

Cauvery Water Disputes Tribunal AIR 1992 SC 522: Case Analysis

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Abstract

It was surely to avoid anarchism that any country swore to have "Law." However, a law not implemented or enforced properly is even worse. Perhaps this is the reason why the independence of the judiciary has always been emphasized by the most revered jurists. The case that has been analyzed in this article is a clear manifestation of the extent of protection and justice an independent judiciary can ensure. It acquaints us with how the judiciary does not let the executive misuse its powers and safeguards the interests of people. Second, it also establishes the prudence of the framers of our Constitution when they chose a quasi-federal structure for our nation, wherein states are bound by the apex court and cannot act arbitrary under the guise of state interest. In the present case, there is a dispute over the waters of the Cauvery river among the States of Karnataka, Kerala, Tamil Nadu, and the Union Territory of Pondicherry. The State of Karnataka, being an upper-riparian state, tries to exploit the waters of the Cauvery in its own favor thereby depriving others of its use. In fact, it went to the extent of enacting legislation having effect above judiciary. This is the point where the role of an independent judiciary becomes inevitable. Had there been strict federalism, the dispute between two states over the waters of a river would have killed the masses in a water crisis. Being independent entities, the state would have paid no heed to the interests of the people of other states. But as our system is quasi-federal, states had to abide by the decision of the honorable Supreme Court, which decided in favor of people and not states. It ensured an equitable distribution of waters among the four states by enforcing the provisions of the Constitution, existing legislations, and the decisions of the Tribunal constituted on this behalf. Although the case relates to Article 143 and is actually nothing but a reply to the questions asked by the President, it gives a complete account of the matter and at the same time clarifies the existing questions of law.

Keywords: Inter-state, water-dispute, tribunal, ordinance, interim relief

INTRODUCTION

The case deals mainly with a case under Article 143, which empowers the President to consult the Supreme Court when he thinks that a question of law has arisen. Here, three questions were referred to the honorable court for its opinion by the President. The dispute relates to the Cauvery Water Dispute among the states, namely Karnataka, Kerala, Tamil Nadu, and the Union territory of Pondicherry [1]. Although Article 262 makes a specific provision for inter-state water disputes and the matter had already

been referred to a tribunal under the same, the Supreme Court's opinion was needed as questions of law had arisen on the powers and jurisdiction of the tribunal itself.

Karnataka, being the upper riparian state, regulated the flow of the inter-state river Cauvery to its own benefit, which many times deprived Tamil Nadu and Pondicherry of its waters, making the lives of people difficult there. So, the aggrieved parties approached the Supreme Court to direct the Central Government to constitute a tribunal under the Inter-

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state Water Dispute Act, 1956, made under Article 262 by the Parliament, and to refer the matter to it [2]. Accordingly, the Tribunal was constituted, a dispute was referred to it, and its proceedings began. The twist came when Tamil Nadu and Pondicherry applied for interim relief because Karnataka raised a question of law that the Tribunal had no power to grant interim relief. However, after a green signal from Supreme Court, the Tribunal granted interim relief, which was again challenged by Karnataka on several grounds. The question of law therefore that arose was: Whether the Tribunal possessed the power to grant interim relief when matter is (a) referred to it and (b) not referred to it. Another question was pertaining to the interim order of the Tribunal being a report or decision under Section 5(2) of the Act and its requirement of being published by the Central Government.

Tribunal's interim order was followed by an Ordinance issued by the Governor of Karnataka which became an Act subsequently. The Ordinance was passed just a month after the interim order. It empowered Karnataka Government to use Cauvery water as per its wish against the interim order of the Tribunal and declared its effect to be above any Tribunal or Court. So, the question of constitutional validity of this ordinance also arose. All these questions of law, which had acquired public importance were referred to the Supreme Court by the President.

FACTS

The river Cauvery is an inter-state river primarily flowing from the state of Karnataka, which is the upper riparian state, to the state of Tamil Nadu, which is the lower riparian state. However, the State of Kerala and the Union Territory of Pondicherry, too, benefitted from its water. There were two agreements in 1892 and 1924, and the last agreement had expired in 1974 [3]. The State of Karnataka impounded all the flows in its reservoirs. Only after its reservoirs were filled up, the surplus flows were let down. This badly affected life, irrigation, and agriculture in the state of Tamil Nadu. Karnataka was also increasing its ayacuts through new projects.

