament to make laws for the settlement of these disputes."

Article 262 of the Constitution reproduces draft Article 242(a) quoted above under the heading: "Disputes relating to Waters". The other relevant provisions of the Constitution are entry. 56, List I of the Seventh Schedule and entry 17, List II of the Seventh Schedule.

Entry 56, List I, Seventh Schedule:—

"Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

Entry 17, List II; Seventh Schedule:—

"Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I."

In 1956, Parliament enacted the inter-State Water Disputes Act (Act 33) 1956. The Act is entitled as "An Act to provide for the adjudication of disputes relating to waters of inter-State rivers and river valleys." Section 2(c) of the Act defines a "water dispute" to mean:

"any dispute or difference between two or more State Governments with respect to—

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

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

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

In Section 3 of the Act, the following provision is made:—

"If it appears to the Government of any State that a water dispute with the Government of another State has arisen or is likely to arise by reason of the fact, that the interests of the State, or of any of the inhabitants thereof in the waters of an inter-State river or river valley have been, or are likely to be, affected prejudicially by—

(a) any executive action or legislation taken or passed, by the other State; or

(b) the failure of the other State or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters, or

(c) the failure of the other State to implement the terms of any agreement relating to the use, distribution or control of such waters, the State Government may, in such form and manner as may be prescribed, request the Central Government to refer the water dispute to a Tribunal for adjudication."

Section 4 prescribes as follows:—

"(1) When any request under section 3 is received from any State Government in respect of any water dispute and the Central Government is of opinion that the water dispute cannot be settled by negotiations, the Central Government shall, by notification in the Official Gazette, constitute a Water Disputes Tribunal for the adjudication of the water dispute."

Section 5 deals with the adjudication of water disputes between States.

Sub-section (1): When a Tribunal has been constituted under section 4, the Central Government shall, subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with or relevant to, the water dispute to the Tribunal for adjudication.

(2) The Tribunal shall investigate the matters referred to it and forward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it.

(3) If, upon consideration of the decision of the Tribunal, the Central Government or any State Government is of opinion that anything therein contained requires explanation or that guidance is needed upon any point not originally referred to the Tribunal, the Central Government or the State Government, as the case may be, may within three months from the date of the decision, again refer the matter to the Tribunal for further consideration; and on such reference, the Tribunal may forward to the Central Government a further report giving such explanation or guidance as it deems fit and in such a case, the decision of the Tribunal shall be deemed to be modified accordingly.

Section 6 reads:—

"The Central Government shall publish the decision of the Tribunal in the Official Gazette and the decision shall be final and binding on the parties to the dispute and shall be given effect to by them."

Sections 8 and 11 are as follows:—

"*Section* 8—*Bar of reference of certain disputes to Tribunal.*—Notwithstanding anything contained in section 3 or section 5, no reference shall be made to a Tribunal of any dispute that may arise regarding any matter which may be referred to arbitration under the River Boards Act, 1956.

Section 11—*Bar of jurisdiction of Supreme Court and other Courts.*—Notwithstanding anything contained in any other law, neither the Supreme Court nor any other Court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act."

It is manifest that Act 33 of 1956 was enacted by Parliament in exercise of the powers contained in Article 262 (1) of the Constitution and the bar of jurisdiction of the Supreme Court and of other Courts contained in section 11 of the Act was made in pursuance of the express powers conferred on Parliament under Article 262(2) of the Constitution.

Article 73 of the Constitution provides that the executive authority of the Union is co-extensive with its legislative authority in respect of matters covered by List I and Article 162 similarly provides that the executive authority of the State is co-extensive with its legislative authority. Article 162 reads as follows:—

Article 162. Subject to the provisions of this Constitution, the executive power of a State shall extent to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

If the constitutional powers under Article 162 and item 19 of List II had stood alone, the power of the State Legislature and of the State Government to do what they liked with reference to the waters of inter-State rivers would be unrestricted, but just as sections 130 to 132 of the Government of India Act, 1935, placed important shackles on that power, Article 262 of our Constitution contemplates that fetters should be put on the State legislative power by law to be enacted by Parliament. Article 262 recognises (as sections 130 to 132 of the Government of India Act, 1935, recognised) that it is not open to a State Government to take legislative or executive action in respect of an inter-State river which would prejudicially affect the rights of other States in the waters of the same inter-State river. Section 3 of the Inter-State Water Disputes Act, 1956, sub-clauses (a) and (b) reproduce substantially the provisions of section 132 of the Government of India Act, 1935. The law governing the rights of the States in respect of the waters of inter-State rivers under the Constitution is therefore almost identical with the law under the provisions of the Government of India Act, 1935. Article 262 recognises the principle that no State can be permitted to use the waters of inter-State river so as to cause prejudice to the interests of another riparian State or of a State in the river valley or of the inhabitants thereof.

The main question for determination in this case is: what is the law or legal principle in the light of which it can be said that a State has taken legislative or executive action which has affected or is likely to affect prejudicially the interests of another State or any of its inhabitants in the waters of an inter-State river. The same question arose before the Indus Commission which expressed the view that in the absence of an agreement between the parties, the rights of several States must be determined by applying the doctrine of "equitable apportionment" and not the doctrine of sovereignty or

the doctrine of riparian rights. At page 10 of its report, the Indus Commission states:—

14. *General principles suggested for consideration by parties.*—With a view to saving time we propounded on the first day of the session certain general principles for distribution of the water of inter-Provincial rivers, which seemed to us to emerge from a study of the practice in other countries and which we desired the parties to comment upon in due course. The statement which we made is quoted below:—

"Subject to correction in the light of what you may have to say, the following principles seem to emerge from the authorities:—

(1) The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political or administrative frontiers. (Madrid Rules of 1911 and Geneva Convention, 1923, Articles 4 and 5).

(2) If once there is such an agreement, that in itself furnishes the 'law' governing the rights of the several parties until a new agreement is concluded. (Judgment of the Permanent Court of International Justice, 1937, in the Meuse Dispute between Holland and Belgium).

(3) If there is no such agreement, the rights of the several Provinces and States must be determined by applying the rule of 'equitable apportionment', each unit getting a fair share of the water of the common river (American decisions).

(4) In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one: 'priority of appropriation gives superiority of rights' (*Wyoming* v. *Colorado,* 259 U.S. 419, 459, 470).

The important issues before the Indus Commission were:—

1(a) What is the law governing the rights of the several Provinces and States connected in the present dispute with respect to the waters of the Indus and its tributaries?

1(b) How far do the orders of the Government of India annexed to and explained in their letter of March 30, 1937, themselves constitute the law by which the rights in question are to be determined?

The answer given to these issues by the Indus Commission was in the following terms:—

"*Issue* 1(*a*): All parties have accepted the general principles which we tentatively formulated on the first day after examining the practice in other parts of the world. It follows from them that the rights of the several units concerned in this dispute must be determined by applying neither the doctrine of sovereignty, nor the doctrine of riparian rights, but the rule of 'equitable apportionment', each unit being entitled to a fair share of the waters of the Indus and its tributaries.

Issue 1(*b*): The orders of the Government of India, dated March 30, 1937, proceeding, as they did for the most part, on the consent of the units concerned, must be regarded as having secured the most equitable apportionment then possible. If owing to material errors in the original data, or a material change in river conditions, or other sufficient cause, those orders are now found to be inequitable, and if a more equitable arrangement can be discovered in present circumstances, with due regard to the interests of all the units concerned, the original orders may properly be modified. This implies of course that a modification of the orders in one particular may necessitate consequential modifications in other particulars by way of redressing the balance between the several units."

The Indus Commission further enquired into the question as to when a State could be said to have taken legislative or executive action which was likely to "prejudicially affect" the interest of a neighbouring State or of its inhabitants. Paragraph 30 of the report reads as follows:—

"*Limits of permissible action*: What then can it legitimately claim to do? And when can we say that it oversteps the limits of permissible action? Until we have found some law or principle which would furnish an answer to these questions, we cannot determine the extent, if any, to which any proposed action "prejudicially affects" the interests of a neighbouring Province or State; nor can we recommend to what extent that action should be permitted or restrained."

The answer of the Indus Commission was that no State could use the water of an inter-State river so as to prejudicially affect another State or of its inhabitants, and the latter State was prejudicially affected as a matter of law when it was deprived of its equitable share of waters of the inter-State

river on the application of "the doctrine of equitable apportionment". As we have already said the legal position under the Government of India Act, 1935, is substantially the same as under Article 262 of the Constitution read with the 1956 Act except for the concept of the river valley and the procedural variation contained in section 4 of the Inter-State Water Disputes Act 1956. In other words, the theory underlying Article 262 of the Constitution and the Inter-State Water Disputes Act 1956 is the theory of equitable distribution of waters of an inter-State river between the riparian States or States in the inter-State river valley. As a necessary corollary of this proposition, it follows that the legislative or executive action of a State prejudicially affects the interests of another riparian State or a State in the river valley or its inhabitants, if such legislative or executive action injuriously affects the equitable apportionment of the waters to which the latter State is entitled.

In the course of argument, Mr. Nariman on behalf of Maharashtra and Mr. Thakore, Advocate General of Gujarat expressly said that the correct legal principle applicable in the present dispute is the doctrine of equitable apportionment as enunciated by the Indus Commission in paragraphs 14, 16, 27 and 51 (Volume I of its Report). Mr. Chitale, appearing on behalf of Madhya Pradesh, also made an express concession to the same effect. Mr. Ashoke Sen for Rajasthan also stated that the doctrine of equitable apportionment is the correct doctrine to be applied but qualified his statement saying that non-riparian States were also entitled to apportionment and therefore Rajasthan was entitled to apportionment though it was not a riparian State.

We shall therefore proceed to consider the question as to whether Rajasthan has a right to claim an equitable apportionment of the waters of the Narmada river. The contention of Mr. Ashoke Sen was that section 3 of the Inter-State Water Disputes Act 1956 conferred the right upon the Government of any State (including a non-riparian State) to make a complaint to the Central Government that the interests of that State or of its inhabitants have been prejudicially affected by the executive action or legislation taken or passed by the other State. In our opinion there is no warrant for this argument. The language of section 3 of the 1956 Act must be construed in the context of section 2(c) (i) which defines a "water dispute" to mean any dispute or difference between two or more State Governments with respect to the use, distribution and control of the waters of an inter-State river or river valley. Section 3 of the 1956 Act also provides that the complaint of the State Government could be made only if the interests of the State or any of its inhabitants thereof in the waters of the inter-State river or river valley have been prejudicially affected. The section further prescribes that such prejudicial affectation must be caused by any executive or legislative action taken or passed or proposed to be taken or passed by the other State. Under entry 17, List II of the Seventh Schedule of the Constitution read with Article 246 of the Constitution only the States through which the inter-State river flows have legislative jurisdiction in respect of its waters. Under Article 162 of the Constitution only riparian States have executive jurisdiction over the waters of an inter-State river. No such legislative or executive jurisdiction is conferred by the Constitution on States through which the inter-State river does not flow. It follows that only riparian States are entitled to claim a share of the waters of inter-State river under the doctrine of equitable apportionment. The same principle is accepted in Article 262 of the Constitution and in section 2(c)(i) of the 1956 Act, but it has been extended to a limited extent to cover a State situated in a river valley which may not be a riparian State. We have already expressed the view that the interest of the State in the waters of an inter-State river is prejudicially affected within the meaning of section 3 of the 1956 Act if the State is deprived of its equitable share of the waters on the principle of "equitable apportionment". This view is in accordance with the interpretation of the Indus Commission on the analogous provisions of the Government of India Act, 1935.

Referring to the Geneva Convention, the Indus Commission states in paragraph 27 of its report:—

> ".....Article 4 of the Convention provides that "if a Contracting State desires to carry out operations for the development of hydraulic power which might cause prejudice to any other Contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operation to be executed." Article 5 provides that the technical solutions to be adopted in the agreements shall be based exclusively upon considerations which might legitimately be taken into account in analogous cases of development in a single State, "without reference to any political frontier". If we may regard this Convention as typical, it would seem to be an international recognition of the general principle

that *inter-State rivers are for the general benefit of all the States through which they flow* irrespective of political frontiers."

Reviewing the American decisions, the Indus Commission observes in paragraph 51 as follows:—

"A third principle that has been advocated is that of "equitable apportionment", that is to say, that every riparian State is entitled to a fair share of the waters of an inter-State river. What is a fair share must depend on the circumstances of each case; but the *river is for the common benefit of the whole community through whose territories it flows,* even though those territories may be divided by political frontiers."

We are, therefore, of the opinion that Rajasthan, not being a riparian State, is not entitled to make a complaint under section 3 of the 1956 Act.

This view is also consonant with the principle of international law and the principle of law administered in a federation with respect to rights of States in inter-State rivers. In the *International Commission of the River Order Case* [31], the Permanent Court of International Justice referred to a community of interest of riparian State and said that this community of interest in a navigable river was really the basis of the common legal right. In the course of its judgment, the Permanent Court stated:

"When consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfiling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, *but in that of a community of interest of riparian States.* This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole of the course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."

In an Italian case, the Court of Cassation similarly stated the legal position—

"International law recognises the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation ***. However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever regime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this regime, the opportunity of the other States to avail themselves of the flow of water for their own national needs." [*Societies Energie Electrique Du Littroal Mediteraneen* v. *Compagnia Impresse Elettriche Liguri,* (1938—40), Ann. Dig. 120, 121 (No. 47) Ct. of Sassation, Italy].

The same principle is implicit in the decision of the Supreme Court of the United States in *Kansas* v. *colorado* [32]. In the course of his opinion, Justice Brewer observed:—

"One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois,* supra, *the action of one State reaches, through the agency of natural laws* (98) *into the territory of another State,* the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."

In *Connection* v. *Massachusetts*[33] the Supreme Court of the United States stated:

"For the decision of suits between States, federal state and international law is considered and applied by this court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through

31. P.C.I.J. Serial A, No. 23 (1929).
32. 206 U.S. 46.
33. 282 U.S. 607.

them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right *Kansas* v. *Colorado,* 185 U.S. 125, 146, 46'L. eo 838, 846, 22 S. Ct. 552. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in *Kansas* v. *Colorado,* 206 U.S. 46, 100, 51 L. ed, 956, 957, 27 S. Ct. 655, such disputes are to be settled on the basis of equality of right."

At page 608, the Supreme Court of the United States observed:—

"But this is not to say that there must be an equal division of the waters of an inter-State stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this court will determine what is an equitable apportionment of the use of such waters (*Wyoming* v. *Colorado,* 259 U.S. 419, 465, 470, 66 L. ed. 999, 1013, 1015, 42 S. Ct. 552)."

In a later case *NEW JERSEY* v. *NEW YORK*[34], the jurisprudential basis was summarised by Mr. Justice Holmes as follows:—

"A river is more than an amenity, it is a treature. It offers a necessity of life *that must be rationed among those who have power over it.* New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little New Jersey be permitted to require New York to give up its powers altogether a order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas."

The legal principle underlying all these decisions is that where a river flows between or through two or more States each State has a vital interest in the waters and neither State has an absolute right to the waters; on the contrary, in the exercise of its sovereignty each State must consider the needs of the neighbouring State. A basis of division must be evolved which takes into consideration the needs of each State usually accompanied by some compromise of interest by all. As pointed out by Olmstead "this is the limited sovereignty principle which, underlies the concept of equitable utilisation". In International Water Law, the principle of Sovereignty of the single State was historically speaking the original principle. But the principle was modified in course of time by the limited sovereignty principle—that is, that every State is restricted in its right of dealing with the water courses within its territory to the extent that such dealing is not likely to produce a detrimental reaction on another State.

As Winiarski states "Let us take the matter further. If a river, whether or not navigable, traverses or separates two or more States, each of the riparan States exercise sovereignty on the section of the river which is within its territory; but in using this section it must respect the rights of its neighbours; it is one of the general principles of law elaborated by Roman jurists for the *praedia vicina* the receipt of which by international law was equally entirely natural" (Winiarski—"Principles Generaux de droit fluvial" Recueil des Cours, III, p. 81).

The same view is expressed in the Salsburg Resolution of the Institute of International Law 1961 in its Articles I and II as follows:—

"*Article I*: The present rules and recommendations apply to the use of waters which are part of a river or of a watershed extending upon the territory of two or more States."

"*Article II*: Every State has the right to make use of the waters flowing across or bordering its territory subject to the limitations imposed by international law and in particular those which result from the following legal dispositions. That right is limited by the right of use by the other States concerned with the same river or watershed."

34. 283 U.S. 336.

To the same effect is the New York Resolution of the International Law Association (1958):—

"2. *Agreed Principles of International Law*:

(a) A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal).

(b) Except as otherwise provided by treaty or other instruments or customs binding upon the parties, *each co-riparian State* is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case."

The Declaration of Buenos Aires (1957) of the Inter-American Bar Association states the same principle:—

"I. The following general principles which form part of existing international law, are applicable to every watercourse or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States; such a system will be referred to hereinafter as a "System of International Waters".

1. *Every State having under its jurisdiction a part of a system of international waters*, has the right to make use of the waters thereof in so far as such use does not affect adversely the equal right of the States having under their jurisdiction other parts of the system."

2. States having under their jurisdiction a part of a system of international waters are under a duty, in the application of the principle of equality of rights, to recognise the right of the other States having jurisdiction over a part of the system to share the benefits of the system taking as the basis the right of each State to maintenance of the status of its existing beneficial uses and to enjoy, according to the relative needs of the respective States, the benefits of future developments. In cases where agreement cannot be reached the States should submit their differences to an international court or an arbitral commission."

Article 17 of the Helsinki Rules 1966 also indicates that only riparian States are entitled to share in the equitable distribution of the waters of international river. Article 17 provides that a riparian State may grant rights of navigation to non-riparian States on rivers or lakes within its territory. The commentary of the I.L.A. Committee of the Helsinki Conference states:

"The extent of the right of a riparian State to an equitable utilization of the waters of a river or lake is not enlarged by its grant of a right of navigation within its territory to a non-riparian State.

Illustration:

State A, a riparian State, permits vessels of State B, a non-riparian, to navigate within its territory on an international river. State C, a co-riparian which previously has not used the waters, seek to initiate a use for irrigation and meets with State A to agree on an equitable utilization. State A takes the position that the use by State B for navigation be deemed a relevant factor in State A's favour in determining the rights of the co-riparians. The argument will fail. Only the uses of the riparian States are relevant in determining an equitable utilization."

In the course of his argument, the Attorney General referred to the concept of trans-basin diversion from areas where waters are available to areas where they are scarce. He cited for example the transfer of Colorado waters to Los Angeles, diversion of water from Kootney River to Frazer River by the construction of a dam and the Colorado-Big Thomson Project, constructed by the U.S. Bureau of Reclamation and supplying Denver and the eastern slopes with the waters of the Colorado river. The Attorney General said that the modern trend was towards large-scale water grid systems, which, by drawing upon various water sources, including surface and ground water, might provide an inter-basin system of water supply.

It is true that there is a trend towards regional or national development in the United States. The 1965 Federal Water Resources Planning Act[35] was a major step in the direction of regional development. The Act created a Water Resources Council to maintain a continuing study of the relation

35. 79 Stat. 244.

of regional or river basin plans and programmes to the requirements of large regions of the nation. It also empowered the President to establish river basin commission to plan the development of the water resources of a river or a group of rivers in an area. An example of the current thought in the United States on this matter may be taken from the Report of the Senate Committee on Interior and Insular Affairs on Section 20 of this Act[36].

> "The United States has developed to such an extent that water problems and specific water programmes proposed to solve these problems have social, political, economic and ecological ramifications that affect the entire Nation and not just the immediate area or region in which a problem or project is located. The total impact on the country of water programmes may vary greatly, depending on the choice made from alternative solutions. The committee recognizes that the problem of water is national in character; that proper solutions must be developed with full attention to the entire range alternatives and the ultimate consequences of proposed project.. ....."Bill S. 20 would establish a National Water Commission" to assess one major water problems and develop guidelines for the most effective use of available water resources."

In our opinion, the contention of the Union of India is not really to the point. The question for decision of the Tribunal is not whether trans-basin transfer of waters is desirable from the socio-economic point of view but whether under the Constitution of India and on a proper interpretation of the 1956 Act, the State through whose territory an inter-State river does not flow is entitled in law to a share in the equitable distribution of its waters. The question is not what is *desirable* but what is *possible* to be done within the present constitutional framework. As we have already indicated, the correct legal principle applicable in the present dispute is the Doctrine of Equitable Apportionment as between riparian States or between States located in the inter-State river basin. It was stated for Maharshtra that Parliament could change the existing law and enact another law in exercise of its authority under item 56 of List I of Seventh Schedule directing apportionment of the waters of the Narmada river not only between the riparian States of Gujarat, Madhya Pradesh and Maharashtra but also to give a share to Rajasthan. But it is open to argument whether the scope of the present entry 56 of List I is sufficient for the purpose. Perhaps it would be necessary for the Constitution to be amended, and entry 56 should be expanded so as to include "control, apportionment and use of waters of all inter-State rivers which are declared by Parliament by law to be expedient in the public interest." We refrain how ever from expressing any opinion on this point.

The Attorney General referred to the directives of the Planning Commission for development of irrigation and power in the First Five Year Plan. It was pointed out that all the major rivers of India which run through more than one State should be utilized to the best possible advantage in the tracts commanded irrespective of provincial or State boundaries. All irrigation projects are to be planned for the optimum development keeping in view the overall benefits of the country as a whole and not to be restricted for use within the States through which such rivers flow. In its letter dated 2nd October 1958, the Planning Commission said :

> "For achievement of optimum benefits river basin development schemes of different States have to be closely co-ordinated. Water stored in reservoirs of one State may be used with advantage in adjoining States. In certain cases it may be useful to divert waters from one river basin to another for the benefit of a region as a whole. In this connection cooperation among States will be essential for investigation, allocataion of waters and sharing of cost."

The Attorney General stated that the approach of the Government of India had been to promote the national interest transcending basin and State boundaries. Reference was also made in this connection to the speech of Shri Hafiz Mohd. Ibrahim, Union Minister for Irrigation & Power before Parliament on 23rd March 1963 that the "main guiding principle has been the interest of the region keeping in view generally the requirements of the scarcity areas and backward areas and a balanced and integrated development of the region as a whole in the overall interest of the country."

