

WATER RIGHTS

Water is a common and shared resource. It does not belong to any individual or a nation but both together. Therefore, there should be a joint effort on the part of the people, Government as well the judiciary of a nation to protect this common resource.

An analysis of the case-law enumerated above shows the feebleness of the law in tackling disputes. This is water ~~related~~ so because tort law relating to water disputes has not been codified, and it is surprising why it has not been^{up} to this day. Disputes arising on account of violation of water rights are inevitable. A perusal of case-law in the pre-independence era is evident of this fact. In fact a comparison of pre and post-independence periods shows that the number of water cases decided by the courts was definitely larger in the pre-independence period than in the post-independence period. This means that the ground for the codification of tort law relating to water disputes^{has been fertile ever since the land the last quarter of the 19th century but no attempt has^{been} made} in this direction. It is equally surprising why the number of water cases ~~coming~~^{have been} to the courts in the post-independence era / considerably reduced. Either the disputes especially between small farmers

are being tackled at the local level for which there is no definite information or the nature of disputes could have taken such a character which might be outside the power of the judiciary to tackle or the high rate of court fee could be preventing a large number of people from seeking redress through courts. Whatever the reason there is an immediate need to codify tort law relating to water rights.

The legislature should draw up rules which would take into account the precise nature of the problem in its various dimensions. The concept of liability should be expanded keeping in mind the economic loss suffered by the injured party. In most of the cases highlighted above the absence of a duty of care was used to exclude liability for economic loss. There is a general consensus of opinion upon the fact that it is usually difficult for the plaintiff to prove the existence of a duty of care on the part of the defendant. If at all the judiciary wants to insist upon the establishment of such a principle then tort law should be so codified as to make it possible for a common man to determine what his duty at common law would be.

Once a general duty not to harm others is developed there will no longer be any need to draw

attention to it. Jurisprudentially speaking 'duty' in the sense of a general prohibition imposed by law not to cause damage carelessly will have to become implicit in every case so that there will be no need to establish its existence each time. Once the existence of duty is presumed the control on liability will shift to other concepts such as carelessness, causation and damage in order to achieve that which had been achieved by way of duty of care.

The scope of applicability of the principle of strict liability to water related disputes involving the government and a private individual or individuals interse should be widened. The law laid down in Madras Railway Company that the principle of strict liability is inapplicable to statutory provisions is too primitive. The unchecked policy of the Government in constructing large dams, reservoirs and canals is a constant threat to the common law water rights of an individual. This necessitates the evolution of a new kind of liability which is a complete departure from the kind of strict liability established in Rylands v. Fletcher. In this regard the Legislature must conceptualize the law in accordance with that laid down in M.C.Mehta's Case.

A determination of damages suffered by the injured party is a very difficult task for the judiciary; therefore, it is essential to codify the principles on which the same can be established, for example, the physical and material injury involved, the quantum of damages vis-a-vis the economic loss incurred, general and special damages etc. There are certain statutes which embody compensation provisions but most of the times, the decision taken in compensating the plaintiff being in the hands of the executive is arbitrarily exercised. Moreover the decision of the authority in deciding the amount of compensation to be paid is final which completely ousts the possibility of challenging the action, if found unjust. It is in such situations that the common law right of an individual to sue the executive needs to be codified so that the individual can question the quantum of compensation if found too meagre.

Since the Government's power to regulate the control and the distribution of water is sovereign it can continue its policy of constructing large dams, reservoirs and canals irrespective of the loss suffered by the people on the ground that its action is in public interest. In order to compensate for the harm cause to certain people the Government should float

insurance schemes so that the loss suffered is publicly distributed and burden is not felt on one party alone.

Tort law pertaining to injury caused to water rights should be so codified as to reflect the general acceptance of ethical, legal ecological and social principles or guidelines. There should be an equitable balance of rights and obligations between the Government and the individual as well as between private individuals^{interse}. This should be especially perceived from a financial standpoint. Tort law should also explicitly say what rights and obligations should apply to private citizens, to state and to both.

The Constitution of India enjoins a duty both upon the State as well as the citizen to protect the environment. Article 48A of the Constitution makes it obligatory for the State 'to protect and improve the natural environment and safeguard, the forests and wildlife in the country" while Article 51 (g) casts a duty upon "every citizen to protect and improve the natural environment includings forest, lakes, rivers..." The duty of the State to protect the environment includes the duty to create laws^{so} to protect the same. Therefore, it is obligatory for the state to formulate

a legislation on tort law as soon as possible. Once such a law is enacted every citizen is duty bound to comply with it.

For a proper control of water resources scientific and technological knowledge is required. Knowledge of ecology is equally important. Then come economic analysis and economic priorities. All these aspects should be reflected in the legal framework which should be able to translate such priorities and decisions into action. There should be concern for control at both private and State level.

The underlying philosophy of the proposed tort legislation should be based on the principle that prevention is one of the fundamental requirements for the protection of environment. In this way there is no longer the need to wait for damage to be suffered in order to be able to intervene against harm done- environmental or personal. The legislative policy should aim in preventing the creation of nuisances like floods, water logging at their sources rather than subsequently trying to counteract their effects. Technical progress must be conceived and devised so as to improve the quality of life at the lowest cost of the community. Ecological movement seems to be very deeply rooted in the present day consciousness. This fact is of considerable importance for law for

legal rules must be founded on an ethic composed of values recognised by the society as its own, that is to say, of social values.

With the increase in the welfare activities of the State there has been an emergence of mass tort and toxic torts, for example, in cases of Railway accidents, floods, defective drugs etc. The building of large dams, reservoirs, and canals is also giving rise to mass tort. To check the wrong being committed to millions of people a tort law which would check and leter the launching of such gigantic projects is the need of the hour and if tort law can be codified with respect to railway and motor accidents why can't it be framed with respect to injury caused to water rights.

Finally in order to make tort law workable for the common man the court fees must be drastically reduced. This would attract more people to the court and help the judiciary to develop specific facts of tort law. A bill entitled the Government (liability in tort) Bill, drafted on the lines recommended by the Law commission was first introduced in Parliament in 1965, but could not be enacted into law. It was re-introduced in 1967 with modifications suggested in 1969 but the bill has still not been enacted into law. It is suggested that the same be enacted fast. As far as a tort bill for disputes concerning private water rights is concerned

none was ever formulated. It is recommended that a
legislation governing peoples' private rights in
water be enacted soon.