Being aggrieved, the state of Tamil Nadu by the virtue of Section 3 of the Inter-State Water Dispute Act, 1956, requested the Central Government to constitute a Tribunal and to refer the dispute to the same for adjudicating [4]. It also filed an application for interim reliefs along with the aforesaid request. Accordingly, the Union Government constituted the Cauvery Water Disputes Tribunal and the tribunal began its proceedings for the main dispute. Meanwhile, an emergency arose in Tamil Nadu for survival of samba crop and it filed an urgent petition for interim relief.

A preliminary objection was raised by both Karnataka and Kerala as to the jurisdiction of the Tribunal to hear the said petition and grant any interim relief. They based their objection on the ground that the powers of the tribunal were limited and matter for interim relief was not referred to it. As a result, the state of Tamil Nadu filed a Special Leave Petition before the honorable Supreme Court of India under Article 136 of the Indian Constitution [5]. The apex court observed that the Tribunal had committed a grave error in the sense that it has not read the main paragraph of the request, which included the request for the efficient and speedy action referring the dispute to the Tribunal. The Tribunal was, therefore, directed to hear and decide the application for interim relief by the court.

Having heard the application, in obedience to the honorable court's direction, the Tribunal granted an interim relief. It made an order that the first, the state of Karnataka shall release water and ensure that 205 TMC water is available in Mettur reservoir of Tamil Nadu yearly from June to May; second, the monthly quota of water shall be released by it in four equal instalments every week; and third, it shall not increase its area under irrigation of Cauvery river beyond the existing 11.2 lakh acres. Besides, the Tribunal also directed the State of Tamil Nadu to provide 6 TMC of water to the Union Territory of Pondicherry in the regulated manner. These orders as interim reliefs were to be operated by the four States until the final adjudication of the dispute [6].

An Ordinance known as, "The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991" was promulgated by the Governor of Karnataka on July 25, 1991, which brought a new twist in the dispute [7]. Section 3 Clause (2) of the said Ordinance laid down that the Government of Karnataka may draw

such quantity of water from the river Cauvery in such a manner and during such intervals as it would think fit and appropriate. In addition, if any other Ordinance or any rule is made under the said Ordinance, it would have an overriding effect over any order, report, or decision of any court or Tribunal. It would be immaterial whether the such order rule or decision was made before or after the said Ordinance. Only exception to this Clause 2 of Section 3 of the said Ordinance would be—Section 5(2) and 6 of the Inter-State Water Dispute Act, 1956. In fact, the State of Karnataka filed a suit under Article 131 against the other three for a declaration that the direction made by the Tribunal granting interim relief lacked jurisdiction and therefore was null and void.

In the context of aforementioned developments, the President invoked his powers under Article 143(1) of the Constitution of India and referred the following questions to the honorable Supreme Court of India for consideration and report thereon:

1. Whether the Ordinance issued by the Governor of Karnataka and its provisions are in consonance with the Constitution of India?
2. Whether the Order of Tribunal can be called a report and a decision within the meaning of section 5(2) of the Inter-State Water Dispute Act, 1956?
 - i. Whether the Central Government is required to publish the Order of the Tribunal so as to ensure its effectiveness?
 - ii. Whether the Water Dispute Tribunal constituted under the Act possesses the competence to grant any interim relief to the parties to the dispute when a reference for such relief has been made by the Central Government?