But it is obvious that neither the directive of the Planning Commission nor the statement of the Union Minister can be taken as an interpretation of the existing law. It may perhaps be open to Parliament to enact a law in exercise of its authority under item 56 of List I of the Seventh Schedule not only apportioning the waters of the Narmada river between the riparian States of Gujarat, Madhya Pradesh and Maharashtra but also give a share to Rajasthan. The Constitution may also perhaps be amended so as to expand the scope of entry 56 of

36. (1967), 90th Cong., 1st Sess., Report No. 25, Calendar No. 28 (p. 2)

List I so as to include apportionment, control and use of waters of all inter-State rivers which are declared by Parliament by law to be expedient in public interest. If the Constitution is so amended and the appropriate law is enacted by Parliament, the rights and interests of the riparian States of Narmada under item 17 of List II would be superseded and the law enacted by Parliament would prevail. But unless and until such a law is enacted by Parliament, the dispute has to be determined under the law as it stands at present in the manner we have already indicated.

We pass on to consider the argument of Mr. Ashoke Sen that the effect of entry 17 of List II is only to give legislative jurisdiction and not proprietary rights to the States concerned over the waters of inter-State rivers. Reference was made in this connection to Articles 294 and 295 of the Constitution and the corresponding provisions of the Government of India Act, 1935, namely, sections 172 and 173. It is true that there is a broad distinction between proprietary rights and legislative jurisdiction and the fact that such jurisdiction in respect of a particular subject matter is conferred on the State legislature affords no evidence that any proprietary rights with respect to it is transferred to the State concerned. There is no presumption that because legislative jurisdiction in respect of entry 17 List II is vested in the State legislature, proprietary right in respect of the subject matter of that entry is also transferred to it. The principle is borne out by the decision of the Judicial Committee in *ATTORNEY GENERAL FOR THE DOMINION OF CANADA* v. *ATTORNEYS GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC AND NOVO SCOTIA*[37] in which the Judicial Committee pointed out that section 91 of the British North America Act, 1867, did not convey to the Dominion any proprietary rights with regard to fisheries and fishing rights although the legislative jurisdiction conferred by that section enable it to affect those rights to an unlimited extent short of transferring them to others. Mr. Ashoke Sen pressed the argument that Narmada river was admittedly not a navigable river and the waters thereof cannot belong to any riparian State unless that State is the proprietor of the land abutting on the river on both sides. It was said that no river would belong to the State unless it was a river which from the source to the sea was within Government land or unless the river was tidal and navigable. In support of this proposition, reliance was placed on the decision of the Judicial Committee in *Secretary of State for India* v. *Subbarayudu*.[38]

It was contended that running water at common law, though many people have the right to take and use it, belongs in a river to no one. Flowing water cannot be the subject of property capable of being the subject matter of a grant. Flowing water is really *publici juris* in the sense that it is public or common to all who have a right of access thereto.[39]

The argument is not, however, of much assistance to Rajasthan. Assuming in favour of Rajasthan that flowing waters cannot be the subject matter of property right, still legislation from 1873 onwards shows that the right to use and control waters for irrigation had been vested in the Central Government and after the commencement of the Government of India Act 1935 in the Provincial Governments and after the Constitution in the State Governments. The preamble of Northern India Canal & Drainage Act 1873 (8 of 1873) states:

> "Whereas, throughout the territories to which this Act extends, the State Government is entitled to use and control for public purposes the water of all rivers and steams flowing in natural channels and of all lakes and other natural collections of still water; and whereas it is expedient to amend the law relating to irrigation, navigation and drainage in the said territories".

Section 5 of the Act provides:

> "Whenever it appears expedient to the State Government that the water of any river or stream flowing in a natural channel, or of any lake or other natural collection of still water, should be applied or used by (the State Government) for the purpose of any existing or projected canal or drainage-work; the State Government may by notification in the Official Gazette; declare that the said water will be so applied or used after a day to be named in the said notification not being earlier than three months from the date thereof."

By the Adaptation of Indian Laws Order 1937, the words "Provincial Government" were substituted for the word "the Government". Again by the Adaptation of Laws Order 1950, the words "State

37. 1898 Appeal Cases 700.

38. 59 Indian Appeals 56.

39. Halsbury Laws of England 3rd ed. Vol. 59, p. 506.

Government[39] were substituted for the words "Provincial Government". Section 5 of the Bombay Irrigation Act, 1879, is similar in effect:—

> *Notification when water supply to be applied for purpose of Canal.*—Whenever it appears expedient to (the State Government) that the water of any river or stream flowing in a natural channel, or of any lake or any other natural collection of still water, should be applied or used by the (State Government) for the purpose of any existing or projected canal, the (State Government) may, by notification in the Official Gazette, declare that the said water will be so applied or used after a day to be named in the said notification, not being earlier than three months from the date thereof."

This Act applies to Gujarat after the reorganisation of the State of Bombay. Madhya Pradesh Irrigation Act 1931 (M.P. Act 14 of 1931) contain a similar provision. Rajasthan Irrigation & Drainage Act 1954 (Rajasthan Act 21 of 1954) also shows that Rajasthan has legislated to control and use the waters of all rivers and streams flowing in that State. Section 2 of the Indian Easements Act, 1882, expressly saves from the operation of the Act any right of the Government to regulate the collection, retention and distribution of the waters of rivers and streams flowing in natural channels. Section 2(a) of the Indian Easements Act, 1882 states:

> "2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—
>
> (a) any right of the Government to regulate the collection, retention and distribution of the waters of rivers and streams flowing in natural channels and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;"

By the Adaptation of Laws Order 1950, the word "Government" was substituted for the word "Crown" in this sub-section. As pointed out by Varadachari J. the State posesses sovereign right in Indian Law to control and regulate the supply of water in all public and natural streams so as to utilise it to the best interests of the people.[40] Even assuming that the flowing waters of Narmada cannot be the subject matter of proprietary right, still the riparian States have legislative and executive jurisdiction under entry 17 of List II read with Article 162 of the Constitution with regard to the use and control of the waters of Narmada river for public purpose. It follows therefore that the riparian States of Gujarat, Madhya Pradesh and Maharashtra have a legal right to claim apportionment of Narmada waters. Rajasthan has no such legislative or executive jurisdiction over Narmada river waters and has therefore no legal claim for an apportionment of the waters of river Narmada. It follows that Rajasthan has no *locus standi* to make a complaint under section 3 of the 1956 Act.

The alternative argument of Mr. Ashoke Sen is that even if flowing waters could be subject matter of property right, the vesting of such rights as regards inter-Provincial rivers like Narmada was in the Crown under section 173(1)(a) and (b) of the Government of India Act, 1935. It was stated that the vesting in the Crown was for the purpose of the Government of India and for the purpose of exercise of the functions of the Crown in its relation with the Princely States and not for the purpose of the Government of any Province. The argument was based on the assumption that property right could be held in flowing waters by the Crown. We are doubtful whether this assumption has any justification in law. In the Institutes of Justinian it is declared concerning things. They are the property of someone or no one.[41] As further expressed in the Institutes, "By natural law these things are common to all viz., AIR, *running water*, the sea and as a consequence the shores of the sea."[42] Commenting on this Vinnius says: "Things common are such because, while by nature being things everyone has use for, they have not, as yet come into the ownership or control of anyone."[43] That is they are the property of no one within the first quotation from the Institutes.

This classification of running water with what has been called "the negative community", such as

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40. *Secretary of State* v. *Nageswara Iyer*, A.I.R. 1936 Madras 923 Iyer.

41. "Vel in nostro patrimonio vel extra nostrum patrimonium". As translated in Lux v. Haggin, 69 Cal. 315, 10 Pac. 674.

42. "Et quidem naturali jure, communia sunt ominium hace : aer et aqua profluens, et. mure, et per hoc, littora maris." Institutes of Justinian. lib., 2, tit. 1 sec. 1 Mr. Ware (Wares Roman Water Law) gives chiefly the Pandects or Digest,and does not give this passage in the Institutes.

43. "Communia sunt quea a natura ad omnium usum prodita, in nullius adhuc ditinem aut dominium pervenerunt". Quoted in Mason v. Hill, 5 Barn. & Adol, 1,110 Eng. Reprint, 692.

the air, runs through the civil law authorities. Pother's exposition of it is as follows: [44]

> "The first of mankind had in common all these things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community which, those who have written on this subject, have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others. (Then, after saying that in the course of time men divided up among themselves almost all things, and most things have passed out of the negative community and become recognised as private property, proceeds:) Some things, however, did not enter into this division, and remain, therefore, to this day in the condition of the ancient and negative community. These things are those which the jurisconsults called *res-communes*. Marcien refers to several kinds—the air, *the water which runs in the rivers*, the sea and its shores.....As regards wild animals *feraenaturae*, they have remained in the ancient state of the negative community.[45] All these things, which remained in the ancient state of the negative community, are called things common because subject to becoming the property of anyone who takes of them. They are also called *res nullius* because no one owns them while in this state, and cannot own them but by getting them into his possession. These are the things which, belonging to no one to the extent that they have remained in the negative community, are susceptible of being held by right of possession."[46] (*Wiel—Water Rights in the Western States, Vol. I, page* 2).

The Civil Law Principle that running water was in the "negative community" passed into English Common Law, in Embrey v. Own[47] Parke B observed:

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only.....But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

In *Tracy* v. *Becker*[48] the New Court of Appeals made a similar statement of the law. "The right to property in the water is usufructary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected." However, the concept of water right has not been fully analysed and it seems to us that it was described in that case as a usufructuary right merely as an illustration of the limited character of the right. Doubts also exist as to whether it is real or personal property since under the reasonable use theory, it can be separated from the land. A Montana Court defined it as personal property when interpreting the meaning of the word "property" under the Montana Code of 189549. In France the regime of water is placed in the Civil Code in the chapter dealing with servitudes, and in Article 637, a servitude is defined as a charge imposed on land for the use and benefit of other land belonging to somebody. But in a riparian right, there is no subservient land. An equally serious difficulty arises when a riparian right is likened to a usufruct. Article 578 describes it as the right to enjoy things of which another has ownership as the owner himself, but subject to the charge of preserving the substance of things. We shall however assume in favour of Rajasthan that the use and control of waters of inter-State rivers is property falling within section 173 of the Government of India Act, 1935. Even so we are unable to accept the argument of Mr. Ashoke Sen that such property was held after 1935 by the Crown exclusively for the

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44. Pothier, Traite du Droit de Propriete. No. 21.
45. Thus far, the translation is that viven in Geer b. Connecticut, 161 U.S. 525, 16 Sup. Ct. Rep. 600, 40 I. Ed. 793.
46. "Toutes ces choses, qui sont demurrees dans l' ancien etat de communaute negative, sont appellees res communes, par rapport au droit que chacun a de s'en emparer. Elles sont aussi appellees res nullius, parce qu'aucun n'enala propriete, tant qu'elles demeurent en cet etat, et ne peut l' acquerir qu'en s'en emparant. Ce sont ces choses qui, n'appartiennent a personne, en tant qu'elles sont restees dans la communaute negative, qui sont susceptibles d l'acquisition quise fait a titre d' occupation".
47. 1851 6 Exch. 353.
48. 212 N. Y. 488.
49. *Helene, Water Works*, v. *Settles* 37 *Mont.* 237 95 P.A. 838.

purposes of the Government of India and for the Princely States. The reason is that under entry 19 of List II the Provinces had capacity to legislate as regards "water supply, that is to say, water supplies irrigation and canals, water storage and water power" and such a capacity to legislate was indicative of the purpose for which the property was held by the Crown under s. 173 of the Government of India Act, 1935.

In *Re. The Allocation of Lands and Buildings in a Chief Commissioner's Province*[50], the Federal Court relied upon the capacity to legislate as disclosed by the entries in the legislative lists as indicative of the purpose for which the particular item of property was to be held by the Crown. At page 30 of the Report, Sir Maurice Gwyer, C.J. stated:—

> "That part of the canal which was, immediately before the commencement of the Act, still used for irrigation purposes in the Province of Delhi must, we think, be held to have been used at that date for purposes which thereafter became Central Government purposes, since irrigation and canals are a Provincial subject, and the Central Government has all the powers of a Province in the centrally administered areas [ss 8(i)(a) and 100(4)]. It seems an irrelevant 'consideration that the Central Government may have found it convenient to request or permit the Punjab Government to continue to administer so much of the canal as, after the separation of the Province of Delhi, was situate in that Province; and it seems equally irrelevant that the canal forms part of the Punjab irrigation system and that the water in it comes from the Punjab."

We are, therefore, unable to accept the submission of Mr. Ashoke Sen on this aspect of the case.

It was also argued by Mr. Ashoke Sen that the constitutional position regarding water supplies was the same after passing of the Government of India Act, 1935 as it was before the passing of that Act. Item 7 of Part II of Schedule I of the Devolution Rules, 1920, reads as:

> "Water supplies, irrigation and canals, drainage and embankments, water storage and water power; subject to legislation by the Indian legislature with regard to matters of inter-Provincial concern or affecting the relations of a province with any other territory."

Item 41 of Part I of Schedule I was: "Legislation in regard to any provincial subject, in so far as such subject is in Part II of this schedule stated to be subject to legislation by the Indian legislature, and any powers relating to such subject reserved by legislation to the Governor-General in Council."

Under the Devolution Rules, therefore, the Central Government could pass legislation with regard to water supplies in matters of inter-Provincial concern, e.g., in the case of inter-Provincial rivers. But the constitutional position was radically changed with the passing of the Government of India Act, 1935. Under item 19 of List II of the Seventh Schedule to that Act read with section 49(2) of that Act, each Province had both legislative and executive jurisdiction in respect of waters of inter-Provincial rivers subject to the restrictions imposed by sections 130 to 134 of that Act. The language of item 19 of List II of the Government of India Act, 1935 is materially different from that of item 7 of Part II and item 41 of Part I of Schedule I of the Devolution Rules. The general presumption is that a change of wording by the legislative authority denotes a change of meaning and ideas. No good reason is suggested by Mr. Ashoke Sen why the same meaning should be assigned to item 19 of List II of the 1935 Act as it was to item 7 of Part II of the Devolution Rules in spite of the deliberate change and contrast of language. It is therefore not possible to accept the argument of Mr. Ashoke Sen that the constitutional position in regard to water supplies continued to be the same after the passing of the Government of India Act, 1935.

We shall next deal with the argument of Mr. Ashoke Sen that there is a long course of Indian history and practice that the distribution of inter-State river waters should be in the best interests of the public at large irrespective of Provincial or State boundaries. For instance, the Order of the Secretary of State of 1865 directed:—

> ".....the only project which should be entertained by the Government of India is the best that can be devised irrespective of the territorial boundaries of the British and foreign States, in the benefits of which the Native States should be allowed to participate on like terms with our own subject." (Quoted in printed Completion Report of the Sirhind Canal).

It was contended that the principle laid down by the Secretary of State was tantamount to a piece of

50. (1943) F.C.R. 20.

legislation. We are unable to agree. . The decision of the Secretary of State was given in connection with the Sirhind Canal Project which related both to British India and Native States (over which the Crown exercised paramount power). The extracts of Maharashtra Volume II pages 482 to 491 show that Captain Baker first drafted a project for irrigating Patiala alone. Col. Dias thereafter devised a comprehensive project for irrigating British India and the Native States of Patiala, Nabha, Jind etc. In 1868 the general approval of the project was obtained from the Secretary of State. In 1873, an agreement was reached between the British Government and the Governments of Patiala, Nabha and Jind States. The policy decisions of the Government of India taken in 1866 were that (1) irrigation projects should be constructed by the State through its own agency and not through private irrigation companies; (2) irrigation projects should be financed by public loans raised for the purpose and (3) political boundaries between British India and Native States would not be allowed to come in the way as Native States were to be allowed to participate on like terms with British subjects. The right of participation included a very important ingredient, viz., sharing of cost.

Mr. Ashoke Sen then referred to the Conference of 1918 between the representatives of British Indian Province of Punjab and the Native States of Bahawalpur and Bikaner regarding distribution of Sutlej waters. The following principle was laid down by Sir Claude Hill, Chairman of the meeting :—

> "In considering the method of disposing of the waters made available for irrigation by the Sutlej Valley Project, the general principle is recognised that these waters should be distributed in the best interests of the public at large, irrespective of Provincial or State boundaries, subject always to the proviso that established rights are fully safeguarded or compensated for, and that full and prior recognition is given to the claims of riparian owners, and that their rights in the existing supplies or in any supplies which may hereafter be made available in the Sutlej river below the junction of the Beas and Upper Sutlej are fully investigated and are limited only by the economic factor." [Quoted in Bikaner's brief printed in Report of the Indus (Anderson) Committee, Vol. II, p. 60, (1935)].

Mr. Ashoke Sen laid much stress on Despatch of the Secretary of State of 1865 and the principle laid down by Sir Claude Hill. It is however manifest that the decisions of the Secretary of State in 1865 and of Sir Claude Hill in 1918 were both political in character, and were made in exercise of the Paramount Power. Indeed Sir Claude Hill stated at the Conference that "as between Bahawalpur State and British Government, the question was really a political one in which the Paramount Power was not only the natural judge of the case but was also the sole owner of the gift solicited; that any concession given was a matter of grace and involved the British Government giving up rights to which it was entitled from whatever aspect the case might be viewed." It follows, therefore, that the decisions of the Secretary of State for India in 1865 and of Sir Claude Hill in 1918 cannot be equated with any legislative practice or any legal principle. In the *Privy Purses case*[51] the Supreme Court observed that paramountcy had no legal origin and had no fixed concept and its dimensions depended upon what in given circumstances the British Government thought expedient. In the course of his judgement, Hidayatullah, C. J. characterised the concept of paramountcy as the very anti-thesis of law.

Mr. Ashoke Sen also strongly relied upon the report of the Anderson Committee set up in 1935. The Committee was constituted of eight experts, six of whom were nominated by the interested units (namely, Bombay including Sind, the Punjab, North-West Frontier Province, Bahawalpur, Bikaner and Khairpur) and the remaining two including the Chairman were nominated by the Government of India. The Committee's terms of reference were—

> "I. The extent to which additional supplies of water are actually required for (a) the Khairpur State; (b) the Bahawalpur State; (c) the Haveli Project.
>
> II. The possibility of finding such supplies without detriment to the parties interested in the waters of the Indus and its tributaries, and the effect upon the existing or prospective rights of those parties of any fresh withdrawals, the authorization of which the Committee may recommend."

In para 38 of its Report, the Anderson Committee states that :

> "an endeavour has been made to act according to the general direction of the Secretary of State, namely, that in allocating water, the

51. (1971) 1 Supreme Court Cases 85.

greatest good to the greatest number must be sought without reference to political boundaries."

It is not possible to accept the argument of Rajasthan that the Committee was thereby enunciating any legal principle. For the Committee was not a statutory Committee. The object of the Committee was to arrive at a compromise and the recommendations of the Committee actually proceeded upon an agreement between all the party States. The report gave more water at Ferozepur to Bikaner by redistribution of the supplies in the Gharra reach of the Sutlej; just as it gave more water to Bahawalpur at Panjnad by waiving the restriction imposed by clause 4D of the Tripartite Agreement of 1920 between Punjab, Bahawalpur and Bikaner.

Under the 1920 Tripartite Agreement relating to the Sutlej Valley Project the water available at the four weirs on the Sutlej—at Ferozepur, Sulemanke, Islam and Panjnad—was distributed to various perennial and non-perennial camals, to tracts in the Punjab Province and in Bikaner and Bahawalpur States. The supplies in the Gharra reach of the Sutlej upto Islam weir were shared by Punjab, Bahawalpur and Bikaner, Bikaner only from the top-most weir at Ferozepur. The Panjnad weir, below the confluence of the Sutlej and the Chenab allowed the Bahawalpur State to participate in supplies in the Chenab as well as in the surplus waters of the Gharra reach of the Sutlej. The Bahawalpur Canals taking off at the Panjnad weir were, however, restricted in their withdrawals from the Chenab by Clause 4.D.2 of the 1920 Tripartite Agreement which stated as follows:—

"For the perennial and non-perennial Canals in Bahawalpur from the Panjnad, the mean draw-off in each crop shall be maintained at the same fraction of their authorised maximum capacity in cusecs as that of the British Canals from the Gharra."

The *Anderson Committee* found: (i) In the case of the Gharra reach of the Sutlej that it was only necessary to arrive at a fair redistribution of supplies available. In the early Kharif, the perennial canals in the Gharra reach which included Bikaner were given preference to the extent of 26 per cent of the *revised canal capacities*, which were increased in favour of Bikaner by a reduction of Bahawalpur, having regard to the reduced area in the Bahawalpur State to be irrigated from the Gharra reach.

(ii) On the other hand, the restriction imposed on Bahawalpur under Clause 4.D.2 was recommended to be withdrawn and the Panjnad canal to be allowed to draw off any water arriving at Panjnad Weir upto its authorised mean monthly and maximum withdrawals.

(iii) The Haveli Project and the Panjnad canals were recommended to have priority upto their authorised withdrawals during any periods of shortages in the Indus, and the Haveli Canals to be allowed to draw of any water upto authorised withdrawals above their offtake at Trimmu.

(iv) Sind had claimed that the discharges allowed to the Sukkur Barrage Canals were not the maximum withdrawals but withdrawals in excess of these figures could be drawn provided no prescriptive rights to such excesses were claimed at a later date. While increasing the authorised withdrawals for the British-Sind Canals for the month of October, the Anderson Committee regarded the authorised withdrawals as the maximum withdrawals which could be utilised at any time in the month concerned.

(v) For Khairpur State, the Anderson Committee accepted that the irrigation should be on a perennial basis and approved of the mean monthly withdrawals for the Khairpur Canals.

(vi) Mean and Maximum withdrawals were authorised for the new Thal and Pāharpur Projects which were recommended to share with the Sukkur Barrage Canals the supplies during shortages on the basis of the authorised maximum wihdrawals.

