

SUPREME COURT OF INDIA

Atma linga Reddy

Vs.

Union of India

Writ Petition (Civil) No. 197 of 2005

(C.K. Thakker and D.K. Jain JJ.)

10.07.2008

JUDGMENT

C.K. Thakker, J.

1. The present writ petition is instituted by the petitioners as pro-bono publico and is in the nature of Public Interest Litigation (PIL). The petitioners have approached this Court by invoking Article 32 of the Constitution praying for an appropriate writ, direction or order, restraining respondent No.2 - State of Karnataka and respondent No. 4 - Sree Swarna Energy Limited, from constructing a Mini Hydro Power Project at Rajolibanda Diversion Scheme ('RDS' for short), Raichur District, Karnataka, by quashing and canceling the Power Project. A prayer is also made to direct the State of Karnataka to regulate water at RDS anicut and to ensure smooth flow of water in the RDS canal to the extent of full allocated water of 15.9 TMC to the State of Andhra Pradesh. By way of interim relief, a prayer is made to grant stay against construction of Power Project at RDS.

2. It is stated by the petitioners in the petition that they are citizens of India and are residents of District Mehboobnagar in the State of Andhra Pradesh. They are having agricultural lands in the ayacut under RDS (Rajolibanda Diversion Scheme). According to the petitioners, RDS is an inter-State irrigational project covering lands in the States of Karnataka and Andhra Pradesh. The project comprises of an ayacut of RDS on the river Tunghabadra (inter-State river), tributary of river Krishna, near Village Rajolibanda in Raichur District in the State of Karnataka. The canal is of the length of about 89 miles (143 KM) having discharge capacity of 850 cusecs of water. It was constructed by the then Nizam of Hyderabad before more than fifty years.

3. According to the petitioners, consequent upon the reorganization of States under the *States Reorganization Act, 1956*, the State of Andhra Pradesh was formed. 26/27 miles (41.6 KM) of the canal with an ayacut of 5,900 acres fell within the State of Mysore (now the State of Karnataka) while the remaining portion of about 63 miles (100.4 KM) of canal with an ayacut of 87,000 acres came within the State of Andhra Pradesh.

4. The petitioners stated that RDS caters needs of drinking and irrigation water in Mehboobnagar District, which is a drought-prone area of the State of Andhra Pradesh. About 40,000 farmers, out of which 30,000 are small and marginal farmers, are entirely dependent on the water from the said canal for drinking, irrigation, sanitation and other domestic purposes.

5. The petitioners contended that respondent No. 2 - State of Karnataka has acted illegally and unlawfully in sanctioning and approving the Power Project in favour of respondent No. 4 - a private party. Due to the said project, sufficient water for drinking purpose and for irrigation facilities is not available to the residents and farmers of District Mehboobnagar of the State of Andhra Pradesh. The petitioners in the larger interest of the public are, therefore, constrained to approach this Hon'ble Court under Article 32 of the Constitution.

6. The petitioners stated that for equitable distribution of water of river Krishna and the river valley thereof, the Central Government, by a notification dated April 10, 1969 under the *inter-State Water Disputes Act, 1956* (ACT XXXIII of 1956) (hereinafter referred to as 'the Act') created and established Krishna Water Disputes Tribunal, headed by Hon'ble Mr. Justice Bachawat, the then sitting Judge of this Hon'ble Court. The Tribunal was to resolve claims and disputes between various States and allocation of water of river Krishna and its tributaries among the riparian States. The States of Maharashtra, Karnataka and Andhra Pradesh are the riparian States of the inter- State Krishna river. Whereas the State of Karnataka is at the top, the State of Andhra Pradesh is the lowest riparian State. The Tribunal considered the competing claims of all the 24, 1973. The final report was submitted by the Tribunal on December 27, 1976 under Section 5 of the Act. The Central Government notified the final report as required by Section 6 of the Act. The decision of the Tribunal has the force of a decree of the Supreme Court (this Court).