CONTENTIONS

State of Karnataka

1. With regard to Question 1, the onus lies heavily on the party challenging the constitutional validity of the Ordinance to show that it is ultra vires the constitution.
2. The legislation in question is covered under Entry 17 and entries 14 and 18 of the State List in the Seventh Schedule of the Constitution of India. The law-making power of the state is only subject to the Entry 56 of the Union List and that too only to the extent to which the Parliament declares it to be in the interest of the public and thus ought to go under the control of the Centre. But it does not deny to the State Legislature the power to legislate under entry 17 [8].
3. Parliament only enacted the River Boards Act, 1956 under Entry 56 but only Central Government gained the power to set up a River Board to take under its control the regulation and development of inter-state river without restricting the law-making power under Entry 17 in any manner. In the case at hand, since no River Board has been constituted for Cauvery, the full law-making power lies with the State of Karnataka as if Entry 17 remained untouched.
4. Articles 73 or 262 is no hindrance to legislation by State legislature as Article 262 is for dispute resolution and does not attract any Entry in List I.
5. With reference to Question 2, the Inter-State Water Dispute Act, 1956 does not envisages any interim order by the Tribunal. The dispute referred to the Tribunal under section 5 of the Act must be investigated into by the Tribunal itself and a report setting out facts must be forwarded by it followed by its decision. Therefore, only one final report made after full investigation and fact-finding is envisaged within the meaning of the Act and not an interim report which might has its basis in the prima-facie view and half-baked information.
6. No investigation of the type envisaged by the Act was made before passing the interim order dated June 25, 1991, which implies that the interim order cannot be called as a “report” or a “decision” within the meaning of Section 5(2) of the Act and so, there was not obligation on the Central Government to publish the same. In fact, even if the Central Government publishes the interim order of the Tribunal in the gazette, the parties would not be bound to abide by it and it would not have the force of law.
7. As regards the Question 3, the State of Karnataka urges it to be answered in negative. In its opinion, the words, “any matter appearing to be connected with or relevant to water dispute” mentioned in Section 5(2) of the Act do not intend either reference of an interim relief or

empowering the Tribunal to grant interim relief. They suggest the reason behind being that effect of any water dispute is far-reaching and very wide in scope and so it cannot be decided in haste, in a manner, which lacks thorough investigation of data relevant to the dispute and other material including statistical information. When the Tribunal is finally adjudicating the dispute, it could act against any executive or legislative action taken by the State. But until that time, the state cannot be prevented from making optimum use of Cauvery river. Interference of the Tribunal in form of an interim order is not justified.

State of Kerala

1. The Tribunal has no power to grant interim relief due to the absence of any express provision in the Act. Even if anyhow that power could be attached, the Tribunal cannot do so unless the dispute relating to interim relief has been referred to it. In the case at hand, as the matter had not been referred, the interim order of the Tribunal cannot be regarded as a report and a decision as contemplated by Section 5(2) of the Act and therefore the publication of the same in the Official Gazette was also not required.
2. The issuance of Ordinance by the Governor of Karnataka was within his competence and the legislation fell within the scope of Entry 17; therefore, perfectly legal and constitutional and not inconsistent with Entry 56 or Section 2 of River Boards Act. The State of Kerala actually more or less supported the contentions raised by the State of Karnataka.

State of Tamil Nadu

1. Response to the third question must be in the affirmative. Its needless to say that Article 131 enables the Supreme Court to entertain the disputes between the states; however, the Article begins with the words, "subject to the provisions of the constitution" and hence, Article 262 has an overriding effect over Article 131. Article 262 specifically empowers Parliament to provide by law for adjudication of water dispute and it may exclude any court and even Supreme Court from the jurisdiction. As a result, Inter-State Water Dispute Act was enacted by the Parliament in 1956. Section 11 of the Act begins with the words, "Notwithstanding anything contained in any other law," which implies that all courts including the Supreme Court are barred from exercising any jurisdiction in the water dispute referred to the Tribunal. Therefore, a judicial function was required to be performed by the Tribunal itself as would have been performed by any other court of law. So, it was competent to grant interim relief as other courts generally are.
2. The Tribunal comprised of a chairman and two other members nominated by the Chief Justice of India from among the sitting Judges of Supreme Court or High Court and was an independent high-level machinery. It held the power to override an existing statute or interfere with a future enactment. So, it was inconceivable that it was not empowered to grant interim relief.
3. A combined reading of Article 262, Article 131, and section 11 of the Act suggests that the Tribunal was a substitute for the Supreme Court. This gave an inference that Tribunal had all the powers, which the Supreme Court had under Article 131. Therefore, though an express provision was missing, Tribunal had inherent powers to grant interim relief.
4. As far as the Question 2 was concerned, the State of Tamil Nadu argued that the question of grant of interim relief was included in the reference made to the Tribunal and the Tribunal was also directed by the Supreme Court to entertain the matter concerning interim relief as per the decision of the Supreme Court dated April 26, 1991. This decision of Supreme Court operates as *res judicata* and is binding on parties to dispute. As the order for interim relief by the Tribunal was made in pursuance of Supreme Court's directive, that is also equally binding.
5. The Tribunal is duty bound to entertain the matter of grant of interim relief if the same was included in reference made to the Tribunal and such decision would also be a report within the meaning of Section 5(2) of the Act. The publication of the decision would also be mandatory for the Central Government under section 6 of the Act. However, even if the matter for grant of interim relief was not referred to the Tribunal, it had power to grant interim relief as discussed earlier. Section 5(3) of the Act could clarify any ambiguity in the interim order.