Mr. Ashoke Sen referred to Paragraph 42 of the Anderson Committee Report and said that the principle laid down by that Committee was that the distribution of water must be on the basis of culturable irrigable area. The argument was that Rajasthan was located in the irrigable command of Narmada river and was, therefore, entitled to a share of its waters. The argument is however based on the assumption that the canal from Narmada river would be located at Navagam and it would take off from Navagam Dam at FSL 300. The expression "command area" is not used with reference to the waters of any river, but is always referable to the area commanded as served by canal. It is not therefore conceivable to speak of the culturable command area as such for Narmada River, but there can be a culturable command area of the canal taking off at any particular point from the river. The total culturable command area in such a case would depend upon the nature of the project proposed and the height of the proposed canal. According to Rajasthan's complaint dated

20th September 1969, paragraphs 18 and 19, the command area of Navagam Canal would include an area of 1.80 lakh acres in Rajasthan, if the Navagam Canal is built as FSL 300 and not otherwise. What the Anderson Committee was referring to in paragraph 42 of the report was the culturable irrigable command from the named canals which were already in existence. It is evident that what the Anderson Committee set out in paragraph 42 of the Report was not the principle of apportionment of waters, but the basis for distribution of waters for irrigation *projects* to be prepared in future. We are unable to hold that a non-statutory committee like the Anderson Committee proceeded to lay down any legal principle for the apportionment of waters. Nor are we able to discern from the Report of the Committee any such principle of universal application. We are, therefore, unable to accept the argument of Mr. Ashoke Sen that any principle was laid down in paragraph 42 of the Anderson Committee Report which has relevance to the question presented for determination in the present case.

We should also add that there is no factual foundation for this argument in the pleadings of Rajasthan. Despite the care with which we were taken through the pleadings we have searched in vain for a definite and specific averment that any part of Rajasthan was in the culturable command or irrigable area of the Narmada river or that Rajasthan was entitled to a share in the Narmada waters on that basis. In Rajasthan's Statement of Case, Volume, I, pages 29 and 30, we only get a general statement that the flow of the Narmada river should be extended to the maximum extent and to the remotest regions, but none to delineate these regions or to specify that they are within the culturable command or irrigable area of the Narmada river.

We next proceed to consider the argument of Mr. Ashoke Sen that there was a rule of customary law under which Rajasthan, though not a riparian State, had a right to claim apportionment of Narmada Waters. The following precedents were cited in support of this argument:—

"(1) 1825 The Western Jamuna Canal was constructed by the Moghul Emperors and water was provided to the State of Bikaner for irrigation.

"(2) 1852 Col. Dias enunciated that the best line for a canal is that from which the largest extent of the country can be irrigated at the smallest cost irrespective of the name or nature of the existing Government of the country in question.

"1865 The Government of India returned the project for the Sirhind Canal unsanctioned and directed that the only project they would entertain would be the best that could be devised irrespective of territorial boundaries of British and Indian States.

"(4) 1870 In dispatch No. 76 of 30th September, 1870 the Secretary of State while sanctioning the Sirhind Canal Project stated that the just and liberal view taken with respect to the benefit to be derived from the Canal Works by Native States was undoubtedly correct in principle. The Scheme would be the best that could be devised irrespective of territorial boundaries as was strongly urged by the late Col. Dias.

"(5) 1866 British Government allowed water from the Sirhind Canal taking off from the Sutlej river to the Phulkian States and Faridkote, through all or any of which the said river did not flow.

"(6) and "(7).....

"(8) 1895 A portion of water of the Jamuna Canal (Sirsa Branch) was allotted to Patiala through whose territory the river Jamuna did not flow.

"(9) 1918 The State of Bikaner through which river Sutlej did not flow was allocated water in pursuance of the Conference under the Chairmanship of Sir Claude Hill from the said river in spite of opposition by the State of Bahawalpur, a State through which the river flows.

"(10) 1935 The Anderson Committee recommended further allotment of water to Bikaner on the principle already enunciated that in allocating waters the greatest good to the greatest number must be sought without reference to political boundaries. The recommendations of the said Committee were approved by the Government of India on 30-3-1937.

"(11) 1948 The State of Bikaner claimed water from the Bhakra Project under contemplation, for irrigating the areas in Bikaner. The State of Bikaner was allocated water to irrigate an area of 8,90,000 acres.

"(12).....

"(12A) 1951 When the question of the utilization of waters of Ravi and Beas was under examination the Punjab Government again claimed a preference *vide* their representation dated 16-11-1964, for the waters of these rivers

on the ground of their being a riparian State. The superiority of right of Punjab was not upheld by the Government of India and in the meeting under the auspices of the Government of India the water was apportioned between Jammu & Kashmir, Rajasthan, PEPSU and Punjab on 29-1-1955 according to the respective needs. Rajasthan was allotted 8 MAFT out of a total available quantity of 15.85 MAFT."

Item 1: It appears that the Western Jamuna Canal was constructed by Ferozeshah Tughlak and was meant to carry water from Yamuna river to his hunting grounds in Hissar District. Only a small area of Bikaner of 460 acres was irrigated by this canal. The original purpose of the Canal was not for irrigation.

Items 2, 3, 4 *and* 5 (*The Sirhind Canal Project*): The project was carried out in 1873 after an agreement was arrived at regarding the use of the waters of the canal between the British Government and the Governments of Patiala, Nabha and Jind States. The cost of the works was to be shared by the Princely States to the extent of 36 per cent. The project was carried out at a time when British India was a Unitary State and the Crown had responsibility as the Paramount Power over the Native States.

Item 8—*Jamuna Canal*: It is said that irrigation on the Western Jamuna Canal in Patiala State was under an agreement of 1892. A copy of the agreement has not been produced by Rajasthan and it is not known what was the basis of the agreement, namely, whether on the sharing of costs or on the basis of any alleged right of Patiala.

Item 9: We have already observed that the question was treated by Sir Claude Hill as a political one for the decision of the Paramount Power.

Item 10: This item refers to the Anderson Committee Report which has already been commented upon.

Item 12A—*Utilisation of Ravi & Beas*: The apportionment of the waters was the result of an agreement. It appears from Rajasthan Documents Volume VI at pages 26 and 32 that Punjab was prepared to satisfy the needs of Rajasthan provided its own needs as a riparian State were first satisfied.

Our conclusion is that the precedents furnished by Rajasthan do not establish as a matter of law that Rajasthan had a customary right to apportionment of the Narmada waters. In order to prove custom, there must be established usage regarded as obligatory in character. There must be a clear and continuous habit of doing certain actions under the conviction that these actions are both obligatory and legally right. In other words, only those practices give rise to customary law which are accompanied by the feeling or consciousness of a legal duty—*opinio juris vel necessitatis*. In the *Asylum case*[52] the International Court of Justice relying on Article 38 of its Statute formulated the requirements of custom in International Law as follows:—

"The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."

In the case before it, the International Court declined to acknowledge the existence of a custom as claimed by Columbia.

The International Court further enunciated the principle that a practice influenced by considerations of political expediency cannot be the basis of custom. At page 277, the International Court stated:

"Finally, the Columbian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked, that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by

52. (1950) I.C.J. Report 266 (276).

others and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence."

The International Court also ruled that one custom cannot be deduced from another custom; in other words, custom cannot be extended by analogy.

"The Court cannot therefore find that the Columbian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru....." (P. 277).

In *SARASWATHI AMMAL* v. *JAGADAMBAL AND ANOTHER*[53] the Supreme Court also laid down the same principle that custom cannot be extended by analogy and it must be established inductively and not deductively. It must always be a matter of fact and one custom cannot be deduced from another custom.

Tested in the light of these principles, we are unable to say that Rajasthan has fulfilled the burden of showing the requirement of *opinio necessitatis*. Nor is there evidence of a clear and continuous course of conduct with regard to the rights of Rajasthan as a non-riparian State in the rivers of Punjab or Uttar Pradesh. In any case, even on the assumption that Rajasthan has established a custom in respect of Sutlej, Bias and Jamuna, such a custom cannot be invoked with regard to Narmada waters as against the States of Maharashtra, Madhya Pradesh and Gujarat.

We proceed next to consider the argument of Mr. Ashoke Sen that the Tribunal is not bound to act according to strict legal rights, but it may decide according to its own notions of fairplay and justice. It was contended that Rajasthan was a border State of the Indian Union. It was necessary in the interest of national security that irrigation should be extended to the desert areas of Jalore and Barmer districts and there should be a settlement of peasants close to the international border. It was said that the areas of Jalore and Barmer districts suffer from a permanent scarcity conditions and are liable to frequent and severe famines. The area receives very little monsoon rain and no winter rain and no rabi crop was possible. The subsoil water was very deep and unfit for irrigation. But introduction of canal irrigation and raising of irrigated crops over 14 lakh acres will make a vast change. Agricultural production over the area will greatly increase and would become stable instead of depending on precarious monsoon conditions. Loss of life and misery to human life and cattle would become a thing of the past and mass migration of inhabitants to other parts of the country would become unnecessary. It was said that the gain to the country by way of additional foodgrains in Rajasthan would be over a million tons and there will be great saving of foreign exchange.

We appreciate the point of view put forward by Mr. Ashoke Sen, but the question in this case is whether it is possible for the Tribunal to decide the case otherwise than on principles of Law. Mr. Ashoke Sen pointed out that under section 131(5) of the Government of India Act, 1935, the Governor General was empowered "to give such decision and make such order, if any, in the matter of the complaint as he may deem proper". Under section 131(9) the functions of the Governor General were to be exercised by him in his discretion. Section 131(6) provided that effect shall be given in any Province or State affected to any order made under the section by the Governor General and any Act of a Provincial Legislature which is repugnant to the order shall, to the extent of the repugnancy, be void. Section 133 enacted that neither the Federal Court nor any other Court shall have jurisdiction to entertain any action or suit in respect of any matter if action in respect of that matter might have been taken under sections 130 to 132 by the Governor General. The contention of Mr. Ashoke Sen is that the decision of the Governor General was made paramount to State laws and a similar interpretation must be given to the Inter-State Water Disputes Act, 1956, enacted by Parliament under Article 262 of the Constitution. It was urged that the power of adjudication granted to the Tribunal was both judicial and legislative in character. The power of the Tribunal to adjudicate the dispute and give a decision thereon was legislative and the Tribunal has the power not merely to take into account existing legal rights but also to create new legal rights in favour of the States concerned. Mr. Ashoke Sen referred in this connection to the speech of Sir Thomas Inskip, Attorney General, before the Joint Select Committee (quoted at page 166 of the Commentary of the

53. (1953) 4 SCR 939.

Government of India Act 1935 by N. Rajagopala Aiyangar) reproduced below:—

"As far as the waters in the natural streams and reservoirs are concerned there is no (sic) statute or common law in India which regulates the rights of people to the use of the water .....In India there is no such statute or common law, and, therefore these natural resources of water supplies have been dealt with in a general way and on certain broad lines. That is to say, an area which has a very small rainfall, or no rainfall, at all, gets a prior right to the water as compared with those which have a plentiful rainfall. A non-cultivated area will not be preferred to a cultivated area which is in possession of an irrigation supply or a natural supply of water.

These are the general principles which regulate the use of water in these natural conditions, but they are not what lawyers call 'Justiciable rights' which can be taken to a Court of Law."

We are unable to accept the argument of Rajasthan. In the first place, it is not permissible to take into account the speech of Sir Thomas Inskip for ascertaining the character and scope of the Governor General's power under section 131 of the Government of India Act, 1935. In any case, the provisions of Art. 262 and the relevant sections of the 1956 Act clearly show that the power of the Tribunal is judicial in character. In construing Art. 262 and the relevant sections of the 1956 Act, it is necessary to consider the historical setting and the circumstances in which Article 262 of the Constitution and the 1956 Act came to be passed. Under section 131(5) of the Government of India Act, 1935, the Governor General had unfettered discretion to reject or accept the report of the Commission and to make such order if any as he may deem proper. But under Article 240(6) of the Draft Constitution, the Report of the Commission was made binding upon the President who was required to make orders in accordance with the report. Article 240(7) of the Draft Constitution empowered the President to refer any question to the Supreme Court under Article 119 of the Draft Constitution if he was of the opinion that anything in the Report of the Commission involved a substantial question of law. On receipt of the opinion of the Supreme Court, the Commission was bound to modify its report in accordance with the opinion of the Supreme Court and present the Report so modified to the President. It is evident, therefore, that Article 240 of the Draft Constitution made the decision of the Commission binding upon the President and took away the discretion formerly conferred upon the Governor General under the 1935 Act. Again, section 4 of the 1956 Act empowers the Central Government to constitute a Water Disputes Tribunal, by notification in the Official Gazette, for the *adjudication* of the water dispute. Section 5(2) states: "The Tribunal shall investigate the matters referred to it and forward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it." Section 6 enacts that the decision of the Tribunal shall be final and binding on the parties to the dispute and shall be given effect to by them.

There is a significant contrast between the language of section 131(5) of the Government of India Act, 1935 and sections 4 and 5 of the 1956 Act. The phrase "as it thinks fit" occurring in section 131(5) of the Government of India Act, 1935 is removed from Article 262 of the Constitution and also from section 5 of the 1956 Act. It is manifest that under Article 262 of the Constitution and the provisions of the 1956 Act, the Tribunal is not entitled to decide the inter-State water dispute "as it thinks fit". On the contrary, the Tribunal has to *adjudicate* the dispute and make a report to the Central Government setting out the facts as found by it and giving its *decision* on the matters referred to it. The use of the words "adjudication" and "decision" in the 1956 Act clearly shows that the decision of the Tribunal must be based upon legal principles. In Bouvier's Law Dictionary the words "Adjudge" and "Adjudication" are defined as follows :—

ADJUDGE. To decide or determine. It is sometimes used with "considered, ordered, determined, decreed as one of the operative words of a final judgement," but is also applicable to interlocutory orders. It is synonymous with "decided", "determined", etc., "and may be used by a judge trying a case, without a jury with reference to his findings of fact, but they would not be a judgement";

ADJUDICATION. A judgement, giving or pronouncing judgement in a case Determination in the exercise of judicial power. *Street* v. *Benner,* 20 *Fla.* 700: *Joseph C. Irwin & Co.* v. *U.S.* 23 Ct. Cl. 149."

In *JAGER* v. *TOLME & RUNGE AND THE LONDON PRODUCE CLEARING HOUSE*

LTD.,[54] the question at issue was whether the appeal made by a party to the contract under Rule 491B of the Rules of the Sugar Association of London can only be decided according to the legal rights of the party. Rule 491B was to the following effect :—

> "For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing and/or passing of documents then any party to the contract shall be entitled to appeal to the Council (of the Association) for a decision which shall be binding on all concerned."

It was held by the Court of Appeal upon an interpretation of this Rule, that the Council upon an appeal to them by a party to a contract could only decide according to the legal rights of the parties and were not entitled to decide what, in their opinion, was fair and reasonable to be done as between the parties in the circumstances of the case. This ruling was followed by the Judicial Committee in *RAMDUTT RAMKISSEN DAS* v. *E.D. SASSOON AND COMPANY*[55] and it was observed that it was the duty of the arbitrator in the absence of express provision in the submission to the contrary to decide the question submitted to him according to the legal rights of the parties.

It is also well-established that a Tribunal is not invested with the power to adjudicate *ex aequo et bono* unless such a power is given to it expressly between the parties, as, for example, is provided in the case of the International Court of Justice in Article 38(2) of its Statute. That would mean that the Tribunal would have the power in such a case of special agreement to decide according to the non-legal principles of justice, of morality, of usefulness, of political prudence and of commonsense.

In its award on the Indo-Pakistan Western Boundary Case, the International Tribunal rejected Pakistan's request for a decision *ex aequo et bono* by its order dated 23-2-1966, and stated:—

> "The question submitted to the Tribunal is whether or not the Agreement of 30 June 1965 confers upon it the power to decide the case *ex aequo et bono*.
>
> India moves that this agreement does not authorise the Tribunal to decide the present case *ex aequo et bono*, while Pakistan submits that the said Agreement gives the Tribunal such power.
>
> India requests the Tribunal to decide this issue during the present Session. Pakistan moves that the issue should not be decided until after the closure of the written proceedings.
>
> Having regard to the circumstances of the case, the Tribunal deems it appropriate to resolve the issue at this stage of the proceedings.
>
> As both Parties have pointed out, equity forms part of International Law; therefore, the Parties are free to present and develop their cases with reliance on principles of equity.
>
> An International Tribunal will have the wider power to adjudicate a case *ex aequo et bono*, and thus to go outside the bounds of law, only if such power has been conferred on it by mutual agreement between the Parties.
>
> The Tribunal cannot find that the Agreement of 30 June 1965 does authorise it clearly and beyond doubt to adjudicate *ex aequo et bono*.
>
> Therefore, and as the Parties have not by any subsequent agreement consented to confer the power upon the Tribunal to adjudicate *ex aequo et bono*, the Tribunal resolves that it has not such power."

With reference to international arbitration Lauterpacht states :—

> "Neither does the expression 'Rules of equity' mean that the arbitrator is free to deviate from the path of law proper. Although some arbitrators refuse to accept this term in its technical meaning as understood in the English-American jurisprudence, they never confuse it with a settlement *ex aequo et bono*. Rules of equity are rules of law both in municipal law and in international arbitration. Thus the unratified general arbitration treaty of August 3, 1911, between Great Britain and the United States describes in Article 1, as justiciable such disputes as are 'susceptible of decision by the application of the principles of law or equity'. In many cases decided by the British-American Claims Arbitral Tribunal under the Convention of 1910 the arbitrator disallowed claims unsupported by rules 'of international law and of equity' (such being the terms of submission),

54. (1916) 1 K.B.D. 929.
55. (1929) 31 B.L.R. 741.

although he recognised that a judgment governed by consideration *ex aequo et bono* could not have disregarded the claims in question; he appealed in such cases to the respective governments to effect a payment—as an act of grace.*

"The term 'Justice' is used in arbitration conventions in the meaning of legal justice, and it is in this manner that it is interpreted by arbitral tribunals. In the Delagoa Railway arbitration, for instance, the arbitrator had to decide according to what he would deem 'most just,' *'Cette clause,'* 'says the judgement, *'n'exclut pas, elle implique au contraire, pour lui T'obligation de determiner au prealable quelle est la legislation qui devra le guider dans la recherche de la solution "Justo."*, ** The arbitrator called upon to decide in accordance with justice has here recource to rules of law, more especially to such rules of private law as seem to him most comprehensive and of universal application." [Private Law Sources and Analogies of International Law—Page 66 (1970) edition].

The litigation between Rhode Island and Massachusets is also significant. It was held by the Supreme Court of the United States in that case that the submission of Sovereigns, or States to a Court of a controversy between them, without prescribing any rule of decisions, gave power to the Court to decide according to the appropriate law of the Case.[56] At page 736 of the report Justice Baldwin stated:

"The submission by the sovereigns or States, to a Court of Law or enquiry of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate Law of the case. (11 Ves. 294); which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power; it comes to the Court, to be decided by its judgement, legal discretion and solemn considerations of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence as the case requires."

In the Canadian case, *DOMINION OF CANADA v. PROVINCE OF ONTARIO*[57] the Judicial Committee affirming the judgement of the Supreme Court of Canada held that, having regard to the jurisdiction conferred upon the Exchequer Court, the action of the Dominion Government must be dismissed as unsustainable on any principle of law. At page 645 of the report, Lord Loreburn L. C. observed:—

"Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognised legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable."

The next argument of Mr. Ashoke Sen was that sections 4, 5 and 6 of the 1956 Act were similar in language to sections 7(A), 10, 15 and 17 of the Industrial Disputes Act (Act No. XIV of 1947) and that the principle of the Supreme Court decisions under the latter Act was applicable to the interpretation of the former Act.

It was said that the Industrial Court had jurisdiction to impose new obligations upon the parties or modify old obligations in the interest of industrial peace. In *WESTERN INDIA AUTOMOBILE ASSOCIATION* v. *INDUSTRIAL TRIBUNAL, BOMBAY & OTHERS*[58] it was observed by the Federal Court that "adjudication did not mean adjudication according to the strict law of master

* The award in Claim No. 36 under the British-American Claims Arbitral Tribunal of 1910 (Eastern Extension Australasia and ChinaTelegraph Company).
** Sentence finale du Tribunal Arbitral du Delagoa, 1900. p. 154.
56. *Rhode Island* v *Massachusets*, 12 Pet 657, 721 (1938).
57. (1910) Appeal Cases 637.
58. (1949) F.C.R. 321.

and servant; the award of the tribunal may contain provisions for settlement of a dispute which no court could order if it was bound by ordinary law; but the tribunal is not fettered in any way by these limitations."

In *Rohtas Industries* v. *Brijnandan Pandey*[59] the Supreme Court pointed out the distinction between industrial and commercial arbitration :—

> "A Court of Law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An Industrial tribunal is not so fettered and may create new obligations or modify contracts in the interest of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation."

In the course of its judgement, the Supreme Court approved the following passage from Ludwig Teller—Labour Disputes and Collective Bargaining Vol. I, page 536:—

> "Industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements."

We are, however, unable to agree with the submission of Rajasthan that merely because there is similarity of language between the 1956 Act and Industrial Disputes Act, a similar principle underlies section 4 of the 1956 Act. There is no analogy to be drawn between a dispute between the States regarding inter-State rivers and a dispute between an employer and the employee. The history of the legislation makes it manifest that the Industrial Disputes Act was introduced as an important step in achieving social and economic justice. The Act seeks to ameliorate the service conditions of workers and to provide a machinery for resolving their conflicts and to encourage their co-operative effort in the service of the community. The purpose of the Industrial Disputes Act is to make provision for "investigation and *settlement* of industrial disputes." The purpose of the 1956 Act on the other hand is to provide for *adjudication* of disputes relating to waters of inter-State rivers and river valley. The objects of the two Acts are manifestly different and the provisions of the 1956 Act must be construed *subjectae meteries*. It is, therefore, not possible to import the principle of the Supreme Court decisions on the interpretation of the Industrial Disputes Act in deciding the question presented for decision in the present case.