7. It is the allegation of the petitioners that in 2002-03, the State of Karnataka granted unilateral sanction and approval to respondent No. 4 to construct and operate a Mini Hydel Power Project to generate 4.5 Mega Watts power using the water of RDS without the consent of the State of Andhra Pradesh. An agreement was entered into between the State of Karnataka (respondent No. 2) and Sree Swarna Energy Limited--a private Company (respondent No. 4) on September 26, 2003. The action was taken by respondent No. 2 - State of Karnataka illegally and unlawfully with a view to oblige respondent No.4. Apart from the State of Andhra Pradesh, approval or consent of other riparian State, i.e. the State of Maharashtra was also not taken nor was the matter referred to Central Electrical Authority (CEA) or to Central Water Commission (CWC). As the lowest riparian State, the State of Andhra Pradesh will suffer the most. Moreover, the execution of the Power Project was entrusted to a private agency. It was alleged that one Mr. Y.V. Subba Reddy, who is the Managing Director of the Company is co-brother of Dr. Y.S. Rajasekhar Reddy, Hon'ble the Chief Minister of the State of Andhra Pradesh. Thus, the project has been entrusted to respondent No. 4 with a view to oblige the said respondent. The Power Project would remain in operation for a period of thirty years from the date of commissioning of the power house and as per the term in the agreement, thereafter it would

be handed over to the State of Karnataka. But in the agreement itself, there is a stipulation for renewal at the option of the company for a further period of twenty years. Thus, virtually, the power project has been assigned to an individual operator and put in the hands of private- management for a period of half a century.

8. Petitioners have further stated that the power channel is so designed that it will take away water from pondage of RDS which would result in substantially curtailing the flow of water diverting water to Power Project. It would adversely affect 40,000 farmers, their family members and the residents in the ayacut area of RDS canal in the State of A.P..

9. According to the petitioners, water is the most essential natural resource upon which the life of all living beings depends. The human need of drinking water is paramount, perennial and eternal. Of all human needs, need for drinking and domestic use of water is inevitable. Equally important is the role of water in irrigation which is the only source that enables production of food-grains, another essential component for survival of human life. Right to water, therefore, is held to be part and parcel of right to life within the meaning of Article 21 of the Constitution. In multiple uses of water, drinking purpose must have the top most priority. The second preference should be given to irrigation. Power production cannot have precedence over them. Use of water for producing electricity can never be preferred at the cost of drinking purpose or irrigation facility. The petitioners have, therefore, prayed that appropriate relief is required to be granted by this Court by allowing the petition and by issuing necessary directions to the respondents.

10. On May 9, 2005, notice was issued by this Court. Affidavits and further affidavits were filed by the parties. The Registry was then directed to place the matter for final hearing on a non-miscellaneous day. That is how the matter has been placed before us.

11. An affidavit in reply is filed by the State of Karnataka. It is, inter alia, contended in the said affidavit that a writ petition filed by the petitioners under Article 32 of the Constitution is not maintainable in view of Article 262(2) of the Constitution read with Section 11 of Act XXXIII of 1956 which bars jurisdiction of all Courts, including this Court. It is also stated that water disputes regarding RDS is pending for consideration before Krishna Water Disputes Tribunal and on that ground also, the petition is not tenable. One more preliminary objection is raised that petitioners have no locus standi to agitate water disputes or a matter connected therewith or related to such dispute. It is urged that even if the dispute involves enforcement of adjudicated decision under the Act (since it has the force of a decree of this Court), the remedy is available to the aggrieved State to get it executed/implemented. Again, it is only a State which can file a suit in this Court under Article 131 of the Constitution to get any disput adjudicated in certain cases. Obviously, therefore, a petition filed by the petitioners is not maintainable and cannot be entertained.

12. On merits, it was contended that the grievance raised by the petitioners that the Mini Hydel Power Project would consume water is totally unfounded and ill-conceived. The scheme contemplates production of electricity on the run-off-the-river technology which involves 'no consumptive utilization of water' at all.

13. The scheme works thus;

"a. A separate canal would be cut at a distance of about 120 metres above the Rajolibanda Diversion.

b. It is the surplus water which would be utilized under the Mini Hydel Scheme.

c. The drawal level of the canal would be one foot higher than the drawal level of Rajolibanda Diversion Canal, which will ensure that the water meant to be utilized under the Rajolibanda Diversion Canal is not affected. The gates of the proposed canal will be electronically operated through sensors. The gates will open automatically only when the depth of water over the anicut is more than 15 cm. When the water level comes back to 15 cm. above the anicut, the gates of the canal get automatically closed. By this process, the designed discharge of 850 cusecs (24 cumecs) in the Rajolibanda Diversion Scheme Irrigation Canal is always ensured when the water level is up to the crest level of the Rajolibanda Diversion Scheme anicut."