6. As regards the Question 1, the State of Tamil Nadu contended that the Karnataka Ordinance (now Act) had an extra-territorial operation and therefore was ultra vires. The river Cauvery cannot be said to be located in one state being an inter-state river. The rights of people of Tamil Nadu would directly be infringed if the State of Karnataka has the sole competence to legislate over the river Cauvery even under Entry 17 of State List.
7. The Ordinance intended to override or neutralize the legislation by Parliament in conformity with Article 262. It would be incongruous to accord the power to enact a law in relation to a water dispute because it would destroy what a judicial body (Tribunal) had done under the law made by the Centre.
8. The legislation in question was against the rule of law and a power not contemplated by Article 262 cannot be conferred on the State. Otherwise, it would shake the very principle of justice.
9. What the State of Karnataka was doing was totally arbitrary and in total disregard of right to life of the people of Tamil Nadu who were dependent on Cauvery river for their survival. Therefore, the fundamental rights of inhabitants of Tamil Nadu accorded by Articles 14 and 21 of the Constitution of India were violated by the impugned legislation.

Union Territory of Pondicherry

1. With regard to Question 1, the Union Territory of Pondicherry contended that the power of the State legislature to make a law on the subject mentioned in Entry II was subject to Entry 56 and as a declaration in that respect has been made by the Parliament in Section 2 of River Boards Act, enactment of the impugned law was completely outside the scope of the competence of the State Legislature. Therefore, the Ordinance was unconstitutional and a piece of colorable legislation.
2. The State of Karnataka had no constitutional authority to enact the impugned legislation as an independent Tribunal had been entrusted the task of adjudicating the water dispute. In fact, when the issue is relating to a flowing river, the riparian States only have the usufructuary right and that too is subject to getting only the customary quantity of water. No ownership or proprietary right is vested to such States. Hence, legislative power under Entry 17 would also extend only to the usufructuary right.
3. The legislation in question seeks to eclipse the interim order of the Tribunal constituted under a Statute enacted under Article 262 of the Constitution of India. So, it being contradicting Central Enactments, must be void for repugnancy. Besides, it is ultra vires the constitution to the extent it is interfering with the exercise of judicial powers.
4. The impugned legislation intends to diminish the water supply to the Tamil Nadu and Pondicherry. This runs against the spirit of Articles 38 and 39 of the Constitution and also infringes the Article 21 of the Constitution.
5. As far as Question 2 was concerned, the Union Territory of Pondicherry contended that the interim order made by the Tribunal was a report under section 5(2) of the Act as Kasliwal J. had already held it to have been included in the water dispute referred to the Tribunal. As a result, it was the obligation on the Central Government to publish the order as directed by Section 6 of the Act.
6. The Question 3 must be answered in affirmative as the Section 11 of the Act took away the jurisdiction of all courts including the Supreme Court to adjudicate a water dispute. The Tribunal must be deemed to be possessing inherent power to grant interim relief, which is generally vested in all judicial bodies since a judicial function of adjudicating water dispute between two and more States was being discharged by the Tribunal. Otherwise, adjudication would be difficult.

JUDGEMENT

In answer to the first question that was referred to the Supreme Court, it observed that it was beyond the legislative competence of the State of Karnataka to enact Karnataka Cauvery Basin Irrigation

Protection Ordinance, 1991 (issued by the Governor of Karnataka on July 25th, 1991, later an Act) and hence ultra vires the Constitution. It based its observation on following rationale:

- The ordinance is in direct conflict with Article 262 and the judicial power of the State. Clause 4 of the Ordinance provided it an overriding effect over any order, report or decision of any court or Tribunal made before or after the promulgation of the Ordinance. Thus, if the Ordinance is given effect, the order for interim relief made by the Tribunal would be null.
- The Supreme court through its decision dated April 26th, 1991 had already held that the power to consider the request for granting relief vested in the Tribunal itself. But this decision of Supreme Court was challenged by the Ordinance on ground that the State had subjected itself only to the final order of Tribunal under section 5(2) of the Act and therefore the interim order made by the Tribunal would not be complied with by the State despite it being made in pursuance of the direction of the Supreme Court.
- Since the equitable rights of Tamil Nadu and Pondicherry to the water of inter-state river, Cauvery were being interfered with by the Ordinance, it had an extra-territorial operation. An inter-state river flows through more than one State. Any one State, therefore, cannot claim it be located within its territorial boundaries alone, nor can any single State can be exclusive owner called the exclusive owner of its waters. Otherwise, there would be injustice to the other States as they would be deprived of their equitable share in that river. No state has legislative power extending beyond its territories.
- The State of Karnataka by issuing an Ordinance and then enforcing it as a law seems to have taken law in its own hand and to be above law. Hence, it has violated the basic tenets of the rule of law. The desire of the State to be a judge in its own cause as well as to go against the decisions of the judicial authorities can clearly be inferred from the Ordinance, which in turn invites lawlessness and anarchy.

As regards the third question which was referred to the honorable Supreme Court of India by the President, the apex court opined that if Central Government has made a reference resulting into the constitution of a Water Dispute Tribunal under the Act, the Tribunal so constituted has the competence to grant any interim relief to the parties to the dispute. However, when the Central Government has made no reference for such relief, whether the power to grant relief lies with the Tribunal or not, is a question not arising in the facts and circumstances under which the Reference has been made. The answer to the same, therefore, is not deemed necessary to be answered by the honorable court. The first part of the third question was reasoned by the Supreme court as—the honorable court by its order dated, April, 26, 1991 had already recognized that the jurisdiction to consider the request for interim relief vested in the Tribunal since a reference had been made by the Central Government in that behalf to the Tribunal which included the same. In fact, there is no doubt on this question of law as the apex court had already pronounced its authoritative over it and therefore, the President was not required to ask the same invoking Article 143. Rather, all authorities are bound by that decision of the Supreme Court. The decisions of Supreme Court cannot be appealed against even by itself. But the honorable court can review those verdicts only under Article 137 read with Rule 1 of Order 40 of the Supreme Court Rules, 1966, subject to the conditions mentioned therein.

In regard to the Question 2, the Supreme Court advised that Tribunal's order dated June 25th, 1991 was a report and a decision as contemplated by Section 5(2) of the Inter-State Water Disputes Act, 1956. Therefore, in order to make the order effective, the Central Government was supposed to publish the same in the official Gazette in accordance with Section 6 of the Act. The scope of the investigation made by any court or a Tribunal at the stage of passing an interim order is limited unlike the one made before the final adjudication is made. However, not having all the material required to take the final decision cannot be the ground for preventing or prohibiting a court or tribunal from passing any interim order. The power of any court or tribunal to grant interim relief stands denied if such an inhibition is placed in the powers of the Tribunal or court despite the fact that Reference for such relief has been made. Therefore, it has to be held that not carrying out a complete investigation as required to be done before final report and final decision, shall not prevent the Tribunal constituted under the Act from

passing any interim order or direction or granting an interim relief pursuant to the reference. Interim orders can be passed by a tribunal or court on such material as deemed appropriate by it to the nature of the interim order.

CONCLUSION

Thus, it can be concluded that the case is all about the answers of the Supreme Court to the questions of law referred to it by the President. Out of three, it answers all except the second part of the third question. All the opinions of the Supreme Court are backed by sound reasoning. The Supreme Court rightly declares the Ordinance to be unconstitutional as its provisions are in direct conflict with Article 262 of the constitution. By empowering the Karnataka Government to make use of Cauvery water as per its wish, the Ordinance nullified the interim order of the Tribunal to release regulated amount of water. The order of Supreme Court was further challenged by the State of Karnataka, by which it was held by the apex court that the power to grant interim relief was lied with the Tribunal.

The present case is a very nice example of the exercise of advisory jurisdiction by the Supreme Court and the matter concerning water dispute in it is of great relevance even today. The Supreme Court has very categorically defined an inter-state river and jurisdiction over it of the states to make laws on it under Entry 17 of List II. An inter-state river is in state of flow and one single state cannot legislate on its use when the dispute has already been referred to a tribunal and in such a manner that it infringes the right to equality and that of life from inhabitants of other states and therefore has extra-territorial operation.

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