For the Union of India, the Attorney General argued that section 3 of the 1956 Act must be construed in the context of the River Boards Act (Act 49 of 1956). He referred in particular to section 3(b) of River Boards Act which defines the expression "Governments interested" to mean "Governments of those States, which in the opinion of the Central Government are likely to be interested in or affected by the functions of the Board under the River Boards Act." But it is not permissible to apply or to import the definition of the expression "Governments interested" in s. 3(b) of the River Boards Act into the interpretation of section 3 and 2(c) of Act 33 of 1956. There is no definition of the phrase "State Government" in Act 33 of 1956, and we see no warrant for giving the same meaning to it as to the expression "Government interested" in section 2(b) of Act 49 of 1956. In our opinion, the Attorney General is unable to make good his argument on this aspect of the case.

Our conclusion, therefore, is that the State of Rajasthan is not entitled to any portion of the waters of Narmada basin on the ground that the State of Rajasthan is not co-riparian State or that no portion of its territory is situated in the basin of River Narmada. We also hold that the Reference of the Central Government No. 10/1/69-WD dated 16-10-1969 in referring the complaint of Rajasthan to this Tribunal for adjudication under section 5 of the 1956 Act is *ultra vires* of the 1956 Act. Issues 2(b) and 3 are answered accordingly.

Issue 2 (*a*)

We proceed next to consider the question whether the complaint of Rajasthan is a matter connected with or relevant to the water dispute with Madhya Pradesh, Maharashtra and Gujarat within the meaning of section 5(1) of the 1956 Act. In its letter of complaint dated 20th September, 1969, Rajasthan states that the apportionment of the Narmada waters should be according to the recommendations of the Khosla Committee and for the optimum use of Narmada waters, a dam should be constructed at Navagam site with the canal at full supply level not below 300 FSL. Rajasthan has claimed that 2.2 MAF should be made directly available from Narmada waters for the irrigation of the Barmer and Jalore Districts in addition to the

59. (1956) S.C.R. 810.

water from Mahi to be available to Rajasthan on transfer of Gujarat area from Mahi to Narmada command. The Khosla Committee has recommended that 6.57 lakh acres of land served by Mahi canals in Gujarat should be transferred to Navagam Canal and the corresponding Mahi waters should be released for irrigating higher areas in Rajasthan which cannot be commanded by Navagam Canal. The area in Rajasthan proposed to be irrigated from Mahi waters is 7.24 lakh acres and the area proposed to be irrigated direct from Navagam Canal is 7.44 lakh acres. The contention of Rajasthan is that Maharashtra and Madhya Pradesh have refused to accept the recommendation of the Khosla Committee, Mr. Ashoke Sen stated that the dispute raised by Rajasthan is integrally connected with and relevant to the dispute of Gujarat already referred to the Tribunal by the Central Government. We are unable to accept the contention of Rajasthan that the matters raised by it fall within the meaning of section 5 of the 1956 Act. So far as the direct claim of Rajasthan for apportionment of Narmada waters to the extent of 2.2 MAF is concerned we have already held that Rajasthan is not entitled as a matter of law to apportionment of Narmada waters not being a riparian State and not having any area located in the Narmada basin. If the complaint of Rajasthan does not fall under section 3 of the 1956 Act and cannot be referred by the Central Government to the Water Disputes Tribunal under section 4 of the same Act, it is not possible to say that the complaint of Rajasthan may be referred to the Tribunal under section 5 "as a matter appearing to be connected with or relevant to the water dispute". The reason is that the Central Government cannot do indirectly what it cannot do directly. Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance and a transaction will not be upheld which is "a mere device for carrying into effect that which the legislature has said shall not be done"—*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* As an example of the maxim, that what "cannot be done *per directum* shall not be done *per obliquum*", it may be mentioned that a tenant who has covenanted not to transfer his lease, commits a fraud upon his landlord, and breaks his covenants, if an alienation be effected by his collusion under colour of a seizure of the term in execution[60]. It is of the essence of the constitution of a Tribunal under section 4 that on receipt of a request or a complaint under section 3, the Central Government should form an opinion that the dispute cannot be settled by negotiation; and to allow what in effect and substance, if not in fact, is an independent complaint, to be smuggled in under section 5 as "a matter connected with, and relevant to" the dispute, would be to by-pass the essential requirements of section 4. This is particularly so when we find that the complaint of Rajasthan *expressis verbis* purported to be a complaint under section 3, and solicited the constitution of a Tribunal under section 4.

The principle was applied by the Australian High Court in the *Bank Nationalisation case*[61] in which a question arose relating to the validity of the Banking Act, 1947, one of whose objects was "the taking over by the Commonwealth Bank of the Banking business of private banks and the acquisition on just terms of property used in that business." Dixon, J. discussed the acquisition of the interest of the Shareholders in such banks and observed:

> "I have reached the conclusion that this is but a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by section 52 (xxxi) of the Constitution";

and further explained:

> "When a constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply to the principle embodied in the maxim *quando aliquid prohibetur et omne per quod devenitur ad illud.*"

As regards the claim of Rajasthan based upon its agreement of March, 1966 with Gujarat for release of the Mahi waters for irrigating an area of 7.25 lakh acres, the argument of Rajasthan stands on no better footing. It was contended that the agreement was "a matter connected with or relevant to" the water dispute between Gujarat and Madhya Pradesh and Maharashtra under section 5 of the 1956 Act. But the matter referred to in section 5 must be a matter of dispute between the concerned States and it is only such a matter which may be referred for adjudication by the Central Government to the Tribunal already constituted. The language of section 5 that the matter 'is referred for adjudication' itself suggests that the matter must be a subject of dispute between the States concerned. In the present case, the agree-

60. *Doe* d. *Mitchinson* v. *Carter*, 8 T.R. 300.
61. 76 C.L.R. 1.

ment between Gujarat and Rajasthan with regard to the release of Mahi waters is not disputed either by Gujarat or Madhya Pradesh or Maharashtra. Indeed there is no issue between Rajasthan and any of the other States on the fact of the agreement. There is nothing therefore for the Tribunal to adjudicate with regard to this matter and it follows; that the Government of India is not competent in law to make a reference of the complaint of Rajasthan under section 5 of the Act to the Tribunal.

On behalf of the Union of India, the Attorney General and on behalf of Rajasthan Mr. Ashoke Sen referred to the language of section 5(1) of the 1956 Act and said that it was competent for the Central Government to refer the water dispute and "any matter *appearing to be* connected with, or relevant to, the water dispute" to the Tribunal for adjudication. The argument was that the power conferred on the Central Government under section 5(1) was a discretionary power, that the formation of opinion by the Central Government that "the matter was connected with or relevant to the water dispute" was a purely subjective process and such an opinion cannot be challenged in Court of Law on the ground of propriety, reasonableness or sufficiency. It is true that the formation of opinion by the Central Government is a purely subjective process and such an opinion cannot be challenged on the ground of propriety, reasonableness or sufficiency. But even in a case where jurisdiction is conferred upon an authority in "subjective" terms, the action of the authority is liable to be interfered with for lack of jurisdiction if the authority misconstrues the Statute or misdirects itself in law. The decision of the House of Lords in *PADFIELD AND ORS.* v. *MINISTER OF AGRICULTURE, FISHERIES AND FOOD AND ORS.*[62] is an illustrative case. The appellants in that case, members of the south east regional committee of the Milk Marketing Board, made a complaint to the Minister of Agriculture, Fisheries and Food, pursuant to section 19(3) of the Agricultural Marketing Act, 1958 asking that the complaint be referred to the committee of investigation established under that enactment. The complaint was that the Board's terms and prices for the sale of milk to the Board did not take fully into account variations between producers and the cost of bringing milk to a liquid market. There had been many previous requests to the Board, but these had failed to get the Board in which the south east producers were in a minority to do anything in the matter. The Minister declined to refer the matter to the committee. By letters of May 1, 1964 and March 23, 1965, he gave reasons which included that (in effect) his main duty had been to decide the suitability of the complaint for such investigation but that it was one which raised wide issues and which he did not consider suitable for such investigation, as it could be settled through arrangements available to producers and the Board within the milk marketing scheme. The Minister said he had unfettered discretion and that if the complaint was upheld by the Committee, he might be expected to make a statutory order to give effect to the committee's recommendations. Section 19(3)(b) of the Agricultural Marketing Act, 1958 reads:

> "A committee of investigation shall be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister, on any report made by the consumers' committee and any complaint made to the Minister as to the operation of any scheme which, *in the opinion of the Minister*, cannot be considered by a consumers' committee under the last foregoing sub-section."

The appeal was allowed by the House of Lords. Lord Hodson and Lord Upjohn held that although the Minister had full and unfettered discretion under section 19(3) of the Agricultural Marketing Act, 1958, he was bound to exercise his discretion lawfully, that is, not to misdirect himself in law, nor to take into account irrelevant matters, nor to omit relevant matters from consideration.

In the course of his speech, Lord Hodson made the following observations:

> "If the Minister has a complete discretion under the Act of 1958, as in my opinion, he has, the only question remaining is whether he has exercised it lawfully. It is on this issue that much difference of judicial opinion has emerged, although there is no divergence of opinion on the relevant law. As Lord Denning M. R. said citing Lord Greene M.R. in *ASSOCIATED PROVINCIAL PICTURE HOUSES LTD.* v. *WEDNESBURY CORPORATION* (1947 2 All. E.R. 682).
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> "'a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his

62. (1968) 1 All. E.R. 694.

consideration matters which are irrelevant to the matter that he has to consider.' "

Lord Upjohn observed in the course of his speech:—

"My Lords, on the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to his case. The Minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker CJ. in the divisional court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration. There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law, but by failing to observe the other headings which I have mentioned."

In the present case, we are of the opinion that the Central Government has misconstrued the Statute and has misdirected itself in law in referring the complaint of Rajasthan for adjudication under section 5(1) of the 1956 Act. The reference of the Central Government dated 16-10-1969 must therefore be held to be *ultra vires and issue* No. 2(a) should be answered in the affirmative.

Issue 1(*a*) *and Issues* 19(*i*) *and* 19(*ii*)

On behalf of Madhya Pradesh, it was argued by Mr. Palkhivala that the proposed execution of the Navagam Dam Project with FRL 530 or thereabout would involve submergence of portions of the territory of Madhya Pradesh and that submergence of land of Madhya Pradesh without its consent was unconstitutional as entry 18 of List II conferred on the State exclusive power to deal with rights in or over land. It was contended by Mr. Palkhivala that Madhya Pradesh owned its land within its territorial limit and that its title was absolute and such ownership was not subject to any constitutional limitation. At page 67 of the Statement of Case, Madhya Pradesh has stated that "the State of Gujarat cannot claim to inundate the land in the State of Madhya Pradesh and invade its constitutional right of title to land". We are unable to accept this argument as correct. In the first place, there is a distinction between legislative jurisdiction and proprietary rights. The fact that jurisdiction in respect of a particular subject matter is conferred upon the State legislature affords no evidence that any proprietary right with respect to it is transferred to the State. [*See* the decision of the Privy Council in *ATTORNEY GENERAL FOR THE DOMINION OF CANADA* v. *ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC AND NOVA SCOTIA*[63] and the Madras High Court in *A.M.S.S.V.M. & Co.* v. *State of Madras.*][64] In the second place, it is not a correct proposition that the power of the State legislature under entry 18 of List II is absolute. Article 245 which deals with extent of laws made by Parliament and by the Legislatures of States begins with the words "subject to the provisions of this Constitution". In other words, the power of Parliament and Legislatures of States to make laws is subject to the provisions of the Constitution and that must bring in the application of Article 262 of the Constitution. The absence of words "subject to the provision of the Constitution" in Article 246 makes no difference, in view of what is contained in Article 245 of the Constitution. The legislative jurisdiction conferred by entry 18 of List II is, therefore, subject to other Articles of the Constitution including Article 262. In our view, Article 262 must be construed in its historical setting and the context and circumstances in which Article 262 came to be enacted. Under the Government of India Act, 1935, all the Provincial legislative entries inclusive of item 21 of List II, corresponding to item 17 of List II of the Constitution were subject to the over-riding powers of the Governor General under sections 130 to 134 of that Act. Under section 131(5), the Governor General was empowered to give such decision and "make such order as he may deem proper" with regard to the complaint made by a Provincial Government as regards interference with inter-Provincial water supplies. The function of the Governor General under section 131(5) was exercised by him in his discretion. Under section 131(6), effect was to be given to

63. (1898) A.C. 700.
64. A.I.R. 1954 Mad 291.

every order made under this section by the Governor General, and any Act of a Provincial legislature or of a State which was repugnant to the order shall, to the extent of the repugnancy be void. In other words, the order of the Governor General was both legislative and executive in character, and over-rode the power of the State Legislatures under all entries of List II including entries 79 and 21 of that List. Under section 133, neither the Federal Court nor any other court had any jurisdiction to entertain any action or suit in respect of any decision of the Governor General given under section 131(5). The order of the Governor General was, therefore, made paramount to the legislative powers of the disputing States. In this historical setting and context, Article 262 of the Constitution must also be construed as having over-riding effect on the legislative authority of the States in respect of the field assigned to Parliament under Article 262. Under section 6 of the 1956 Act, Parliament has enacted that the decision of the Tribunal *"shall be final and binding on the parties to the dispute* and *shall be given effect to by them"*. The effect of this section read with Article 262 of the Constitution is that the decision of the Tribunal on the water dispute and other connected matters referred to it under section 5 over-rides the legislative and executive Acts of the States so far as the inter-State water dispute is concerned.

The argument was presented in a different manner by Mr. Nariman on behalf of Maharashtra. It was said that an inter-State water dispute involving submergence of land must be taken out of the purview of Article 262 of the Constitution and of the definition under section 2(c)(i) of the 1956 Act. The contention was that the legislative jurisdiction of the State under entry 18 of List II was absolute and was not subject to any other Article of the Constitution. Alternatively, it was argued that even if entry 18 of List II was to be construcred in the extent of Article 262 of the Constitution, full effect must be given to the legislative power under entry 18 of List II and it must be held that Parliament cannot legislate under Article 262 of the Constitution with regard to any inter-State water dispute involving submergence of land in another State. Reference was made to the principle of harmonious construction expressed in *CHHOTABHAI JETHABHAI PATEL & CO.* v. *THE UNION OF INDIA*[65] and in *HARAKCHAND RATANCHAND BANTHIA* v. *UNION OF INDIA*.[66] On behalf of Gujarat and Rajasthan it was argued by Mr. Thakore and Mr. Ashoke Sen that Article 262 was paramount to entry 18 of List II and reliance was placed on the decisions of the Supreme Court in *ATIABARI TEA CO. LTD.* v. *THE STATE OF ASSAM*[67] *and Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan.*[68] But we shall assume in favour of Maharashtra that the principle of harmonious construction as expressed in *Chhota Bhai's case*[69] and *Banthia's case*[70] is applicable. Even so, we are unable to accept the contention of Maharashtra that inter-State water disputes involving submergence of land is taken out of the purview of Article 262 of the Constitution. Take for instance the case of an inter-State river flowing between State A and State B. State A is on the upper riparian reaches of the river and State B is on the lower reaches. Suppose a Tribunal constituted under the 1956 Act applies the principles of equitable apportionment and finds that State B is entitled to 10 MAF of the waters of the inter-State river. State B adduces unimpeachable expert evidence that it can make beneficial use of its share only by construction of a dam in its own territory on the border of State A which has the effect of submerging a considerable part of State A. It cannot be supposed that the Constitution makers intended that such a dispute should not be the subject matter of adjudication under Article 262. The argument of Madhya Pradesh and Maharashtra that such a dispute must be taken out of Article 262 would deprive that Article of its full meaning and content and make it a dead letter and nugatory. We are, therefore, of the opinion that legislative power of the States under entry 18 of List II must give way to Article 262 to the extent that any submergence of territory is integrally and inextricably connected with the equitable apportionment of waters of an inter-State river between the claimant States.

Mr. Nariman further contended that even if Article 262 gave power to Parliament to provide for adjudication of disputes regarding submergence of land, the provisions of the 1956 Act do not indicate that adjudication of such disputes was contemplated by Parliament. In our opinion there

65. 1962 SUPP. 2 S.C.R. 1.
66. (1970) 1 S.C.R. 479.
67. (1961) 1 S.C.R. 809.
68. (1963) 1 S.C.R. 491.
69. (1962) SUPP. 2 S.C.R. 1.
70. (1970) 1 S.C.R. 479.

is no warrant for this submission. Section 2(c)(i) of the Act defines a "water dispute" as "any dispute between two or more State Governments with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley". According to section 3 of the 1956 Act, it is open to the Government of any State to complain to the Central Government that a water dispute has arisen with the Government of another State by reason of the fact that the interests of the State, or of its inhabitants in the waters of the inter-State river have been prejudicially affected by any executive action or legislation taken or passed or proposed to be taken or passed, by the other State. The section is enacted in general terms and all types of legislative and executive action by one State Government involving injury to interest of another State or of its inhabitants are contemplated. The language of the section 2(c) is equally wide. The section contemplates all classes of disputes regarding inter-State river waters including disputes regarding submergence of land. We see no reason either in the language or the context of the Act, to cut down the width of the language of the definition of section 2(c) read with section 3 of the 1956 Act.

It was then argued that in the present case the claim of Gujarat for construction of the high level Navagam Dam Project was not an inter-State water dispute but was in reality a dispute relating to submergence of land in the territories of Madhya Pradesh and Maharashtra. In our opinion, there is no justification for this argument. The claim of Gujarat is for its rightful share of the Narmada waters. The Kholsa Committee had recommended the Navagam site as the best location for a terminal dam and reservoir. The committee further recommended FRL plus 500 as the optimum height for the reservoir and FRL plus 300 for the Navagam Canal. According to the Khosla Committee, Gujarat was entitled to 10.65 MAF as its share of Narmada waters for irrigation. In its complaint, Gujarat claims that its equitable share would be 22.29 MAF and the height of the 'Navagam Dam should be 530 FRL. Gujarat also claims that the only way it could make beneficial use of its share of waters is by construction of a dam at this particular site. The claim of Gujarat is disputed by Madhya Pradesh and Maharashtra. The claim of Gujarat has still to be tried on merits; but it is manifest that the dispute between Gujarat and Maharashtra and Madhya Pradesh is in substance a dispute with regard to apportionment of Narmada waters and not a dispute with regard to submergence of land. The question of submergence of land in Maharashtra and Madhya Pradesh is merely incidental or consequential to the question of apportionment of waters. The problem is one of classification or characterisation. The real question is whether in substance the dispute is one regarding apportionment of waters incidentally affecting the land or whether it is a dispute regarding land only incidentally affecting the apportionment of the waters. In other words, what is the subject matter of the dispute in its true nature and character or in "its pith and substance"? [*See* the test applied by the Judicial Committee in *PRAFULLA KUMAR MUKHERJEE* v. *BANK OF COMMERCE*[71].] In our opinion, the dominant question involved is the question of apportionment of waters between Gujarat on the one hand and Maharashtra and Madhya Pradesh on the other and not the question of submergence of land, which is merely consequential. It was also contended for Maharashtra that the dispute with regard to the submergence of land was a dispute falling under Article 131 of the Constitution and therefore could be tried by the Supreme Court alone in its original jurisdiction. There is no merit in this argument because as we have already pointed out, the dispute in this case is in pith and substance a dispute in regard to apportionment of waters falling within Article 262 of the Constitution and within the meaning of section 2(c) of the 1956 Act. Also the question of submergence of land is so inextricably connected with the question of apportionment of waters that it cannot be separately tried under Article 131 of the Constitution.

As a matter of law the question of submergence of land, of compensation, rehabilitation etc. is really one aspect of the Doctrine of Equitable Apportionment. As pointed out by Eduardo Jimenez de Arechaga:

> "the occurrence of substantial or considerable injury is an essential condition for setting restrictions to territorial sovereignty... Examples of substantial injuries are diversion of waters causing an appreciable decrease of the river level affecting navigation, considerable and harmful pollution of the water course, diversion seriously affecting existing or projected irrigation works, or considerably diminishing the productive capacity of hydro-electric dams, and constructive irrigation works causing floods into the territory of the upstream country".....

71. (1947) F.C.R. 28.

"*The principle of equitable apportionment of benefits*: For the foregoing reasons the policy has gained favour that, before undertaking works utilising waters, it is necessary that a system of adequate compensation be established and agreed upon in advance and that such compensation whether provided for in a treaty or in a judicial or arbitral award, should be guided by certain principles summed up in the idea of 'equitable apportionment'. The basis of equitable apportionment is that co-riparian States have the right to obtain in advance adequate compensation in kind for substantial injuries which may be caused by proposed changes in some part of the basin." [Eduardo Jimenez de Arechaga—International Legal Rules governing the use of waters from International Water Courses—Inter-American Review (1960) page 329, at pages 332 and 334].

The next question to be considered is whether it it obligatory for Gujarat to obtain the prior consent of Madhya Pradesh or Maharashtra before proceeding to execute the Navagam Dam Project. On behalf of Maharashtra and Madhya Pradesh, it was claimed that such prior consent must be obtained and that in the absence of such prior consent, Gujarat cannot proceed with the execution of the project. In support of this proposition, both Maharashtra and Madhya Pradesh relied upon Article 1 of Madrid Declaration of 1911 which states:

"When a stream forms the frontier of two States, neither of these States may without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilise or allow the utilisation of the water in such a way as seriously to interfere with its utlisation by the other State or by individuals, corporations, etc. thereof."

But Article 1 of the Madrid Declaration 1911 does not represent the correct state of law. It has been superseded by Articles IV, VI and VIII of the Salsbourg Resolution of 1961 of the Institute of International Law reproduced below:—

"*Article IV*: Each State may only proceed with works or to use the waters of a river or watershed that may affect the possibilities of use of the same waters by other States on condition of preserving for those States the benefit of the advantages to which they are entitled by virtue of Article III, as well as adequate compensation for any losses or damages incurred.

"*Article VI*: If objections are raised, the States shall enter in negotiations in view of reaching an agreement within a reasonable time. To this end, it is desirable that the States involved make use of technical expertises and need be of appropriate commissions and organisations to reach solutions ensuring maximum benefits for all concerned.

"*Article VIII*: If the States involved cannot reach an agreement within a reasonable time, it is recommended to submit to judicial or arbitral settlement the question whether the intended development runs counter to the above mentioned rules. If the State raising objections to the projected works or uses is opposed to any judicial or arbitral settlement, the other State remains free, under its own responsibility, to proceed with said works or uses, while obligated by the provisions of Articles II to IV."