14. It is also stated that the decision of the Krishna Water Disputes Tribunal permits utilization of water for 'production of power'. Diversion of water for the purpose of 'Power Project', hence, cannot be termed illegal, unlawful or against the award of the Tribunal.

15. An affidavit is also filed by respondent No. 4--Company supporting the stand taken by the State of Karnataka in its affidavit. The Managing Director of the Company asserted that the project had been designed as a "run-off-river-scheme" which does not involve consumption of water at all and the power would be generated only when there is a spill over of water over the anicut after meeting the irrigation demands. The petition has been filed with a view to stall the project. The litigation is not a Public Interest Litigation (PIL) and is instituted only to make political gains by the opposition parties and to malign the present Chief Minister. It was further stated that when the Project was cleared, another political Party was in power and not the present Chief Minister. Moreover, the entire project is located in the State of Karnataka. It was stated that the cost of project is about Rs. 20.60 crores. Necessary approval has been granted by the State concerned, i.e. State of Karnataka and there is no illegality in the grant of project. The work had already commenced on November 25, 2004 and major portion thereof is over. About 9.40 crore rupees had been spent. It was also stated that being a Mini Hydel Project, it was not required to be referred to other States, Central Electrical Authority (CEA) or Central Water Commission (CWC). They have been joined as party-respondents in the writ petition only with a view to cause delay to the project. The writ petition is thus an abuse of process of court and the Court is being used as a political platform to achieve political mileage by the opposition parties.

16. An affidavit-in-reply is filed by the State of Andhra Pradesh indirectly supporting the case of the petitioners. It was alleged that the State of Karnataka has been utilizing more than

its allocated share of water taking advantage of its location at the top and having control of flow of water as a riparian State. It is further stated that Mini Hydel Scheme would adversely affect the State of Andhra Pradesh and it would be detrimental to the interests of the farmers of the State. It was, therefore, stated that the State of Karnataka could not have entered into an agreement with respondent No. 4 without the consent of the State of Andhra Pradesh.

17. In a counter affidavit filed by the Central Water Commission (CWC) respondent No. 1, it was stated that the Ministry of Water Resources and Central Water Commission 'has no role in the issue' involved in the petition. It went on to state that the Mini Hydel Project is likely to have an impact on the flow of RDS Scheme. It was also stated that the project was not referred to by the State of Karnataka to the Central Electrical Authority (CEA) for clearance.

18. In paragraph 10 of the Affidavit, the Commission stated;

"That it is also relevant to point out that second Krishna Water Disputes Tribunal has already been constituted and in the construction of the proposed project any issue involved is inter-State between the States of Andhra Pradesh and Karnataka then the matter should be referred to the Tribunal for examination."

19. Rejoinder-affidavits to all the counter-affidavits have been filed by the petitioners reiterating what was averred and contended in the writ petition. Additional Affidavits have also been filed by the parties.

20. We have heard the learned counsel for parties. The learned counsel for the contesting respondents raised certain preliminary objections to maintainability of the writ petition. It was submitted that a petition in this Court under Article 32 of the Constitution is not maintainable in view of the provisions of the Constitution as also the provisions of the Act.

21. Let us consider legal position in the light of preliminary objections against the maintainability of the writ-petition.

22. Article 262 deals with "Disputes relating to Waters" and is of great importance. It may, therefore, be quoted in extenso;

"262. 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 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)."

(Emphasis supplied)

23. Article 131 of the Constitution is another material provision. It confers original jurisdiction on this Court in certain cases and reads thus;

"131. Original jurisdiction of the Supreme Court.--Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

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

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

(c) Between two or more States,

If and insofar as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

24. In exercise of power under Article 262 of the Constitution, Parliament enacted a law known as the *Inter-State River Water Disputes Act, 1956* (ACT XXXIII of 1956) with a view "to provide for the adjudication of disputes relating to Waters of inter-State rivers and river valleys".