To the same effect is the 1958 New York Resolution of the International Law Association. Paragraph 3(a) of the Resolution states:

"Co-riparian States should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian State in the drainage basin so long as such co-riparian State is willing to resolve differences as to their legal rights within a reasonable time by consultation. In the eventuality of a failure of these consultations to produce agreement within a reasonable time, the parties should seek a solution in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedure envisaged in Article 33 thereof."

"Articles XXIX, XXX and XXXIV of the Helsinki Rules of the International Law Association 1966 are also to the same effect:—

"*Article XXIX*: With a view to preventing disputes from arising between basin States as to their legal rights or other interest, it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to such waters.

(2) A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may

be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute as defined in Article XXVI. The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration.

(3) A State providing the notice referred to in paragraph (2) of this Article should afford to the recipient a reasonable period of time to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.

"*Article* XXX: In case of a dispute between States as to their legal rights or other interests, as defined in Article XXVI, they should seek a solution by negotiation.

"*Article XXXIV*: It is rtcommended that the States concerned agree to submit their legal disputes to an ad hoc arbitral tribunal, to a permanent arbitral tribunal or to the International Court of Justice."

In the *Lake Lanoux Arbitration*[72] the Arbitral Tribunal clearly stated that there was no international law or rule or principle providing that a State proposing to undertake works must previously obtain the consent from the co-riparian States as the condition precedent to use waters within its own territory. In other words, a riparian State does not have what, in effect, would amount to a *right of veto* over the proposed development of the common river by a co-riparian State.

At pages 128 and 130, the Arbitral Tribunal stated:

"In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement . In such a case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', '*right of veto*', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another" ....."But international practice does not so far permit more than the following conclusion: The rule that States may utilise the hydraulic power of international water courses only on condition or a *prior* agreement between the interested States cannot be established as a custom even less as a general principle of law."

The same view is expressed by Herbert Arthur Smith (Treatise on "Economic Uses of International Rivers" at page 151):

"(2) No State is justified in taking unilateral action to use the waters of an international river in any manner which causes or threatens appreciable injury to the lawful interests of any other riparian State.

"(3) No State is justified in opposing the unilateral action of another in utilizing waters, if such action neither causes nor threatens any appreciable injury to the former State.

"(4) Where any proposed employment of waters promises great benefits to one State and only minor detriment to another, it is the duty of the latter State to acquiesce in the employment proposed, subject to full compensation and adequate provision for future security.

"(5) Where any proposed employment of waters by one State threatens to injure the legitimate and vital interests of another, the latter is justified in offering an absolute opposition to the employment proposed, but any difference as to the existence or non-existence of such a vital interest should be regarded as a justifiable dispute suitable for arbitration, judicial settlement, or reference to the Council of the League of Nations. If the tribunal or the Council find that such a vital interest in fact exists, no economic or other advantage to the former State can justify it in proceeding with the works proposed. If, on the other hand, the tribunal or the Council finds that no vital interests are affected, the works should be allowed to proceed upon payment of compensation and upon such other terms as the tribunal or the Council may consider just."

The same view has been expressed by C. B. Bourne:

"Moreover, the principle of prior consent has recently been dealt some hard blows. First in the Lake Lanoux Arbitration, Spain had argued that France could not undertake a diversion project upstream in French territory without her consent, even though France had modified its project so that the waters diverted would be re-

72. (1957) International Law Reports (edited by Lauterpacht) 101.

turned to the river before it entered Spain and damage to Spanish interests would thus be avoided. The Tribunal emphatically rejected this contention, saying that the rule of prior agreement was not "a custom, or even less...a general principle of law" and could arise only from a treaty. Although it was dealing with a case where the development would cause no damage, nothing in its judgement suggests that it intended to confine its remarks to such situations. And, second, the principle was rejected in the recent resolutions of the International Law Association and of the Institute of International Law the work of those two bodies being the most careful and extensive study ever made of international water law. One may conclude, therefore, that the international law has not yet conferred on a riparian State the right to veto developments of other riparians, whether or not those developments will cause him serious harm, and that a State may ultimately act unilaterally in the development of its portion of an international river, subject to the risk of being liable for violating the lawful rights of coriparians under international law." [(1965) Canadian Year Book of International Law, page 187 and page 227].

In the present case, therefore, we are unable to accept the contention of Madhya Pradesh and Maharashtra that the land in their respective States cannot be submerged by the proposed construction of the Navagam Project without their previous consent. On the other hand, the question of the submergence between the party States is a justiciable question which is a matter for this Tribunal to decide and adjudicate under Section 5 of the 1956 Act read with Article 262 of the Constitution. As already pointed out, this view is also in accordance with the rule of international law. If the Tribunal finds that any vital interests are affected the project will not be allowed to proceed, but if, on the other hand, the Tribunal is of the opinion that no vital interests are affected by the proposed submergence, the Navagam Project will be allowed to proceed upon payment of compensation and upon such other terms as the Tribunal may consider just.

It was then argued by Mr. Nariman that even if Parliament had the power under Article 262 of the Constitution to invest the Tribunal with jurisdiction to give directions with regard to submergence of land, there was no specific provision enacted in the 1956 Act enabling the Tribunal to give such directions. In our opinion there is no warrant for this argument. Under Section 4 of the 1956 Act the Central Government is empowered to constitute a Tribunal for the adjudication of the water dispute. Section 5(1) states that when the Tribunal has been constituted under Section 4, the Central Government shall refer the water dispute and any matter appearing to be connected with or relevant to, the water dispute to the Tribunal for adjudication. Section 5(2) enacts that the Tribunal shall investigate the matters referred to it and forward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it. The Act, therefore, confers express jurisdiction upon the Tribunal to investigate into the water dispute and to give its decision on the water dispute and other matters referred to it. It is true that the Act does not expressly confer power on the Tribunal to give directions with regard to submergence of land, payment of compensation or for rehabilitation of displaced persons. But in our opinion the express power granted to the Tribunal by Parliament to investigate the water dispute and give its decision thereon involves by necessary implication that the Tribunal is granted power to do everything which is indispensable for carrying out its decision. Dealing with the doctrine of Implied Powers, Pollock C. B. observed in *MICHEALY PENTON & JAMES FRASER* v. *JOHN STEPHEN HEMPTON*[73].

> "It becomes therefore all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus: Whenever anything is authorised and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be else done, then that something will be supplied by necessary intendment."

The principle is that where an Act confers a jurisdiction it also confers by necessary implication the power of doing all such acts, or employing all such means as are essentially necessary to its execution. In other words, the doctrine of implied powers can be ligitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a Statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental

73. (1858) 117 R.R. 32, 41, 11 Moo, P.C. 347.

power is assumed to exist. In our opinion the Tribunal has jurisdiction, (if it finds it necessary), to give proper directions to Madhya Pradesh and/or Maharashtra to take steps by way of acquisition or otherwise for making any submerged land available to Gujarat in order to enable it to execute the Navagam Project and also to give consequential directions regarding payment of compensation, rehabilitation of displaced persons etc.

The argument was stressed on behalf of Madhya Pradesh that the proposed execution of the Navagam Dam Project would involve submergence of portions of the territory of Madhya Pradesh, that such submergence of territory without its consent was a violation of its territorial integrity, and that entry 18 of List II conferred on the State exclusive power to deal with rights in or over land. In our opinion, there is no merit in this argument. As we have already pointed out, there is a constitutional distinction between legislative jurisdiction and proprietary rights. The fact that jurisdiction in respect of a particular subject matter is conferred upon the State legislature affords no evidence that any proprietary right with respect to it is transferred to the State. In the second place, any direction of the Tribunal to Madhya Pradesh or Maharashtra would not have the legal effect that the submerged territory in Maharashtra or Madhya Pradesh would cease to be part of the territory of respective States. On the contrary, Madhya Pradesh and Maharashtra would continue to exercise legislative, executive and judicial powers over the submerged territories. We do not wish to express our opinion at this stage on the merits of the Navagam High Dam Project as proposed by Gujarat. But if the Tribunal should ultimately decide that the Navagam High Dam Project should be sanctioned involving the submergence of territories of Maharashtra and Madhya Pradesh, the Tribunal has authority to give appropriate directions to Madhya Pradesh and Maharashtra to make the submerged land available to Gujarat either by way of sale, lease or even licence subject to appropriate conditions. As an illustration, we may cite the agreement dated 29th October, 1886, between Madras and the former Travancore State in respect of lease of certain territory for the Periyar Irrigation Project. By this document, the former Travancore State granted a lease to Madras of about 8,000 acres of land for submergence and certain other areas for a period of 999 years on a rent of Rs. 40,000/- per year for construction of a reservoir and headworks for irrigation purposes. By a subsequent agreement dated 29th May, 1970, between the successor States of Kerala and Tamil Nadu there was a modification of the lease dated 29th October, 1886, and the Kerala Government agreed to convey to the Government of Tamil Nadu the power rights in the Periyar waters for an additional consideration. The next example is the agreement dated 10th May, 1969, between Tamil Nadu and Kerala with regard to the Parambikulam Project, across Anamalai Hills. Schedule 4 refers to the licensing of the land required by Tamil Nadu for the construction of the project. Clauses 3, 7, 9, 10, 11 and 17 are important :—

> 3. The right of the Government of Tamil Nadu to utilise the lands covered by the licence and lying within the Kerala State for the construction, maintenance and operation of the Parambikulam Aliyar Project shall in no way affect the rights of the Government of Kerala in the said lands and the Government of Kerala shall continue to have full rights in respect of the said lands (subject to the terms and conditions of this agreement).
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> 7. The Government of Kerala shall be the sole authority for the maintenance of law and order in the area covered by the Parambikulam Aliyar Project lying within the State of Kerala.
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> 9. The Government of Kerala shall grant to the Government of Tamil Nadu, licence for the use of all the lands required permanently by the reservoirs and the construction of dams and the appurtenant structures relating to Parambikulam Aliyar Project. The rent for the use of the land, compensation for the trees to be cut and removed from the sites and the terms and conditions of the licence shall be as detailed in Annexure II appended.
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> 10. Compensation of the Kerala Government forests made available to the Government of Tamil Nadu for the use of the Parambikulam Aliyar Project shall be paid in accordance with the terms and conditions of this agreement and the recommendations made by the Joint Team of officers of the Government of Tamil Nadu and Kerala on 12th August, 1965, and agreed to by both the Governments.
>
> 11. The Government of Kerala shall also grant to the Government of Tamil Nadu a licence for the use of all lands required temporarily by the Government of Tamil Nadu for the works connected with the Parambikulam Aliyar Project. The period of this licence shall

be limited to the actual period of construction of the Parambikulam Aliyar Project and no compensation of any kind shall be payable to the Government of Tamil Nadu on the termination of the licence. For the buildings constructed by Tamil Nadu and taken over by the Government of Kerala, compensation will be paid. The rent for the use of the land covered by the licence, the compensation for trees to be cut and removed from the sites and the terms and conditions of the licence shall be as mentioned in Annexure II.

* * * * *

17. The Government of Tamil Nadu shall be liable to pay compensation to the Government of Kerala for the use and enjoyment of land and other amenities within the State of Kerala and for the damages that might be caused to the improvements in the land so used and enjoyed, such as roads, forests, buildings, Hillmen settlement, etc., in connection with the execution of the works.

The Agreement on the Kosi Project dated April 25, 1954, between the Government of India and the Government of Nepal is also relevant in this connection, Clauses 3, 5 and 8 of the Agreement are important:

This agreement made this twentyfifth day of April, 1954, between the Government of the Kingdom of Nepal (hereinafter referred to as the 'Government') and the Government of India (hereinafter referred to as the 'Union').

3. *Authority For Execution of Works And Occupation of Land and Other Property—*

(i) The Government will authorise the Union to proceed with the execution of the said project as and when the Project or a part of the Project receives sanction of the said Union and notice has been given by the Union to the Government of its intention to commence work on the Project and shall permit access by the engineer and all other officers, servants and nominees of the Union with such men, animals, vehicles, plants, machinery, equipment and instruments as may be necessary for the direction and execution of the project to all such lands and places and shall permit the occupation, for such period as may be necessary of all such lands and places as may be required for the proper execution of the Project.

(ii) The land required for the purposes mentioned in Clause 3(i) above shall be acquired by the Government and compensation therefore shall be paid by the Union in accordance with provisions of clause 8 hereof.

* * * * *

5. *Sovereignty & Jurisdiction—*

The Union shall be the owner of all lands acquired by the Government under the provisions of clause 3 hereof which shall be transferred by them to the Union and of all water rights secured to it under clause 4(i).

Provided that the sovereignty rights and territorial jurisdiction of the Government in respect of such lands shall continue unimpaired by such transfer.

* * * * *

8. *Compensation For Land And Property—*

(i) For assessing the compensation to be awarded by the Union to the Government in cash (a) lands required for the execution of the various works as mentioned in clause 3(ii) and (b) submerged lands will be divided into the following classes:
1. Cultivated lands, 2. Forest lands, 3. Village lands and houses and other immovable property standing on them, 4. Waste lands.

All lands recorded in the register of lands in the territory as actually cultivated shall be deemed to be cultivated lands for the purposes of this clause.

(ii) The Union shall pay compensation (a) to the Government for the loss of land revenue as at the time of acquisition in respect of the area acquired and (b) to whomsoever it may be due for the Project and transferred to the Union.

The assessment of such compensation, and the manner of payment, shall be determined hereafter by mutual agreement between the Government and the Union.

There are similar clauses in the agreement regarding the Gandak Irrigation & Power Project dated 4th December, 1959, between the Government of Nepal and the Government of India.

Clauses 3 and 11 of this Agreement are as follows :—

3. *Land Acquisition*

(i) His Majesty's Government will acquire or requisition, as the case may be, all such lands as are required by the Government of India for the Project i.e., for the purpose of investigation, construction and maintenance of the Project and the Government of India shall pay reasonable compensation for such lands acquired or requisitioned.

(ii) His Majesty's Government shall transfer to the Government of India such lands belonging to His Majesty's Government as are required for the purposes of the Project on payment of reasonable compensation by the Government of India.

(iii) Lands requisitioned under para (i) shall be held by the Government of India for the duration of the requisition; and lands acquired under sub-clause (i) or transferred under sub-clause (ii) shall vest in the Government of India as proprietor and subject to payment of land revenue (Malpot) at the rates at which it is leviable on agricultural lands in the neighbourhood.

(iv) When such land vesting in the Government of India or any part thereof ceases to be required by the Government of India for the purposes of the Project, the Government of India will reconvey the same to His Majesty's Government free of charge.

* * * * *

11. *Sovereignty & Jurisdiction*

Nothing in this Agreement shall be deemed to derogate from the sovereignty and territorial jurisdiction of His Majesty's Government in respect of lands acquired by His Majesty's Government and made available to the Government of India for investigation, execution and maintenance of the project.

Again by the Columbia River Treaty dated 17th January, 1961, Canada agreed to provide 15.5 million acre feet of storage for the benefit primarily of down stream installations in the United States. The United States agreed to operate 24 power generating plants on the main river and tributaries and any additional ones to be built so as to make the most effective use of the storage. Down stream power benefits in the United States would be shared with Canada on 50 : 50 basis. Under the same treaty, the United States was given the option to build Libby Dam on the Kootenai River within five years. This project would back water 95 miles away upstream in British Columbia and would provide 50,10,000 acre feet of storage. Article XII(4) of the Columbia River Treaty provided that Canada should prepare and make available for flooding the land necessary for the storage reservoir of the dam :—

"(1) The United States of America for a period of five years from the ratification date, has the option to commence construction of a dam on the Kootenai River near Libby, Montana, to provide storage to meet flood control and other purposes in the United States of America. The storage reservoir of the dam shall not raise the level of the Kootenai River at the Canada-United States of America boundary above an elevation consistent with a normal full pool elevation at the dam of 2,459 feet, United States Coast and Geodetic Survey datum, 1929 General Adjustment, 1947 International Supplemental Adjustment.

(2) All benefits which occur in either country from the construction and operation of the storage accrue to the country in which the benefits occur.

(3) The United States of America shall exercise its opinion by written notice to Canada and shall submit with the notice a schedule of construction which shall include provision for commencement of construction, whether by way of railroad relocation work or otherwise, within five years of the ratification date.

(4) If the United States of America exercises its option, Canada in consideration of the benefits accruing to it under paragraph (2) shall prepare and make available for flooding the land in Canada necessary for the storage reservoir of the dam within a period consistent with the construction schedule."

With regard to the Rihand Dam Project, Madhya Pradesh itself had agreed to acquire about 38,000 acres of land submerged within its jurisdiction and make over the land to Uttar Pradesh. The question of payment of compensation, rehabilitation of displaced persons etc., was discussed at the meeting of the Central Zonal Council and a Committee was appointed under the Chairmanship of Mr. Sachdev, Secretary to the Government of India, Ministry of Irrigation & Power to make re-

commendations regarding the principles on which compensation should be made. The recommendations of the Committee were approved by Uttar Pradesh and Madhya Pradesh in October, 1969. With regard to the Matatila Dam also, there was an agreement between Uttar Pradesh and Madhya Pradesh regarding the acquisition of land and payment of compensation. It was agreed that the land in the sub-merged area in the respective States required for the construction of the dam and the canal system should be made through the respective State Governments in accordance with the provisions of the Land Acquisition Act. The principle of rehabilitation would be the same for both the States, the cost being met out of the estimate of the project by the Uttar Pradesh Government. The Irrigation Secretaries of the two States prepared an agreed scheme for building new houses in model villages for the displaced tenants and for concessions in the matter of timber and other building materials and a detailed phased programme for rehabilitation of the tenants of the submerged areas. (See documents of Madhya Pradesh Volume II, p. 222 and pages 262—275).

For the reasons already expressed we hold that the action of the Central Government constituting this Tribunal by Notification No. S.O. 4054 dated 6-10-1969 and in making a reference of complaint of Gujarat by Reference No. 12/6/69-WD dated 6-10-1969 under the 1956 Act is not *ultra vires* for the alleged reason that there was no "water dispute" within the meaning of Section 2(c) read with Section 3 of the 1956 Act. We further hold that the proposed execution of the Navagam Project with FRL 530 or thereabout or less involving the consequent submergence of a portion of the territory of Maharashtra and Madhya Pradesh can form the subject matter of a "water dispute" within the meaning of Section 2(c) of the 1956 Act. We have also come to the conclusion that the Tribunal has jurisdiction:

(a) to give appropriate directions to Madhya Pradesh and Maharashtra to take steps by way of acquisition or otherwise for making submerged land available to Gujarat in order to enable it to execute the Navagam Project with FRL 530 or thereabout or less;

(b) to give consequent directions to Gujarat or other Party States regarding payment of compensation to Maharashtra and Madhya Pradesh or giving them a share in the beneficial use of the Navagam Dam; and

(c) for rehabilitation of displaced persons.

We desire to add that we are not expressing our opinion at this stage on the merits of the Navagam High Dam Project as proposed by Gujarat, but we are merely deciding the question of jurisdiction of the Tribunal as a matter of law.

For these reasons issues No. 19(i) and (ii) must be answered in the affirmative and issue 1(a) in the negative.

Issue 1(*b*)

This issue has to be examined in the setting and back-ground of the principle laid down by the Supreme Court in *THE BARIUM CHEMICALS LTD.* v. *THE COMPANY LAW BOARD*[74] in *ROHTAS INDUSTRIES LTD.* v. *S. D. AGARWAL*[75] and in *RAMPUR DISTILLERY COMPANY* v. *COMPANY LAW BOARD*[76]. In view of the principle enunciated in these authorities the question before the Tribunal is not the sufficiency of the grounds upon which the Central Government formed the opinion that the "water dispute could not be settled by negotiations", within the meaning of Section 4 of 1956 Act. The question on the contrary is whether there was in existence material before the Central Government for its opinion that the water dispute could not be settled by negotiation. It is not disputed that the formation of the opinion by the Central Government is a purely subjective process. There cannot also be any doubt that since Parliament has provided for the opinion of the Government and not of the Court, such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. The existence of the opinion of the Central Government cannot, therefore, be challenged except perhaps on the ground that the Central Government acted *mala fide*. But if in reaching its opinion the Central Government misapprehends the Statute or proceeds upon irrelevant material or ignores relevant material, the jurisdiction of the Court to examine the opinion is not excluded.

74. (1966) SUPP. S.C.R. 311.
75. (1969) 3 S.C.R. 108.
76. (1970) 2 S.C.R. 177.

The argument of Madhya Pradesh is that the Central Government had failed to arrange for a "meaningful dialogue between the party States" after the complaint of Gujarat was received on 6th July, 1968. It was said that as a matter of construction, Section 4 required that negotiation for settlement should be initiated by the Central Government after the complaint of Gujarat was received. The contrary viewpoint was put forward on behalf of Gujarat and Rajasthan. It was argued that Section 4 did not say that negotiation should always take place after the receipt of the complaint from the concerned State. The argument was also pressed that there was nothing in the section which imposed a duty on the Central Government to initiate any process of negotiation between the contending States. In support of its own interpretation learned counsel for Madhya Pradesh referred to certain speeches in the Lok Sabha debate on the 1956 Act, but it is well-established that you cannot look at parliamentary debates on the question of interpretation of a Statute and such debates are not admissible to explain the meaning of the words used in the Statute (see the judgement of Mukherji, J. in *A. K. Gopalan* v. *The State*[77]). We shall, however, proceed on the assumption that the interpretation contended for by Madhya Pradesh is correct. Even on that assumption there is sufficient material in this case to show that Central Government made efforts for a negotiated settlement after the receipt of the complaint of Gujarat dated 6th July, 1968. In its affidavit dated 10th March, 1971, the Union of India has averred that on 31st January, 1969, Dr. K. L. Rao wrote to the Chief Minister of Madhya Pradesh informing him of the complaint of Gujarat and enquiring whether there was a possibility of resolving the dispute by negotiation and if so, it would be desirable to initiate immediate steps in that behalf (Annexure IV of the Affidavit). In his reply the Chief Minister of Madhya Pradesh said that "Madhya Pradesh did not have any dispute on the Narmada with any neighbouring States" (Annexure V). On 25th February, 1969, Dr. K. L. Rao again wrote to the Chief Minister of Madhya Pradesh enclosing a copy of the points of dispute made out by the Government of Gujarat. He pointed out that the apportionment of waters as recommended by the Khosla Committee was accepted by Gujarat and Rajasthan but Madhya Pradesh and Maharashtra had raised various objections. Dr. K. L. Rao again enquired from the Chief Minister of Madhya Pradesh whether there was a possibility of resolving the dispute by negotiation and if so what steps should be initiated in this behalf (Annexure VI). Dr. K. L. Rao wrote a similar letter to the Chief Minister of Maharashtra on 25th February, 1969 (Annexure VII/1). Dr. K. L. Rao also wrote to the Chief Ministers of Gujarat and Rajasthan (Annexure VII/2 and VII/3). On 11th April, 1969, Dr. Rao addressed another letter to the Chief Minister of Madhya Pradesh requesting him to let him know urgently "whether negotiation may be pursued or whether the dispute is to be referred to adjudication". Dr. K. L. Rao at the same time requested the Chief Minister to kindly fix a date and the venue for discussion (Annexure XI). In reply the Chief Minister did not fix a date or venue for the discussion but made a counter proposal that "officers of the Government of Madhya Pradesh and Gujarat should meet early and the unfinished task of assessing the water requirements of Madhya Pradesh must first be completed" (Annexure XII). In his letter to Dr. K. L. Rao, the Chief Minister also enclosed a copy of his letter addressed to the Chief Minister of Gujarat suggesting a meeting of the officers of the two States as envisaged in the counter-proposal. The counter-proposal made by Madhya Pradesh was rejected by Gujarat as will be apparent from the enclosure to Annexure XIV dated 1-5-1969 from the Chief Minister of Gujarat to Dr. K. L. Rao. The said enclosure is a copy of the letter of the Chief Minister of Gujarat rejecting the proposal for a meeting at the official level (The enclosure itself is MP 53). In Annexure XIV the Chief Minister of Gujarat stated that detailed negotiations had already been held in the past and no useful purpose would be served by further discussions. Nearly ten days after Gujarat's rejection of the counter-proposal, by a letter dated 10-5-69 (MP 54) the Chief Minister of Madhya Pradesh informed Dr. K. L. Rao of Gujarat's rejection of the proposal for a meeting at the official level, but significantly failed either to revert to, or to take advantage of, Dr. K. L. Rao's offer in Annexure XI to fix a date and venue for a meeting and discussion at the ministerial level. MP 54 itself was in answer to Annexure XIII dated 28-4-69 wherein Dr. Rao had stated that there had been "regular, continuous and sustained discussions over a long period and every aspect of the dispute had been discussed threadbare both at the technical level and at the Minister's level and only a final decision by the Chief Minis-

77. (1950) 1 S.C.R. 88 at 273.

ters on the question of allocation of Narmada waters and on the scope of the projects was required to be taken". It is significant again that in MP 54 these aspects were not traversed. By his letter dated 11-5-69 to the Chief Minister of Madhya Pradesh, Dr. K. L. Rao stated that there appeared to be no other way but to refer the dispute for adjudication (MP 57).

It was argued for Madhya Pradesh that the negotiations between the party States before the receipt of Gujarat's complaint were not for settling the present dispute regarding the apportionment of Narmada waters and height of Navagam Dam but for the development of River Narmada to the optimum extent in the best interests of the States concerned. There is no substance in this argument for the scheme of development of Narmada waters involved necessarily the question of apportionment of the waters between the various States and the location and height of the Dam at Navagam site as compared with the rival projects of Jalsindhi, Harinphal and Maheshwar.

In paragraphs 8 to 15 of its affidavit dated 10th March, 1971, the Union Government has referred to the attempts of the Central Government to negotiate between the party States before the receipt of the complaint of Gujarat dated 6-7-1968. In August, 1963, a proposal for Navagam Dam of FRL 425 was brought to the notice of Madhya Pradesh Government. A meeting between the Union Minister of Irrigation and Power and Chief Ministers of Madhya Pradesh and Gujarat was held in November, 1963, to discuss the question of development of Narmada River. At this meeting there was an agreement between Madhya Pradesh and Gujarat representatives (subject to ratification of their respective Governments) on the development of Narmada River. According to Clause 6 of the Bhopal Agreement, Gujarat was entitled to build the Navagam Dam upto FRL 425 and the connected canal system and the benefits would go entirely to Gujarat. Gujarat ratified the agreement. Madhya Pradesh, however, raised several objections and failed to ratify the agreement, *vide* letter to Chief Minister of Madhya Pradesh Exhibit MP-17 and the reply of Dr. K. L. Rao Exhibit MP-19. A copy of the Bhopal Agreement is at Annexure II of the Affidavit. In September, 1964, the Government of India in consultation with the States concerned set up a Committee headed by Dr. A. N. Khosla to go into the problem of allocation of the waters of Narmada. One of the specific terms of reference of this Committee was to examine in particular the Navagam Dam Project together with alternative projects, if any and to suggest appropriate full reservoir level and consequential adjustments. While the Khosla Committee was engaged on its work, the Governments of Madhya Pradesh and Maharashtra entered into an agreement on 5th April, 1965, with regard to the construction of the Jalsindhi Project without any consultation with the Government of Gujarat whose proposal for Navagam Dam of greater height would be rendered impossible with the construction of Jalsindhi Dam. The Union Government states in its affidavit that this agreement between Madhya Pradesh and Maharashtra had the effect of pre-empting the options of development of the Lower Narmada with respect to the proposed height of the Navagam Dam Project of Gujarat. A copy of the Jalsindhi Agreement is Annexure III of the Affidavit. The Khosla Committee recommended that the full reservoir level of the Navagam Dam should be 500 and for the irrigation of border areas of Gujarat and Rajasthan the full supply level of Navagam Canal should be 300, as a canal of such level alone could deliver water to the border areas of Gujarat in the Rann of Kutch and in the Barmer and Jalore Districts of Rajasthan State. The Khosla Committee also recommended that Madhya Pradesh could utilise about 15.6 MAF, that Gujarat could utilise 10.99 MAF water and Rajasthan and Maharashtra 0.25 MAF and 0.10 MAF respectively. While Gujarat and Rajasthan broadly accepted the Khosla Committee recommendations, the Governments of Madhya Pradesh and Maharashtra raised various objections. A discussion was again held by the Central Government with the concerned States. The Union Minister of Irrigation and Power had discussions with the Chief Ministers of Madhya Pradesh, Gujarat and Rajasthan individually at the respective State capitals in May-June 1966. Thereafter prolonged discussions were held at technical level in July-August 1966 between the technical officers of the State Governments and those of CW&PC. In August 1966, the Union Minister of Irrigation & Power had a meeting with the Chief Ministers of Madhya Pradesh, Gujarat and Rajasthan. Subsequently, there was a discussion between the Chief Ministers of Gujarat and Madhya Pradesh in May-June 1967. Dr. K. L Rao had also discussions with Ministers of Irrigation and Electricity of Madhya Pradesh in October 1967. He had also meetings with the Chief Ministers of Madhya Pradesh, Maharashtra and Gujarat and the Irrigation Ministers of these States as well

as of Rajasthan in December 1967. Between January and April 1968 discussions were held between officials of the Central Government and those of Madhya Pradesh regarding the water requirements of that State for irrigation, but it was not possible to reconcile the widely divergent viewpoints of requirement of irrigation in the Narmada basin in Madhya Pradesh (see paragraphs 14-15 of the Affidavit of the Union Government dated 10th March, 1971).

In view of the facts stated in the affidavit of the Union Government, we are of the opinion that there was in existence relevant material before the Union Government to form the opinion that the water dispute between the four States could not be settled by negotiation and that the requirement of Section 4 of the 1956 Act has been satisfied in this case.

For the reasons assigned, we hold that the Central Government had material for forming the opinion that the dispute could not be settled by negotiations within the meaning of Section 4 of the 1956 Act and the action of the Central Government constituting the Tribunal by the Notification No. S.O. 4054 dated 6-10-1969 and in making a reference of the complaint of Gujarat by Reference No. 12/6/69-WD dated 6-10-1969 is not *ultra vires.*

Issue 1(b) is answered accordingly.

Lastly we desire to express our indebtedness to the Attorney General of India and all the counsel for the various Party States for their very careful and elaborate arguments in this case.

(Sd.) (V. RAMASWAMI)
Chairman

(Sd.) (V. P. GOPALAN NAMBIYAR)
Member

(Sd.) (E. VENKATESAM)
Member

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF ADJUDICATION OF THE WATER DISPUTES REGARDING THE INTER-STATE RIVER NARMADA AND THE RIVER VALLEY THEREOF

And

IN THE MATTER OF:

Reference Nos. 1 & 2 of 1969.

State of Gujarat and anr.

Vs.

State of Madhya Pradesh and anr.

And

Civil Misc. Petitions Nos. 8, 23, 27, 47, 50, 55, 56 *and* 57 *of* 1974-*NWDT*

The 8th day of October, 1974.

PRESENT

Mr. Justice V. Ramaswami *Chairman*
Mr. Justice V. P. Gopalan Nambiyar *Member*
Mr. Justice E. Venkatesam *Member*

For the State of Gujarat:

Mr. J. M. Thakore, Advocate General
Mr. J. L. Hathi, Senior Advocate
Mr. S. B. Vakil, Advocate, and
Mr. M. G. Doshit, Advocate

For the State of Madhya Pradesh:

Mr. Y. S. Chitale, Senior Advocate, and
Mr. M. S. Ganesh, Advocate

For the State of Maharashtra:

Mr. B. R. Zaiwalla, Advocate

For the State of Rajasthan:

Mr. K. K. Jain, Advocate

For the Union of India:

Mr. O. P. Malhotra, Senior Advocate, and
Mr. Sat Pal, Advocate.

C.M.Ps. 8, 23, 27, 47, 50, 55, 56 and 57 of 1974

Order and Decision of the Tribunal

On Issues 7 *and* 8

The following Order and Decision of the Tribunal is delivered by:

MR. V. RAMASWAMI, *Chairman*—On the 6th July, 1968, the Government of Gujarat made a complaint under section 3 of the Inter-State Water Disputes Act (33 of 1956) stating that a water dispute had arisen between the State of Gujarat and the Respondent States of Madhya Pradesh and Maharashtra over the use, distribution and control of the waters of the inter-State river Narmada. In substance, the allegation was that executive action had been taken by Maharashtra and Madhya Pradesh which had prejudicially affected the State of Gujarat and its inhabitants. The Government of Madhya Pradesh had proposed to construct Maheshwar and Harinphal Dams over Narmada in its lower reach and Madhya Pradesh had also entered into an agreement with the Government of Maharashtra to jointly construct Jalsindhi dam over Narmada in its course between these two States. The Government of Gujarat objected to the proposals of the Governments of Madhya Pradesh and Maharashtra on various grounds, the principal one being that these projects would prejudicially affect the rights and interests of Gujarat State by compelling Gujarat State to restrict the height of the dam it proposed to construct across the river at Navagam from FRL 530 as proposed to FRL 310 or less. It was said that this would mean a permanent detriment to the irrigation and power benefits that would be available to the inhabitants of Gujarat and this would also make it impossible for Gujarat to reclaim the desert area in the Rann of Kutch. It was alleged that the limitation of FRL would drastically reduce the irrigation potential of Navagam Dam to 12 lakh acres or even less and that Gujarat would be permanently deprived of its equitable share in Narmada waters to the prejudice of the rights and interests of the inhabitants of Gujarat. According to the State of Gujarat, the principal matters in dispute are:

(i) the right of the State of Gujarat to the control and use of the waters of the Narmada river on well-accepted principles applicable to the use of waters of inter-State rivers;

(ii) the right of the State of Gujarat to object to the arrangement between Madhya Pradesh

and Maharashtra for development of Jalsindhi Dam;

(iii) the right of the State of Gujarat to raise the Navagam Dam to an optimum height commensurate with the efficient use of Narmada waters including its control for providing requisite cushion for flood control; and

(iv) the consequential right of submergence of areas in the States of Madhya Pradesh and Maharashtra.

Acting under section 4 of the Inter-State Water Disputes Act, 1956 (hereinafter referred to as the 1956 Act) the Government of India constituted this Tribunal for adjudication of the water dispute *vide* Notification No. S.O. 4054 dated 6th October, 1969. On the same date, the Government of India made a reference of the water dispute to this Tribunal by their Reference No. 12/6/69-WD which states :

"In exercise of the powers conferred by subsection (1) of section 5 of the Inter-State Water Disputes Act, 1956 (33 of 1956), the Central Government hereby refers to the Narmada Water Disputes Tribunal for adjudication of the water dispute regarding the inter-State river, Narmada, and the river valley thereof, emerging from letter No. MIP-5565/C-10527-K, dated the 6th July, 1968 from the Government of Gujarat."

On 16th October, 1969, the Government of India made another reference of certain issues raised by the State of Rajasthan under section 5(1) of the 1956 Act *vide* Reference No. 10/1/69-WD dated the 16th October, 1969.

On 24th November, 1969, the State of Madhya Pradesh filed a Demurrer before the Tribunal that the action of the Government of India in constituting the Tribunal under Notification No. S.O. 4054 dated 6th October 1969 and making a reference of the complaints of Gujarat and Rajasthan by their References No. 12/6/69-WD dated the 6th October, 1969 and No. 10/1/69-WD dated the 16th October, 1969 was *ultra vires* of the 1956 Act. The contention of Madhya Pradesh was that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the 1956 Act and also that the Government of India had no material for forming the opinion that the water dispute could not be settled by negotiation within the meaning of section 4 of the 1956 Act. It was said that Maheshwar, Harinphal and Jalsindhi projects were purely power projects and would not diminish the flow of water prejudicially affecting the interests of Gujarat. It was claimed that the implementation of these projects would not reduce the irrigation potential to 12 lakh acres or less as alleged by Gujarat. Madhya Pradesh also objected that Gujarat had no right to construct the Navagam Dam above FRL 210. It was alleged that the claim of Gujarat to construct Navagam Dam at FRL 530 was beyond its competence as the construction of such a dam will submerge the territories of Maharashtra and Madhya Pradesh and three important projects of Madhya Pradesh at Jalsindhi, Harinphal and Maheshwar would be submerged. It was also contended that the State of Rajasthan not being a co-riparian State had no legal right to set in motion the machinery of the Inter-State Water Disputes Act. It was claimed that Rajasthan not being a basin State had no right to share the waters of river Narmada.

After the party States filed their respective Statements of Case and the respective Rejoinders to each other's Statement, the Tribunal framed 24 issues at the seventh meeting on 28-1-1971. In C.M.P. No. 13 of 1971, Maharashtra prayed that out of the issues framed, issue 1(a), 1(A), 2, 3 and 19 may be separately tried as preliminary issues. In C.M.P. No. 3 of 1971, Madhya Pradesh prayed that issues 1(b) and 4 may also be similarly tried. By its Order dated 26th April, 1971 on C.M.P. Nos. 3, 12 and 13 of 1971, the Tribunal held that the following issues already settled on 28th January, 1971 and as amended should be tried as preliminary issues of law:—

"1. Is the action of Central Government constituting this Tribunal by the Notification No. S.O. 4054 dated 6-10-1969 or in making a reference of complaint of Gujarat by Reference No. 12/6/69-WD dated 6-10-1969 under the Inter-State Water Disputes Act (Act No. 33 of 1956) *ultra vires* for the alleged reasons :

(a) that there was no "water dispute" within the meaning of section 2(c) read with section 3 of the Act and/or

(b) that the Central Government had no material for forming the opinion that the water dispute "could not be settled by negotiations" within the meaning of section 4 of the Act?

"1A. Has this Tribunal jurisdiction to entertain or decide the question as to whether the action of the Central Government in constituting this Tribunal under Notification No. S.O. 4054 dated 6-10-1969 and in referring the complaints of Gujarat and Rajasthan by References

No. 12/6/69-WD dated 6th October, 1969 and No. 10/1/69-WD dated the 16th October, 1969 *ultra vires* of the Inter-State Water Disputes Act, 1956 ?

"2. Is the Notification of the Central Government No. 10/1/69-WD dated 16-10-1969 in referring the complaint of Rajasthan to this Tribunal for adjudication under section 5 of the Act *ultra vires* for the reasons :—

(a) that the complaint of Rajasthan is not a matter connected with or relevant to the water dispute between Madhya Pradesh, Maharashtra and Gujarat already referred to the Tribunal by the Central Government by its previous Reference dated 6-10-1969, and

(b) that no part of the territory of Rajasthan is located within the Narmada basin or its valley?

"3. Is the State of Rajasthan not entitled to any portion of the waters of the Narmada basin on the ground that the State of Rajasthan is not a co-riparian State or that no portion of its territory is situated in the basin of the river Narmada?

"19(i). Whether the proposed execution of the Navagam project with FRL 530 or thereabouts or less involving consequent submergence of a portion of the territories of Maharashtra and/or Madhya Pradesh can form the subject matter of a "water dispute" within the meaning of Section 2(c) of the Inter-State Water Disputes Act (Act No. 33 of 1956).

"19(ii). If the answer to 19(i) is in the affirmative whether the Tribunal has jurisdiction :

(a) to give appropriate directions to Madhya Pradesh and/or Maharashtra to take steps by way of acquisition or otherwise for making the submerged land available to Gujarat in order to enable it to execute Navagam Project with FRL 530 or thereabouts or less;

(b) to give consequent directions to Gujarat or other party States regarding payment of compensation to Maharashtra and/or Madhya Pradesh and/or given them a share in the beneficial uses of Navagam Dam; and

(c) for rehabilitation of displaced persons."

After giving a hearing to the party States and the Attorney General on behalf of the Union of India on these preliminary issues, the Tribunal delivered its judgement on 23rd February, 1972 holding that the Notification of the Central Government No. 10/1/69-WD dated 16th October, 1969 referring the matters raised by Rajasthan by its complaint was *ultra vires* of the Act. The Tribunal further held that the action of the Central Government constituting the Tribunal by Notification No. S.O. 4054 dated 6th October, 1969 and making a reference of the water dispute regarding the inter-State river Narmada and the river valley thereof emerging from the complaint of Gujarat by Notification No. 12/1/69-WD dated 6th October, 1969 was not *ultra vires* of the Act and the Tribunal had jurisdiction to decide the dispute referred to it at the instance of Gujarat. With regard to issues No. 19(i) and (ii) the Tribunal further held that the proposed construction of the Navagam Project involving consequent submergence of the portions of territories of Maharashtra and Madhya Pradesh can form the subject-matter of a "water dispute" within the meaning of section 2(c) of the Act. The Tribunal also held that it had jurisdiction to give appropriate directions to Madhya Pradesh and Maharashtra to take steps by way of acquisition or otherwise for making submerged land available to Gujarat in order to enable it to execute the Navagam Project and to give consequent directions to Gujarat and other party States regarding payment of compensation to Maharashtra and Madhya Pradesh, for giving them a share in beneficial uses of Navagam Dam and for rehabilitation of displaced persons.

Against the judgement of the Tribunal on preliminary issues dated 23rd February, 1972, Madhya Pradesh and Rajasthan preferred appeals to the Supreme Court by Special leave and also obtained stay of the proceedings before the Tribunal to the limited extent mentioned in the orders of the Supreme Court.

The orders of the Supreme Court granting Special leave to Rajasthan and Madhya Pradesh are dated 1st May, 1972 and 6th June, 1972.

On 31-7-1972, while the Tribunal was in session engaged in the work of discovery and inspection of documents, it was represented to us by Counsel for all the party States and the Union of India that the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan had entered into an agreement to compromise the matters in dispute with the assistance of the Prime Minister of India. The party States and the Union of India therefore prayed for adjournment of the proceedings of the Tribunal from time to time on the same

ground. The prayer for adjournment was granted by the Tribunal on the relevant dates.

In C.M.P. No. 8 *of* 1974, Gujarat states that the Chief Ministers of Madhya Pradesh, Maharashtra and Rajasthan and the Adviser to the Governor of Gujarat have arrived at an agreement on a number of issues on 12th July, 1974. A copy of the Agreement is Annexure 'A' to the application and is reproduced below:—

"IT IS AGREED :

(1) that the water dispute referred to the Narmada Water Disputes Tribunal be determined by the Tribunal on the basis of this agreement between the States of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan (hereinafter referred to as 'Madhya Pradesh', 'Maharashtra', 'Gujarat' and 'Rajasthan' respectively);

(2) that development of Narmada should no longer be delayed in the best regional and national interests;

(3) that the quantity of water in Narmada available for 75 per cent of the year be assessed at 28 million acre feet and that the Tribunal in determining the disputes referred to it do proceed on the basis of that assessment;

(4) that the requirements of Maharashtra and Rajasthan for use in their territories are 0.25 and 0.5 million acres feet respectively and that the Tribunal in determining the disputes referred to it do proceed on the basis that the requirements of Maharashtra for use in its territories are 0.25 million acre feet and that Rajasthan will get for use in its territories 0.5 million acre feet without prejudice to the height of the canal;

(5) that the net available quantity of water for use in Madhya Pradesh and Gujarat is 27.25 million acre feet and that the Tribunal in determining the disputes referred to it do proceed on the basis that the net available quantity of water for use in Madhya Pradesh and Gujarat is 27.25 million acre feet;

(6) that the Tribunal do allocate this balance of water, namely, 27.25 million acre feet, between Madhya Pradesh and Gujarat after taking into consideration various contentions and submissions of the parties hereto;

(7) that the height of Navagam Dam be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties hereto;

(8) that the level of the canal be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties hereto;

(9) that in the light of this agreement, issues Nos. 4, 5, 7, 7(a), 7(c), 7(d), 7(e), 7(f), 8, 10, 11, 12 and 20 framed by the Tribunal on 28th January, 1971 may be deleted and that issues Nos. 6, 7(b), 13 and 17 may be suitably modified as in the annexure to this agreement. All other issues may be determined by the Tribunal after taking into consideration the various contentions and submissions of the parties hereto;

(10) that for the limited purpose of effectuating the terms of this agreement, Madhya Pradesh do withdraw the proceedings filed by it before the Hon'ble the Supreme Court and arising out of the decision of the Tribunal dated 23rd February 1972, on the preliminary issues of law;

(11) that for the limited purpose of effectuating the terms of this agreement Rajasthan do withdraw the proceedings filed by it before the Hon'ble Supreme Court and arising out of the decision of the Tribunal dated 23rd February, 1972 on the preliminary issues of law; and

(12) that Rajasthan shall be a party to the further proceedings before the Tribunal, without prejudice to the legal position regarding the rights of a non-riparian State."