25. Section 3 deals with complaints by the State Governments as to water disputes and enacts that 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, it may request the Central Government to refer the water dispute to a Tribunal for adjudication. Whereas Section 4 provides for constitution of Tribunal, Section 5 relates to adjudication of water disputes.

26. Section 6 requires the Central Government to publish decisions of the Tribunal and the effect of such publication. It reads thus;

"6. Publication of decision of Tribunal

(1) The Central Government shall publish the decision of the Tribunal in the Official Gazette and the decision shall be given effect to by them.

(2) The decision of the Tribunal, after its publication in the Official Gazette by the Central Government under sub-section (1), shall have the same force as an order or decree of the Supreme Court.”

27. Section 11 is extremely important provision and may be reproduced;

“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.”

28. In the light of the scheme as envisaged by the Makers of the Constitution as also by Parliament under the Act XXXIII of 1956 in connection with water disputes between inter-States, it is clear to us that such disputes cannot be made subject matter of petition either in a High Court under Article 226 or in this Court under Article 32 of the Constitution. Probably, Article 262 is the only provision which enables Parliament to oust and exclude jurisdiction of all Courts including the Supreme Court (this Court). It is also pertinent to note that Clause (2) of Article 262 contains non-obstante clause ("Notwithstanding anything in this Constitution"). It is no doubt that Article 262 of the Constitution is not self-executory inasmuch as it does not, by itself, take away the jurisdiction of this Court in respect of disputes relating to waters of inter-State rivers or river-valleys. It is an enabling provision and empowers Parliament to enact a law providing for adjudication of such disputes or complaints, excluding the jurisdiction of all Courts including this Court (Supreme Court). Article 131 of the Constitution which enables the Central Government or a State Government to institute a suit in this Court on its Original Side in certain cases also cannot be invoked in inter-State water disputes in view of Section 11 of the Act [vide *Tamil Nadu Cauvery Sangam v. Union of India*¹]. In other words, the provisions of Article 131 of the Constitution have to be construed harmoniously subject to the provisions of Article 262 of the Constitution. A petition under Article 32 of the Constitution, hence, cannot be entertained by this Court.

29. The learned counsel for the petitioners, however, strenuously urged that on more than one ground, the present petition is not barred. Firstly, the petition is not filed by a State and hence bar contemplated by Article 262(2) read with Article 131 of the Constitution and Section 11 of the Act has no application. Secondly, it has been held by this Court in several cases that right to get water is a part of right to life under Article 21 of the Constitution. If it is so, Article 32 can certainly be invoked by the petitioners, particularly when the petition is in the nature of PIL. Thirdly, the petitioners cannot approach the Tribunal constituted under the Act for the enforcement of their rights to get water. In fact, an Interim Application NO. 34 of 2006 was filed by the petitioners before the Tribunal but was dismissed observing that the petitioners have no locus standi. If this Court holds that a petition is not maintainable in this Court, they have no remedy for the enforcement of their right recognized by the

Constitution and guarantee by Article 32 enshrined in Part III of the Constitution. It would violate basic philosophy of Rule of Law reflected in the well-known maxim ubi jus ibi remedium (wherever there is right, there is remedy). It was, therefore, submitted that the present petition is maintainable and should be decided on merits.

30. In our considered opinion, however, preliminary objections raised on behalf of the contesting respondents are well founded and are required to be upheld. We have already extracted the relevant provisions of the Constitution as also of Act XXXIII of 1956. The Founding Fathers of the Constitution were aware and conscious of sensitive nature of inter-State disputes relating to waters. They, therefore, provided machinery for adjudication of such disputes relating to waters of inter-State rivers or river valleys. By enacting Article 262, they empowered Parliament to enact a law providing for adjudication of any dispute or complaint with respect to the use, distribution or control of waters of any inter-State river or river valley. They, however, did not stop there. They went ahead and empowered Parliament to exclude the jurisdiction of all Courts including the final Court of the country in such disputes. The intention of Framers of the Constitution, in our opinion, was clear, obvious and apparent. It was thought proper and appropriate to deal with and decide such sensitive issues once and for all by a law made by Parliament.

31. The provisions of Act XXXIII of 1956 are also relevant and pertinent. Clause (c) of Section 2 defines '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 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”.

32. Section 3 of the Act provides for “Complaints by State Governments as to water disputes”. It runs as under;

“Section 3 - Complaints by State Governments as to water disputes--If it appears to the Government of any State that a water disputes 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.”

33. Bare reading of the above provisions leaves no room for doubt that they are very wide. Section 3 deals with situations not only where a water dispute has actually arisen between one State and another State, but also where such dispute is "likely to arise". Moreover, it applies not only to those cases in which interest of the State has been prejudicially affected, but also embraces within its sweep interest of any of the inhabitants thereof which has been affected or likely to be affected. To us, therefore, it is abundantly clear that such a dispute is covered by Article 262 of the Constitution and should be dealt with in accordance with the provisions of Act XXXIII of 1956 and it cannot be challenged in any Court including this Court.

34. In Tamil Nadu Cauvery Sangam, this Court observed;

"It is thus clear that Section 11 of the Act bars the jurisdiction of all courts including this Court to entertain adjudication of disputes which are referable to a tribunal under Section 3 of the Act. Therefore, this Court has no jurisdiction to enter upon the factual aspects raised in the writ petition".

35. In *Cauvery Water Disputes Tribunal, Re¹* a Reference was made to this Court by the Hon'ble the President of India under Article 143 of the Constitution and opinion of the Court was sought on certain questions. This Court considered the provisions of Articles 262 and 131 of the Constitution as also Section 11 of the Act.

36. The Court inter alia opined;

"The effect of the provisions of Section 11 of the present Act, viz., the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act. It is, therefore, not possible to accept the submission that the question of grant of interim relief falls outside the purview of the said provisions and can be agitated under Article 131 of the Constitution. Hence any executive order or a legislative enactment of a State which interferes with the adjudicatory process and adjudication by such Tribunal is an interference with the judicial power of the State. In view of the fact that the Ordinance in question seeks directly to nullify the order of the Tribunal passed on

25th June, 1991, it impinges upon the judicial power of the State and is, therefore, ultra vires the Constitution". (Emphasis supplied)

37. In view of the above legal position, the submission of the petitioners that the bar envisaged by Section 11 of the Act would not cover cases of private individuals or petitioners approaching this Court as pro bono public, and its application is limited to States has no force and we express our inability to agree with the learned counsel.

38. Ultimately, what is contemplated by the Act is to look into, to protect and to safeguard interests of the State as also of its subjects and citizens. Precisely for that reason, Section 3 has been worded widely. It provides for constitution of Tribunal for adjudication by the Central Government on a dispute raised or complaint made by any State that interest of the State or any of the inhabitants thereof has been prejudicially affected or likely to be affected. In our considered opinion, therefore, the present petition under Article 32 is not maintainable.

39. The learned counsel for the petitioner, however, referred to a decision of this Court in *Narmada Bachao Andholan v. Union of India & Ors.*². In para 248 of the reported decision, the majority, after referring to Resolution of United Nations Organization (UNO), observed;

"248. Water is the basic need for the survival of human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The Resolution of the U.N.O. in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under:

All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs".

40. Reference was also made to *A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.) & Ors.*³. In that case also, the Court referred to Resolution of UNO, observations of this Court in *Narmada Bachao Andolan* and emphasized the right to access to drinking water as basic and fundamental to life and a duty of the State under Article 21 to provide clean drinking water to its citizens. The Court also insisted on the need of healthy environment and sustainable development as a part of fundamental right to life embodied in Article 21 of the Constitution.

41. Yet in another case i.e. *State of Haryana v. State of Punjab*⁴ this Court had an occasion to consider a similar issue. There, a suit was filed by the State of Haryana against State of Punjab. The contention of the defendant was that such suit was barred by Section 11 of 1956 Act read with Article 262 (2) of the Constitution.

42. Considering the relevant provisions of Articles 131 and 262(2) of the Constitution as also Sections 2(c)(i) and (ii) read with Section 11 of the Act and keeping in view

the averments in the plaint as a whole, the Court held that the dispute could not be said to be a water dispute' within the meaning of Section 2 (c) of the Act, was not referable to a Tribunal and as such, bar of Article 262(2) and Section 11 of the Act was not attracted. The suit was held maintainable under Section 131 of the Constitution. The decision, in our opinion, has no application to the case on hand.