In C.M.P. 8 *of* 1974, Gujarat has made a prayer that the Tribunal may be pleased to determine the dispute on the basis of this agreement and give appropriate directions to Madhya Pradesh, Maharashtra, Gujarat and Rajasthan, so as to enable it to determine the disputes referred to it on that basis.

In C.M.P. 23 *of* 1974, Rajasthan has also annexed a copy of the agreement dated 12th July, 1974 and has made prayers to a similar effect.

In C.M.P. Nos. 27 *and* 47 *of* 1974, Maharashtra and Madhya Pradesh have also annexed copies of the agreements dated 12th July, 1974 and have made prayers to the Tribunal to an identical effect.

In C.M.P. No. 55 of 1974, Rajasthan made a statement that it has applied to the Supreme Court for withdrawing Civil Appeal No. 1129 of 1972 filed against the judgement of the Tribunal dated 23rd February 1972 and the Supreme Court had made an order allowing Rajasthan to withdraw the said appeal.

In C.M.P. 56 of 1974, Madhya Pradesh has made statement that it has applied to the Supreme Court for withdrawing Civil Appeal No. 1742 of 1972 against the judgement of the Tribunal on the preliminary issues and on 1st August, 1974, the Supreme Court has passed orders permitting Madhya Pradesh to withdraw the said appeal.

On 1st August, 1974, a joint petition by the four Counsel appearing for Madhya Pradesh and the other three States was filed before us saying that the party States have arrived at an agreement dated 12th July, 1974 signed by the Chief Ministers of Madhya Pradesh, Maharashtra, Rajasthan and the Adviser to the Governor of Gujarat and praying that the Tribunal may determine the disputes on the basis of that agreement and give appropriate and necessary directions to the concerned party States (*vide* C.M.P. 57 of 1974).

We propose in the first instance to deal with paragraphs 3, 4 and 12 of the agreement of 12th July 1974 by which the party States have reached a compromise on certain matters of dispute. There has been a serious controversy between the party States as to what is the utilisable quantum of waters in Narmada at Navagam Dam site on the basis of 75 per cent dependability. This is the subject-matter of issue No. 7 before the Tribunal. The party States have now agreed that the net available quantity of Narmada waters for use with 75 per cent dependability should be assessed at 28 million acre feet. It is true that the Inter-State Water Disputes Act does not contain any provision specifically authorising the Tribunal to record a compromise or to make an award in terms thereof corresponding to the provision of Order 23, rule 3 of Civil Procedure Code. But nothing in the Act or Rules precludes this Tribunal from accepting the agreement of the parties on any particular issues and giving a decision in terms of that agreement and from incorporating it in the report of the Tribunal forwarded to the Central Government under section 5(2) of the Act. This view is borne out by the decision of the Supreme Court in *The State of Bihar* v. *D.N. Ganguly & Others* 1959 S.C.R. 1191 at 1202 and 1203. We accordingly accept the agreement of the party States on this issue (that is, issue 7) and give our decision that the utilisable quantum of waters in Narmada at Navagam Dam site on the basis of 75 per cent dependability should be assessed at 28 million acre feet.

In para 4 of the agreement, the party States say that the requirements of Maharashtra and Rajasthan are .25 million acre feet and .5 million acre feet respectively and the Tribunal in determining the disputes referred to it may proceed on the basis that Maharashtra may be allotted .25 million acre feet and Rajasthan may be allotted .5 million acre feet for use in their respective territories without prejudice to the level of the Navagam Canal. As regards the allotment of share to Rajasthan, there has been serious dispute between the party States and the Central Government had to make a reference of the dispute to the Tribunal under section 5(1) of the 1956 Act *vide* Reference No. 10/1/69-WD dated 16th October, 1969. The case of Madhya Pradesh and Maharashtra was that Rajasthan had no right to a share of Narmada waters as it was a non-riparian State. In its preliminary decision given by the Tribunal on 23rd February, 1972, it was held as a matter of law that Rajasthan being a non-riparian State was not entitled to a share of the waters of the inter-State river Narmada. Against the decision of the Tribunal, Rajasthan had taken appeal to the Supreme Court. This appeal has now been withdrawn. The decision of the Tribunal has, therefore, become final. But the legal position has changed as a result of the subsequent agreement between the party States dated 12th July, 1974. As a result of this agreement, Rajasthan has now become entitled to a share of the Narmada waters to the extent of .5 million acre feet. The right of Rajasthan to a share of the Narmada water is now based on the agreement between the party States and not on the general law as set out in the decision of the Tribunal dated 23rd February 1972. As the Indus Commission has pointed out in its report, the most satisfactory settlement of dispute of waters of inter-State rivers is by agreement and once there is such an agreement, that itself furnishes the law governing the rights of the several party States until a new agreement is concluded *vide* page 10 paragraph 14 of the Indus Commission Report, Vol 1. The same principle is enunciated in the judgement of the International Court of Justice, 1937, in the Meuse Dispute between Holland and Belgium (Diversion of water from the Meuse—P.C.I.J. Series A/B No. 70, 1937). We therefore accept the agreement of the parties in this regard and we decide that Rajasthan

is entitled to a share of .5 million acre feet of Narmada waters as a result of the agreement of the party States dated 12-7-1974. In other words, this is our decision on Issue No. 8 and Issue No. 7 so far as it concerns Rajasthan.

As regards Maharashtra also, we accept the agreement and give our decision that Maharashtra is entitled to .25 million acre feet as its rightful share of the utilisable quantum of Narmada waters. This is our decision on Issue 7 so far as it concerns Maharashtra.

In clause 12 of the agreement, the party States have agreed that Rajasthan shall be a party to the further proceedings before the Tribunal without prejudice to the legal position regarding the rights of a non-riparian State. We accept this clause of the agreement and direct that Rajasthan shall be a party to the further proceedings before the Tribunal in terms of the agreement.

In clause 9 of the agreement, the party States pray that Issues Nos. 6, 7(b), 13 and 17 may be suitably modified as follows :–

Issue No.

6. What should be the height of the dam at Navagam across the Narmada water and what should be the level of the canal at its offtake with adequate discharge, carrying capacity from the Navagam Dam?

7(b). How and on what basis should equitable apportionment of the 27.25 million acre feet of water be made between the States of Madhya Pradesh and Gujarat? What should be the allocation to either State?.

13. Should any directions be given

(a) for releases of adequate water by Madhya Pradesh below Narmadasagar for the setting up and operation of Navagam Dam;

(b) for specification of FRL and MWL of the storage at Navagam Dam and the FSL of Navagam Canal so as not to prejudicially affect the interests of Madhya Pradesh, Maharashtra or the other concerned States ;

(c) for releases by the State of Madhya Pradesh below Narmadasagar for the benefits of the States of Gujarat and Maharashtra; and

(d) for the releases by the State of Madhya Pradesh below Narmadasagar for the benefits of the State of Rajasthan.

17. Whether the costs and benefits of the Navagam project, Gujarat are required to be shared amongst the concerned States. If so, in what manner and on what terms and conditions? If not, whether Gujarat is liable to pay any, and if so, what compensation to Maharashtra and/or Madhya Pradesh for loss of power? Whether Maharashtra and/or Madhya Pradesh are entitled to any share of power because of their proposed projects, namely Jalsindhi, Harinphal and Maheshwar.

After having heard the Learned Counsel of the party States, we allow the prayer and direct that issues 6, 7(b), 13 and 17 may be modified as prayed for.

In clause 9 of the agreement, the party States have prayed that issues Nos. 4, 5, 7, 7(a), 7(c), 7(d), 7(e), 7(f), 8, 10, 11, 12 and 20 may be deleted. As regards issues 4 and 5, it was stated by the Counsel for Gujarat and Madhya Pradesh that though they have applied for the deletion of these issues, the intention of the agreement is that it would be open to party States to argue the subject-matter covered by these issues when issue No. 6 is taken up for consideration. In other words, the contention of the party States is that the deletion of the issue does not mean that these issues are given up but they will be argued under another head, namely, under issue No 6. We accept the prayer of the party States and direct that issues 4 and 5 may be deleted subject to the reservation that it will be open to the party States to argue the subject-matter covered by these issues under modified issue 6.

Issues 7 and 7(a): Issue Nos. 7 and 7(a) may be deleted as prayed for by the party States. With regard to this issue we have already given our decision on the net available quantity of Narmada waters for use with 75 per cent dependability on the basis of the agreement of the parties. So far as the allocation of this quantity of water among the party States is concerned, we have already given our decision that Rajasthan is entitled to .5 million acre feet and Maharashtra is entitled to .25 million acre feet as their rightful share in view of the agreement between the party States dated 12th July, 1974.

Issues 7(c), 7(d), 7(e) and 7(f): We pointed out to the Learned Counsel for the party States during argument that it is essential that the matters covered by issues 7(c), 7(d), 7(e) and 7(f) should as a matter of law be taken into account in determining the equitable apportionment of the

available waters of Narmada between different States under the modified issue No. 7(b). In this context we referred to Article V of the Helsinki Rules setting out the relevant factors which are to be considered while determining the reasonable and equitable share of each basin State in the beneficial use of the waters of an inter-State river. The Learned Counsel for all the party States agreed with this legal proposition and prayed that these issues may be deleted as prayed for but it should be made clear in our order that it will be open to the party States to argue the subject-matter covered by issues 7(c), 7(d), 7(e) and 7(f) while dealing the issue 7(b). The submission of all the four party States is that deletion of issues 7(c), 7(d), 7(e) and 7(f) does not mean that these issues are given up but the deletion is only made for compression of the language and for bringing about a reduction of issues. We accept the prayer of the party States and order that issues 7(c), 7(d), 7(e) and 7(f) may be deleted but subject to the qualification that it is open to the party States to argue the subject-matter covered by the issues 7(c), 7(d), 7(e) and 7(f) while arguing issue 7(b).

Issue 8: This issue may be deleted as prayed for. We have already given our decision that Rajasthan is entitled to .5 million acre feet of the utilisable quantum of Narmada waters at 75 per cent dependability as stipulated in clause 4 of the agreement.

A question was raised during the hearing of the case whether this Tribunal could give a decision on the subject-matter of an issue which the parties have applied for deletion in these CMPs. In our opinion, the Tribunal is empowered under section 5(2) of the 1956 Act to adjudicate and give a decision or finding on any matters referred to it irrespective of the presence or absence of a formal issue in that matter and incorporate its decision or finding in its report to the Central Government under section 5(2) of the 1956 Act. The Learned Counsels for Madhya Pradesh, Gujarat, Maharashtra and Rajasthan have all agreed that this view represents the correct position in law.

Issues No. 10, 11, 12 *and* 20: Gujarat says that these issues may be deleted but submits that it should be made clear that it will be open to Gujarat to argue the subject-matter of all these issues under issues 6, 7(b) and 21. Madhya Pradesh, Maharashtra and Rajasthan also said that these issues may be deleted but it should be open to them also to argue these issues under any other issue. We accept the prayer of the party States and order that issues 10, 11, 12 and 20 may be deleted subject to the qualification that it will be open to Gujarat, Madhya Pradesh, Maharashtra and Rajasthan to argue the subject-matter of these issues under issues 6, 7(b), 21 or any other issue.

Sd/-
(V. RAMASWAMI)
Chairman

Sd/-
(V. P. GOPALAN NAMBIYAR)
Member

Sd/-
(E. VENKATESAM)
Member

NEW DELHI;
8*th October*, 1974.

AGREEMENT DATED JULY 22, 1972, AMONGST THE CHIEF MINISTERS OF MADHYA PRADESH, GUJARAT, MAHARA SHTRA AND RAJASTHAN

NARMADA DEVELOPMENT

1. Though Narmada is one of the best rivers of the country with a great potential, it has not been developed even after Independence. Government of India is requested to give priority to the development of this great river in this decade.

2. Narmada Development will result in irrigating millions of acres, development of hydro power specially for peaking purpose in a region dominated by thermal and nuclear power, excellent waterways for navigation cutting across the country and accelerated development of rich mineral resources available in its basin and vicinity. The Chief Ministers of the States concerned feel that development of Narmada should no longer be delayed in the best regional and national interests and therefore agree to the settlement of disputes connected with this river by mutual agreement and with the assistance of the Prime Minister of India.

3. The quantity of water in Narmada available for 75 per cent of the years, is assessed at about 28 million acre feet. The requirements of Maharashtra and Rajasthan for use in their territories are 0.25 and 0.5 million acre feet respectively. These are without prejudice to the level of the canal. Deducting this, the net available quantity of water for use in Madhya Pradesh and Gujarat is 27.25 million acre feet. Prime Minister of India is requested to allocate this balance of water between the States of Madhya Pradesh and Gujarat taking into account the various relevant features in both the States.

4. The various view points with regard to the height of Navagam Dam would be gone into and a suitable height may also be fixed by the Prime Minister of India.

5. After the decisions on the above referred matters are given by the Prime Minister, Chief Ministers of the States concerned will meet and finalise the arrangements for the power generation and its distribution.

6. We earnestly hope the development of Narmada will be inaugurated by laying foundation stone for one or more of the major works on Narmada on the auspicious day of 15th August, 1972.

Sd/- GHANSHYAMBHAI OZA
Chief Minister of Gujarat

Sd/- V. P. NAIK
Chief Minister of Gujarat

NEW DELHI;
July 22, 1972.

Sd/- P. C. SETHI
Chief Minister of Madhya Pradesh

Sd/- BARKATULLAH KHAN
Chief Minister of Rajasthan

NARMADA WATER DISPUTE

IT IS AGREED:—

(1) that the water dispute referred to the Narmada Water Disputes Tribunal be determined by the Tribunal on the basis of this agreement between the States of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan (hereinafter referred to as 'Madhya Pradesh', 'Maharashtra', 'Gujarat' and 'Rajasthan', respectively);

(2) that development of Narmada should no longer be delayed in the best regional and national interests;

(3) that the quantity of water in Narmada available for 75 per cent of the years be assessed at 28 million acre feet and that the Tribunal in determining the disputes referred to it do proceed on the basis of that assessment;

(4) that the requirements of Maharashtra and Rajasthan for use in their territories are 0.25 and 0.5 million acre feet, respectively and that the Tribunal in determining the disputes referred to it do proceed on the basis that the requirements of Maharashtra for use in its territories are 0.25 million acre feet and that Rajasthan will get for use in its territories 0.5 million acre feet without prejudice to the level of the canal;

(5) that the net available quantity of water for use in Madhya Pradesh and Gujarat is 27.25 million acre feet and that the Tribunal in determining the disputes referred to it do proceed on the basis that the net available quantity of water for use in Madhya Pradesh and Gujarat is 27.25 million acre feet;

(6) that the Tribunal do allocate this balance of water, namely, 27.25 million acre feet, between Madhya Pradesh and Gujarat after taking into consideration various contentions and submissions of the parties hereto;

(7) that the height of Navagam Dam be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties hereto;

(8) that the level of the canal be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties hereto;

(9) that in the light of this agreement, issue Nos. 4, 5, 7, 7(a), 7(c), 7(d), 7(e), 7(f), 8, 10, 11, 12 and 20 framed by the Tribunal on 28th January, 1971 may be deleted and that issue Nos. 6, 7(b), 13 and 17 may be suitably modified as in the Annexure to this Agreement. All other issues may be determined by the Tribunal after taking into consideration the various contentions and submissions of the parties hereto;

(10) that for the limited purpose of effectuating the terms of this agreement, Madhya Pradesh do withdraw the proceedings filed by it before the Hon'ble the Supreme Court and arising out of the decision of the Tribunal dated 23rd February, 1972 on the preliminary issues of law;

(11) that for the limited purpose of effectuating the terms of this agreement, Rajasthan do withdraw the proceedings filed by it before the Hon'ble the Supreme Court and arising out of the decision of the Tribunal dated 23rd February, 1972 on the preliminary issues of law; and

(12) that Rajasthan shall be a party to the further proceedings before the Tribunal, without prejudice to the legal position regarding the rights of a non-reparian State.

Dated this Twelfth day of July, 1974.

Sd/-
Chief Minister of Madhya Pradesh
for the State of Madhya Pradesh.

Sd/-
V. P. NAIK 12-7-74
Chief Minister of Maharashtra
for the State of Maharashtra.

Sd/-
12-7-1974
Adviser to the Governor
for the State of Gujarat.

Sd/-
Chief Minister of Rajasthan
for the State of Rajasthan.

NEW DELHI

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF: Water Disputes regarding the Inter-State River Narmada and the River Valley Thereof.

AND

IN THE MATTER OF:

The State of Gujarat .. *Complainant*

AGAINST

The State of Madhya Pradesh and others. .. *Respondents*

SUBJECT: *Statement by The Union of India*

May it please this Honourable Tribunal,

1. This Honourable Tribunal issued Notice to the Union of India on 13th September, 1976 for considering the machinery that might be set up for carrying out the final decision of the Honourable Tribunal. The Honourable Tribunal had considered it expedient that the Union of India should be represented before this Honourable Tribunal at the time of hearing of the said subject.

2. Accordingly, the Counsel for Union of India appeared before the Hon'ble Tribunal. During the course of the meeting of the Tribunal, however, the Counsel was called upon to express views on the following additional items:

(i) Norms of compensation and rehabilitation of oustees.

(ii) Whether the river Narmada is a public navigable river in a legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be.

3. By its order dated 29-8-1977, this Hon'ble Tribunal permitted the Counsel for the Union of India to file a CMP in regard to the following three matters on or before 7-9-1977:—

(i) Norms of compensation and rehabilitation of oustees;

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be; and

(iii) Representation of the Government of India in the machinery proposed to be set up by the Tribunal for carrying out its decision.

4. Regarding item (iii), namely,

Representation of the Government of India in the machinery proposed to be set up by the Tribunal for carrying out its decision;

the Government of India submits that it will do its best to implement the decision of this Hon'ble Tribunal and would also be agreeable to participation by the Government of India in the proposed machinery, if so directed by this Hon'ble Tribunal.

5. Regarding items (i) and (ii), namely,

(i) Norms of compensation and rehabilitation of oustees;

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be;

the Government of India submits that these matters require further consideration. The Government of India, therefore, requires a period of five weeks to enable it to file a CMP in respect of these matters.

6. It is respectfully submitted that the aforementioned period of extension is being sought in view of the further fact that the question of rehabilitation of oustees came up for the first time in the hearing of this Hon'ble Tribunal on 29-8-1977.

7. It is, therefore, very respectfully submitted that in regard to items (i) and (ii) aforementioned, these matters may be adjourned to 14-10-1977 or to a later date as may be convenient to this Hon'ble Tribunal.

Settled by: SMT. SHYAMLA PAPPU
Senior Counsel
for the Govt. of India.

Dated: 7-9-1977.

Through: V. P. NANDA
Counsel for the Govt. of India.

Issue No.

6. What should be the height of the dam at Navagam across the Narmada water and what should be the level of the canal at its off-take with adequate discharge carrying capacity from the Navagam Dam?

7. (b) How and on what basis should equitable apportionment of the 27.25 million acre feet of water be made between the States of Madhya Pradesh and Gujarat ? What should be the allocation to either State?

13. Should any directions be given

(a) for releases of adequate water by Madhya Pradesh below Narmada Sagar for the setting up and operation of Navagam Dam;

(b) for specification of FRL and MWL of the storage at Navagam Dam and the FSL of Navagam Canal so as not to prejudicially affect the interests of Madhya Pradesh, Maharashtra or the other concerned States;

(c) for releases by the State of Madhya Pradesh below Narmada Sagar for the benefits of the States of Gujarat and Maharashtra;

(d) for the releases by the State of Madhya Pradesh below Narmada Sagar for the benefits of the State of Rajasthan?

17. Whether the costs and benefits of the Navagam Project of Gujarat are required to be shared amongst the concerned States? If so, in what manner and on what terms and conditions? If not, whether Gujarat is liable to pay any, and if so, what compensation to Maharashtra and/or Madhya Pradesh for loss of power? Whether Maharashtra and/or Madhya Pradesh are entitled to any share of power because of their proposed projects namely, Jalsindhi, Harinphal and Maheshwar?

CMP No. 261/77-*NWDT*

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF: Water Disputes regarding the Inter-State River Narmada and the River Valley Thereof.

AND

IN THE MATTER OF:

The State of Gujarat .. *Complainant*

AGAINST

The State of Madhya Pradesh and others .. *Respondents*

SUBJECT:—*Statement by The Union Of India*

May it please this Honourable Tribunal,

By its order dated 29-8-1977, this Hon'ble Tribunal permitted the Counsel for the Union of India to file a CMP in regard to the following three matters on or before 7-9-1977:—

(i) Norms of compensation and rehabilitation of oustees;

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be; and

(iii) Representation of the Government of India in the machinery proposed to be set up by the Tribunal for carrying out its decision;

the Government of India submitted vide CMP No. 234/77-NWDT that it will do its best to implement the decision of this Hon'ble Tribunal and would also be agreeable to participation by the Government of India in the proposed machinery, if so directed by this Hon'ble Tribunal.

3. Regarding items (i) and (ii), namely,

(i) Norms of compensation and rehabilitation of oustees; and

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be;

the Government of India had submitted that these matters required further consideration and, therefore, prayed for more time to enable it to file another CMP in respect of these matters.

4. By its order dated 9th September, 1977, this Hon'ble Tribunal had granted time to the Union of India till 13th October, 1977 to file a CMP on the following two remaining items:—

(i) Norms of compensation and rehabilitation of oustees; and

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be.

5. Regarding item (i), namely,

(i) Norms of compensation and rehabilitation of oustees;

the Government of India submits that it is seen from the Document No. MP-886 filed by Madhya Pradesh that only telephone installations, belonging to the Union, in the territory of Madhya Pradesh are likely to be affected by the construction of a dam at Navagam. The norms of compensation for shifting and re-installation of these telephone lines, it is submitted, is for the project authorities to settle with the Posts and Telegraphs Department at the appropriate time.