43. Our attention has also been invited to a decision of the Constitution Bench of this Court in *State of Karnataka v. State of Andhra Pradesh & Ors.*⁵. In that case, this Court was called upon to consider the meaning of the term 'decision' of the Tribunal constituted under Section 4 of the Act. The decision has no relevance so far as the present controversy is concerned. From the relevant provisions of the Constitution, Act XXXIII of 1956 and the decisions referred to hereinabove, there is no doubt in our mind that the present writ petition under Article 32 of the Constitution is not maintainable.

45. But this is not the only ground on which the petition is liable to be dismissed. There is yet another equally sustainable and well-founded reason for not entertaining the so-called grievance of the petitioners raised in this petition.

46. The learned counsel for the contesting respondents have stated that a dispute between the State of Andhra Pradesh and State of Karnataka has already been referred to a Tribunal constituted under the Act under the Chairmanship of Hon'ble Mr. Justice Brijesh Kumar, a retired Judge of this Court and the proceedings are pending. The State of Andhra Pradesh has acted as *parens patriae* and has made a complaint and raised a dispute as to availability of water to the State of Andhra Pradesh and its citizens. The counsel invited our attention to the fact that a specific issue, being issue No.22A, has been framed by the Tribunal at the instance of the State of Andhra Pradesh, which reads as under:

"Whether the State of Karnataka is entitled to construct Mini Hydel Power Project from the common bondage of Rajolibanda Diversion Scheme without the consent of State of Andhra Pradesh?"

47. Thus, the question of construction of Mini Hydel Project, challenged in the present proceedings, is very much before the Tribunal constituted under the Act and the matter is *sub judice*. It also appears that the State of Andhra Pradesh prayed for interim relief in respect of above issue by filing Interim Application No. 8 of 2006 before the Tribunal. One of the prayers in I.A. 8 of 2006 related to 'Rajolibanda Anicut Mini Hydel Scheme' and injunction was sought restraining the State of Karnataka from constructing or proceeding with the said project. The Tribunal, however, did not grant interim relief by an order dated November 15, 2006.

48. In para 9.4 of the order, the Tribunal stated;

"However, we make it clear that the construction of these projects will not entitle the State of Karnataka either to raise any demand on the basis of prior or committed utilization of the water in these projects even though community interest might have grown or may grow or that substantial amount or fund might have been spent for the construction of these projects, as of right, in the surplus water and such prior use or committed use or protected use, whatever may be the case, will be subject to further order or final decision of this Tribunal."

49. The State of Andhra Pradesh filed another application being Interim Application No. 28 of 2006 under sub-section (3) of Section 5 of the Act before the Tribunal for clarification of the earlier order but even that application was dismissed on April 27, 2007 observing that no clarification was required.

50. The counsel referred to the said applications and orders passed thereon and submitted that the Tribunal had considered this aspect. So far as Interim Application No. 28 of 2006 is concerned, the same was dismissed by the Tribunal on April 27, 2007. The relevant portion relating to Mini Hydel Power Project reads thus;

"10. The question related to Clarification III was dealt with in paragraph 7 of the said order. It is pointed out by Mr. Gupta that the Tungabhadra Board mentioned in paragraph 2.1 of the said order was not in control of the Rajolibanda Diversion Canal. It seems that this may be through oversight or due to absence of specific information being made available to this Tribunal. It may be a case that this part of the river being in the mid stream may not be within the control of the Tungabhadra Board, though, however, the release of water for the Diversion Canal is regulated by the said Board, but then it would make no difference because of the reasoning given in paragraph 7.1 of the said order. The Hydel Power Scheme, as it appears at the moment, for diversion of water to the Hydel Power Canal at Rajolibanda, proposes to utilize electronic sensors, which would not operate until the level of water is 15 cm above the anicut. The depth of the sill level of Rajolibanda Diversion Canal being 1082 ft. compared to the crest level of the anicut at 1090 ft. is sufficient at the moment to divert sufficient water in Rajolibanda Diversion Canal for the purpose and object it was conceived and constructed to enable AP to receive major part of the water through Rajolibanda Diversion Canal. Even if the sill level of the Hydel Power Canal is at 1083 ft., it will not operate until the water level is 15 cm above 1090 ft. If it is so from the argument made by Mr. Holla, it does not seem that there will be any effect on the diversion of water in Rajolibanda Diversion Canal. If the water level is 15 cm above the anicut, then there will be sufficient water to cater both to Rajolibanda Diversion Canal and the Hydel Power Canal. If it is up to 15 cm; no water will flow to the Hydel Power Canal but if it is above 15 cm, then water would have gone directly to the mainstream and it would be so going both over the anicut and through the Hydel Power Canal since this diversion joins Krishna ultimately downstream the anicut.

10.1. It is apprehended by Andhra Pradesh that the electronic sensors may not operate properly. Mr. Holla stated that it would take another two years to make the Hydel Power Canal functional. Therefore, at the moment there could be no such apprehension. It is in the womb of the future. Mr. Gupta contended that in such a case either this Tribunal should appoint an 'Authority' to inspect the installation of the electronic sensors, and its functioning and functionality after it is installed or there may be an option given to AP to depute its officers to inspect either alone or jointly with the officers of Karnataka, both at installation and at the functioning and functionality after installation of the sensors. We think that, this could be considered after the sensors are installed and become functional, provided any difficulty is actually felt in its operation.

10.2. The scheme as proposed does not seem to be contrary to the Bachawat Award; inasmuch as no water is utilized for operating a hydel project and it was rightly found by this Tribunal that at this prima facie stage there seems to be nothing before this Tribunal to conclude that the proposed diversion would enable Karnataka to utilize the Tungabhadra waters inconsistent with the Bachawat Award. However, we have also observed that in case power could be generated without affecting the existing irrigation system, then we found no reason to interfere at this stage, on the basis of the information and the materials placed before this Tribunal by the respective parties. As such, we do not think that there is any necessity of Clarification-III as contended by Mr. Gupta. That apart, the right of Karnataka and that of AP are well protected in the said order in paragraph 9 as pointed out earlier".

51. From the above observations also, it is clear that the Tribunal is mindful of the controversy and the issues raised relating to Power Project. The matter is very much before the Tribunal. It has also considered various applications and passed orders from time to time. And for that reason also, the present petition is liable to be dismissed.

52. Before parting with the matter, however, we are constrained to make one observation at this stage. The State of Andhra Pradesh has filed its counter affidavit in this matter on January 31, 2006. Before that date, the Tribunal had already been constituted under the Chairmanship of Hon'ble Mr. Justice Brijesh Kumar, retired Judge of this Court. The said fact has been duly mentioned in the affidavit- in-reply. Interim Application No 8 of 2006 (for interim relief) and Interim Application No. 28 of 2006 (for clarification) were of course subsequent development to the filing of the affidavit. But both the applications had been disposed of on November 15, 2006 and on April 27, 2007 respectively. The present writ-petition was heard by us in April, 2008 i.e. after substantial period of disposal of both the applications. We have heard learned counsel for the State of Andhra Pradesh. No reference whatsoever was made on behalf of the State either to the Interim Applications or to the orders passed thereon. The contesting respondents referred to those applications and the orders of the Tribunal. Respondent No. 3 is 'State' and a public authority. This Court, therefore, obviously expects from such authority to place all the facts before this Court so as

to enable the Court to consider them and to take an appropriate decision in accordance with law. In our considered opinion, the third respondent - State of Andhra Pradesh, in fairness, ought to have placed all facts subsequent to filing of the counter affidavit when the matter was heard by this Court. The State, however, failed to do so. But since on other grounds also, we are of the view that the present petition under Article 32 of the Constitution is not maintainable and is liable to be dismissed, no further action is called for.

53. For the foregoing reasons, the writ petition is dismissed as not maintainable. On the facts and in the circumstances of the case, however, there shall be no order as to costs.

¹*1993 Supp (1) SCC 96 (II)*

²*(2000) 10 SCC 664*

³*(2001) 2 SCC 62*

⁴*(2002) 2 SCC 507*

⁵*(2000) 9 SCC 572*