With regard to norms of compensation for the submergence of the properties in Gujarat, Madhya Pradesh and Maharashtra likely to be affected by the construction of a dam at Navagam, these matters are already regulated by the existing law, namely, the Land Acquisition Act of 1894.

Regarding norms for rehabilitation of oustees, the Government of India submits that no norms

have been laid down so far by the Government of India. Further, the question of rehabilitation of oustees is a matter which essentially concerns the various States, and the Government of India submits that the norms for rehabilitation of oustees generally vary from project to project, depending upon the local conditions and no uniform norms can be laid down for this purpose. The Hon'ble Tribunal may, therefore, decide the issue in the light of the submissions made in his behalf by the States.

Settled by: SMT. SHYAMLA PAPPU
Senior Counsel
for the Govt. of India.

Dated: 13th October, 1977.

6. Regarding item (ii), namely,

(ii) Whether the River Narmada is a public navigable river in the legal sense and in whom does the bed of River Narmada vest as a matter of law i.e. whether in the Union of India or in the States concerned, namely, Madhya Pradesh, Gujarat or Maharashtra, as the case may be;

the Government of India submits that the matter is still under consideration and therefore further time may be granted to the Union of India to enable it to file another CMP in this behalf.

Through: V. P. NANDA
Counsel for the Govt. of India.

CMP 180 *of* 1974

BEFORE THE NARMADA WATER DISPUTES TRIBUNAL

IN THE MATTER OF A WATER DISPUTE REGARDING THE INTER-STATE RIVER NARMADA AND RIVER VALLEY THEREOF

AND

IN THE MATTER OF:

The State of Gujarat

Vs.

The State of Madhya Pradesh and others

To

HON'BLE SHRI V. RAMASWAMI
Chairman of the Tribunal and the other Members thereof.

May it please your Lordships,

As per minutes of the meeting of the party States with Assessors, Narmada Water Disputes Tribunal, held on 2nd September, 1974 it was decided as under :

"After some discussions, the representatives of the party States agreed that for the limited purpose of studies which may be needed in connection with the work of the Tribunal, the set of figures furnished by Madhya Pradesh for the years 1891 to 1970 may be adopted.

The yield series furnished in the Master Plan of Madhya Pradesh was based on calendar year for the years 1891 to 1948 and both calendar year and water year for the years 1949 to 1970. It was considered desirable that water year may be adopted as the basis for all studies in connection with the work of the Tribunal. The State representatives agreed to the proposal of the Assessors for this change."

It was also decided that the computations of the yields for the water years of the period 1891 to 1948 may be carried out by Madhya Pradesh. The Master Plan of Madhya Pradesh 1972 already gives the yields for the water years for the period 1949—1970.

Madhya Pradesh submits that the yields for the calendar years for the period 1891 to 1948 have been recasted by Madhya Pradesh and the series, for the *water years*, for the Mortakka and Garudeshwar sites are prepared as given in Annexures I and II of the enclosed note. The note indicates in brief, the methodology adopted, alongwith details of dependable run-off at Mortakka and Garudeshwar sites.

Madhya Pradesh prays that the water year series computed by Madhya Pradesh for the period 1891 to 1970 may be taken on record.

Submitted

(M. S. BILLORE)
Supdt. Engineer (Narmada)
Irrigation Dept. Bhopal-6
Madhya Pradesh.

DELHI,
Dated 8th Oct. 1974.

Exhibit C-2

NOTE ON (WATER YEAR) YIELD-SERIES OF NARMADA RIVER

(i) at Mortakka.

(ii) at Garudeshwar.

1.0 During the meeting of the party States with Assessors, Narmada Water Disputes Tribunal held on 2nd September, 1974, it was decided that for the limited purpose of studies which may be needed in connection with the work of the Tribunal, the set of figures furnished by Madhya Pradesh for the calendar years 1891 to 1970 may be adopted.

1.1 However, it was considered desirable that water year may be adopted as the basis for all studies in connection with the work of the Tribunal. Accordingly 1st of July has been considered as the commencement of the water-year (July-June).

2.0. *Recasting of Yield Series*

As per directions given in para 6 of the minutes of the above meeting following procedure has been adopted to work out water-year yield series at Mortakka and at Garudeshwar.

(i) Twenty-two years averages of observed monthly in-flows for the period 1948-49 to 1969-70 have been worked out separately for the months July—December and January—June. The percentages of the inflow during above set of months with reference to average calendar year inflows has been worked out from the data given in page 80-81 (for Mortakka discharge site) 82-83 (for Garudeshwar discharge site) of Vol. V. Appendix II, Flow-Data of Narmada River system, Master Plan 1972.

(ii) The inflows and their percentages as worked out are given in table below:—

Gauge site	Inflow (MAF)	% of average water year inflow
1	2	3
A. Narmada at Mortakka average inflow July—December	24·889	95·9%
Average inflow January—June	1·065	4.1%
B. Narmada at Garudeshwar average inflow July—December	29·23	95·62%
Average inflow January—June	1·34	4.38%

(iii) Inflow series for water-year has been reconstructed by applying these percentages and adding up inflow from July to December to subsequent calendar years inflow in the period January—June Col. 5 and Col. 6 of Annexure I gives water-year inflows for Mortakka and Col. 5 and Col. 6 of Annexure II gives water-year yield series at Garudeshwar.

(iv) Dependable yield on the basis of water-year series at Mortakka and Garudeshwar has been worked out as per Annexure III and IV respectively. The results are given below :—

Site	Dependability		Flows 90%
	50%	75%	
	(MAF)	(MAF)	(MAF)
A. Narmada at Mortakka	27·46	22·01	16·45
B. Narmada at Garudeshwar	33·20	27·22	19·77

These are comparable with the dependable yield on the basis of calendar year series which is reproduced below from Table 4.6, page 80 of Vol. I of Master Plan 1972.

Site on Narmada	Flow with dependability		
	50%	75%	90%
	(MAF)	(MAF)	(MAF)
(1) River at Mortakka	28·10	22·75	15·90
(2) River at Garudeshwar	33·70	26·50	18·60

ANNEXURE 1

Conversion of Annual Yield Series at Mortakka to Hydrological Year Series

Calendar year	Inflow MAF+	July to December 95·9%* MAF	Jan. to June 4.1%** MAF	Hydrological year July-June	Inflow MAF@@
1	2	3	4	5	6
1891	41·74	40·03	1·71	—	—
92	33·78	32·40	1·38	1891-92	41·41
93	37·82	36·27	1·55	92-93	33·95
94	37·46	35·92	1·54	93-94	37·81
95	19·19	18·40	0·79	94-95	36·71
96	29·66	28·44	1·22	95-96	19·62
97	24·97	23·95	1·02	96-97	29·46
98	30·00	28·77	1·23	97-98	25·18
99	3·82	3·66	0·16	98-99	28·93
1900	29·38	28·18	1·20	99-1900	4·86
01	27·38	26·26	1·12	1900-01	29·30
02	15·47	14·84	0·63	01-02	26·89
03	28·00	26·85	1·15	02-03	15·99
04	14·86	14·25	0·61	03-04	27·46
05	21·81	20·92	0·89	04-05	15·14
06	26·48	25·39	1·09	05-06	22·01
07	15·96	15·31	0·65	06-07	26·04
08	27·91	26·77	1·14	07-08	16·45
09	16·95	16·26	0·69	08-09	27·46
1910	28·50	27·33	1·17	09-1910	17·43
11	20·92	20·06	0·86	1910-11	28·19
12	22·96	22·02	0·94	11-12	21·00
13	23·45	22·49	0·96	12-13	22·98
14	25·08	24·05	1·03	13-14	23·52
15	32·85	31·50	1·35	14-15	25·40
16	38·34	36·77	1·57	15-16	33·07
17	40·72	39·05	1·67	16-17	38·44
18	15·96	15·31	0·65	17-18	39·70
19	44·37	42·55	1·82	18-19	17·13
1920	16·18	15·52	0·66	19-1920	43·21
21	23·94	22·96	0·98	1920-21	16·50
22	24·92	23·90	1·02	21-22	23·98
23	37·07	35·55	1·52	22-23	25·42
24	28·71	27·53	1.18	23-24	36·73
25	24·49	23·49	1.00	24-25	28.53
26	39.89	38·25	1·64	25-26	25·13
27	25·41	24.37	1·04	26-27	39·29
28	26·91	25·81	1.10	27-28	25.47
29	26·74	25·64	1·10	28-29	26·91
1930	29·63	28·42	1.21	29-1930	26·85
31	37·91	36.36	1.55	1930-31	29·97
32	28·99	27·80	1.19	31-32	37·55

1	2	3	4	5	6
1933	37·71	36·16	1·55	1932-33	29.35
34	38.21	36·64	1·57	33-34	37·73
35	28.10	26·95	1·15	34-35	37·39
36	36·06	34·58	1.48	35-36	28·43
37	37·50	35·96	1·54	36-37	36·12
38	35·40	33·95	1·45	37-38	37·41
39	31·33	30·05	1·28	38-39	35·23
1940	32·42	31.09	1·33	39-1940	31·38
41	14·10	13.52	0·58	1940-41	31·67
42	38·71	37·12	1·59	41-42	15·11
43	35·59	34·13	1·46	42-43	38·58
44	49·50	47·47	2·03	43-44	36·16
45	32·32	30·99	1·33	44-45	48·80
46	36·24	34·75	1·49	45-46	32·48
47	36·01	34·53	1·48	46-47	36·23
48	36·49	34·99	1·50	47-48	36·08
49	Column 6 directly computed from actual observed monthly inflows			48-49	35·874
1950				49-1950	27·459
51				1950-51	26·000
52				51-52	13·786
53				52-53	20·667
54				53-54	21·627
55				54-55	24·976
56				55-56	35·800
57				56-57	33·439
58				57-58	17·747
59				58-59	24·544
1960				59-1960	42·271
61				1960-61	26·188
62				61-62	49·621
63				62-63	21·462
64				63-64	21·450
65				64-65	26·919
66				65-66	8·633
67				66-67	13·307
68				67-68	24.449
69				68-69	21·945
1970				69-1970	32·819

+Figures taken from page 90 of Vol. V of Master Plan 1972.

*Average percentage inflows has been adopted from July to December as per page 80-81 of Vol. V of Master Plan 1972.

**Average percentage of inflows from January to June for the years 1948 to 1970 has been adopted as per page 80-81 of Vol. V of Master Plan 1972.

@@ Diagonal downward total of Col. 3 and Col. 4 except for years from 1948-49 to 1969-70 for which the figures are taken from page 80-81 of the Vol. V of Master Plan 1972.

ANNEXURE II

Annual Yield Series at Gurudeshwar

(Hydrological year)

Calendar year	Inflow MAF+	July to Dec. 95.62%* MAF	Jan. to June 4.38%** MAF	Hydrological year July-June	Inflow MAF@@
1	2	3	4	5	6
1891	55.70	53.26	2.44	—	—
92	43·75	41.83	1.92	1891-92	55.18
93	46·73	44.68	2.05	92-93	43.88
94	46.15	44.13	2.02	93-94	46.70
95	22·32	21.34	0.98	94-95	45.11
96	34·18	32.68	1.50	95-96	22.84
97	28·76	27.50	1.26	96-97	33.94
98	36.60	35.00	1.60	97-98	29.10
99	3.44	3.29	0.15	98-99	35.15
1900	34.64	33.12	1·52	99-1900	4.81
01	30.47	29.14	1.33	1900-01	34.45
02	19.48	18.63	0.05	01-02	29.99
03	33.61	32·14	1.47	02-03	20.10
04	17.87	17.09	0.27	03-04	32.92
05	27.16	25.97	1.19	04-05	18.28
06	34.15	32.65	1.50	05-06	27.47
07	18.18	17.38	0.80	06-07	33.45
08	32.41	30·99	1.42	07-08	18.80
09	22.00	21.04	0·96	08-09	31.95
1910	36.63	35.02	1.61	09-1910	22.65
11	22.75	21.75	1.00	1910-11	36.02
12	27.26	26.07	1.19	11-12	22.94
13	30.19	28.87	1.32	12-13	27.19
14	30.96	29.60	1.36	13-14	30.23
15	39.58	37.85	1.73	14-15	31.33
16	46.97	44.91	2.06	15-16	39.91
17	50.52	48.31	2.21	16-17	47.12
18	18.14	17.35	0.79	17-18	49.10
19	55.17	52.75	2.42	18-19	19.77
1920	20.98	20.06	0.92	19-1920	53.67
21	30.46	29.13	1.33	1920-21	21.39
22	31.02	29.66	1.36	21-22	30.49
23	44.39	42.45	1.94	22-23	31.60
24	36.08	34.50	1.58	23-24	44.03
25	28.90	27.63	1.27	24-25	35.77
26	47.50	45.52	2.08	25-26	29.71
27	32.17	30.76	1.41	26-27	46.83
28	33.25	31.79	1.46	27-28	32.22
29	32.21	30.80	1.41	28-29	33.20

1	2	3	4	5	6
1930	37.31	35.68	1.63	29-1930	32.43
31	46.87	44.83	2.05	1930-31	37.73
32	35.35	33.80	1.55	31-32	46.37
33	47.23	45.16	2.07	32-33	35.87
34	44.29	42.35	1.94	33-34	47.10
35	31.44	30.06	1.38	34-35	43.73
36	41.18	39.38	1.80	35-36	31.86
37	43.28	41.38	1.90	36-37	41.28
38	41.80	39.97	1.83	37-38	43.21
39	35.20	33.66	1.54	38-39	41.51
1940	38.95	37·24	1.71	39-1940	35.37
41	16·84	16·10	0·74	1940-41	37·98
42	46·16	44·14	2.02	41-42	18·12
43	41·61	39·79	1.82	42-43	45·96
44	61·00	58·33	2.67	43-44	42·46
45	38·44	36·76	1.68	44-45	60·01
46	44·82	42·86	1·96	45-46	38·72
47	41·69	39·86	1·83	46-47	44·69
48	43·32	41·42	1·90	47-48	41·76
49	Column 6 directly computed from actual observed monthly flows			48-49	42·822
1950				49-1950	33·696
51				1950-51	32·983
52				51-52	16·435
53				52-53	21·520
54				53-54	23.037
55				54-55	31·482
56				55-56	40.578
57				56-57	35·314
58				57-58	19·839
59				58-59	27·222
1960				59-1960	53·970
61				1960-61	29·049
62				61-62	61·230
63				62-63	35·065
64				63-64	23·289
65	Column 6 directly computed from actual observed monthly inflows			64-65	27·984
66				65-66	10·035
67				66-67	15·728
68				67-68	30·487
69				68-69	27·118
1970				69-1970	43·669

+Figures taken from page 91 of Vol. V of Master Plan 1972.

*Average percentage of inflows has been adopted from July to December as per page 82-83 of Vol. V of Master Plan 1972.

**Average percentage of inflows from January to June for the years 1948 to 1970 has been adopted as per page 61 of Vol. V of Master Plan 1972.

@@Diagonal downward total of Col. 3 and Col. 4 except for years from 1948-49 to 1969-70 for which the figures are taken from page 83 of Vol. V of Master Plan 1972.

ANNEXURE III

Dependable Run-off Of Mortakka

Year	Run-off in Descending Order	Frequency 'n'	m	Plotting position $\frac{m}{n+1} \times 100$
1	2	3	4	5
1962-63	49·621	1	1	1·25
1944-45	48.80	1	2	2·50
1919-20	43.210	1	3	3·75
1959-60	42.271	1	4	5·00
1891-92	41.41	1	5	6.25
1917-18	39·70	1	6	7.50
1926-27	39·29	1	7	8.75
1942-43	38·58	1	8	10·00
1916-17	38·44	1	9	11·25
1893-94	37·81	1	10	12.50
1934-35	37·79	1	11	13·75
1931-32	37·75	1	12	15.00
1933-34	37·73	1	13	16·25
1937-38	37·41	1	14	17.50
1923-24	36·73	1	15	18·75
1894-95	36·71	1	16	20·00
1946-47	36.23	1	17	21·25
1943-44	36·16	1	18	22·50
1936-37	36·12	1	19	23·75
1947-48	36.03	1	20	25·00
1948-49	35·874	1	21	26·25
1955-56	35·800	1	22	27·50
1938-39	35.230	1	23	29·75
1892-93	33·95	1	24	30·00
1956-57	33·439	1	25	31·25
1915-16	33·07	1	26	32·50
1969-70	32·819	1	27	33·75
1945-46	32·48	1	28	35·00
1940-41	31·67	1	29	36.25
1939-40	31·38	1	30	37.50
1930-31	29·97	1	31	38.75
1896-97	29·46	1	32	40.00
1932-33	29·35	1	33	41.25
1900-01	29·30	1	34	42.50
1898-99	28·93	1	35	43.75
1924-25	28·53	1	36	45.00
1935-36	28·43	1	37	46·25
1910-11	28.19	1	38	47.50
1903-04	27·46	—	39	—
1908-09	27.46	1	40	50·00
1949-50	27.459	1	41	51.25
1964-65	26.919	1	42	52·50
1928-29	26.910	1	43	53·75
1901-02	26·890	1	44	55.00

1	2	3	4	5
1929-30	26·85	1	45	56·25
1960-61	26·188	1	46	57.50
1906-07	26.04	1	47	58.75
1950-51	26·00	1	48	60 00
1927-28	25·47	1	49	61·25
1922-23	25·42	1	50	62·50
1914-15	25·40	1	51	63·75
1897-98	25·18	1	52	65·00
1925-26	25·13	1	53	66·25
1954-55	24·976	1	54	67·50
1958-59	24.544	1	55	68·75
1967-68	24·449	1	56	70·00
1921-22	23·98	1	57	71·25
1913-14	23·52	1	58	72·50
1912-13	22·98	1	59	73·75
1905-06	22·01	1	60	75·00
1968-69	21·945	1	61	76·25
1953-54	21·627	1	62	77.50
1962-63	21·462	1	63	78·75
1963-64	21·450	1	64	80·00
1911-12	21·00	1	65	81·25
1952-53	20·667	1	66	82·50
1895-96	19·62	1	67	83·75
1957-58	17.747	1	68	85·00
1909 10	17·43	1	69	86·25
1918-19	17·13	1	70	87.50
1920-21	16·50	1	71	88·75
1907-08	16·45	1	72	90·00
1902-03	15·99	1	73	91·25
1904-05	15·14	1	74	92·50
1941-42	15·11	1	75	93·75
1951-52	13·786	1	76	95·00
1966-67	13.307	1	77	96·25
1965-66	8·633	1	78	97·50
1899-1900	4.86	1	79	98·75

m S. No. of a particular year when arranged in descending order.

n=79

ANNEXURE IV

Dependable Run-off At Gurudeshwar

Year	Run-off in Descending Order	Frequency 'n'	m	Plotting position $\frac{m}{n+1} \times 100$
1	2	3	4	5
1961-62	61·230	1	1	1·25
1944-45	60·010	1	2	2·50
1891-92	55·18	1	3	3·75
1959-60	53·97	1	4	5·00
1919-20	53·67	1	5	6·25
1917-18	49·10	1	6	7·50
1916-17	47·12	1	7	8·75
1933-34	47·10	1	8	10·00
1926-27	46,83	1	9	11·25
1893-94	46·70	1	10	12·50
1931-32	46·37	1	11	13·75
1942-43	45·96	1	12	15·00
1894-95	45·11	1	13	16·25
1946-47	44·69	1	14	17·50
1923-24	44·03	1	15	18·75
1892-93	43·88	1	16	20·00
1934-35	43·73	1	17	21·25
1969-70	46·669	1	18	22·50
1937-38	43·21	1	19	23·75
1948-49	42·822	1	20	25·00
1943-44	42·46	1	21	26·25
1947-48	41·76	1	22	27·50
1938-39	41·51	1	23	28·75
1936-37	41·28	1	24	30·00
1955-56	40·578	1	25	31·25
1915-16	39·91	1	26	32·50
1945-46	38·72	1	27	33·75
1940-41	37·98	1	28	35·00
1930-31	37·73	1	29	36·25
1910-11	36·02	1	30	37·50
1932-33	35.87	1	31	38·75
1924-25	35·77	1	32	40·00
1939-40	35·37	1	33	41·25
1956-57	35·314	1	34	42·50
1898-99	35·15	1	35	43·75
1900-01	35·45	1	36	45·00
1896-97	33·94	1	37	46·25
1949-50	33·696	1	38	47·50
1906-07	33·45	1	39	48·75
1928-29	33·20	1	40	50·00
1950-51	32·983	1	41	51·25
1903-04	32·92	1	42	52·50
1929-30	32·43	1	43	53·75

1	2	3	4	5.
1927-28	32·22	1	44	55·00
1908-09	31·95	1	45	56·25
1935-36	31·86	1	46	57·50
1922-23	31·60	1	47	58·75
1954-55	31·482	1	48	60·00
1914-15	31·33	1	49	61·25
1921-22	30·49	1	50	62·50
1967-68	30·487	1	51	63·75
1913-14	30·23	1	52	65·00
1901-02	29·99	1	53	66·25
1925-26	29·71	1	54	67·50
1897-98	29.10	1	55	68.75
1960-61	29.049	1	56	70.00
1964-65	27.984	1	57	71.25
1905-06	27·47	1	58	72·50
1912-13	27·39	1	59	73·75
1958-59	27·222	1	60	75·00
1968-69	27·118	1	61	76·25
1962-63	25·065	1	62	77·50
1963-64	23·289	1	63	78·75
1953-54	23·037	1	64	80·00
1911-12	22·94	1	65	81·25
1895-96	22·84	1	66	82·50
1909-10	22·65	1	67	83·75
1952-53	21·52	1	68	85·00
1920-21	21·39	1	69	86·25
1902-03	20.10	1	70	87·50
1957-58	19·839	1	71	88·75
1918-19	19·77	1	72	90·00
1907-08	18·80	1	73	91·25
1904-05	18·28	1	74	92·50
1941-42	18·12	1	75	93·75
1951-52	16·435	1	76	95·00
1966-67	15·728	1	77	96·25
1965-66	10·035	1	78	97·50
1899-1900	4·81	1	79	98·75

m S. No. of particular year when arranged in descending order.

n=79

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