CHAPTER II

THE RIGHTS OF THE STATE IN THE WATERS

(*i*) In The Rivers, Streams and other Surface Water Resources

The only right which exists in water in its natural state is the right of use. The right of property in water is usufructuary. Such a right is not in the ownership of the corpus of water, but arises from the privilege to use it. The right of an individual to use water is entitled to the same protection as other forms of property. As the only ownership in waters is one of a right to use, this right can be exercised by an individual, a group of individuals or a legal entity. The rights exercised by the state over waters are not proprietary in nature but sovereign in character. From this flows the inherent right of the state to administer or regulate the waters flowing within its territories, subject to the right of a riparian to get the customary quantity of water.

This concept of the nature of the state's rights in natural waters is embodied in the different irrigation Acts. For instance, the preamble to the Northern India Canal and Drainage Act 1873 provides :

> Whereas, throughout the territories to which this Act extends, the Provincial Government is entitled to use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collections of still water...

Similarly, the Bombay Irrigation Act 1879 also assumes this right and provides in its preamble :

> Whereas it is necessary to make provision for the construction, maintenance and regulation of canals, for the supply of water therefrom and for the levy of rates for water so supplied...

Most of the irrigation Acts empower the state governments to issue a notification when water of rivers, streams etc. is to be applied for public purposes. As an instance, the provision of the Northern India Canal and Drainage Act may be given :

> 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.[1]

For such use or application of water, the canal officers are empowered to enter on any land, remove any obstruction, close any channel and exercise necessary powers.[2] Provisions to this effect exist in the Bombay Irrigation Act, the Rajasthan Irrigation and Drainage Act, the Jammu and Kashmir Canal and Drainage Act, the Bihar Lift Irrigation Act, the Andhra Pradesh (Telangana Area) Irrigation Act, the Bengal Irrigation Act and the Mysore Irrigation Act.

The Mysore Irrigation Act specifically provides that private irrigation works are to be constructed only with the sanction of the state government and subject to conditions which it may impose.[3]

The Orissa Irrigation Act does not contain any specific provision for the application of waters for public use by the state government. But there are provisions which empower the irrigation officers to exercise all powers necessary for the construction of irrigation works.[4]

Unlike other Acts, the Madhya Pradesh Irrigation Act contains specific provisions barring accrual of prescriptive rights of easement against the state in the waters. Under the Act when the state government plans to construct a canal, it shall publish a notification to that effect and thereupon no prescriptive right of easement shall be acquired against the government under sections 15 and 16 of the Indian Easements Act 1882.[5] Similarly, there is a bar of accrual of prescriptive rights of easement in waters to the detriment of existing canal.[6] As regards the nature of water rights vested in the state, the Act vests such rights in the government except rights acquired prior to the government notification.[7] However, the pre-existing right of private parties in waters is subject to the condition that no rights to the supply of water from a canal can be acquired against the government under sections 15 and 16 of the Indian Easements Act or otherwise except in accordance with the provisions of the Act or under a government grant.[8]

1. The Northern India Canal and Drainage Act 1873, s. 5.
2. S. 6.
3. The Mysore Irrigation Act 1965, s. 4.
4. The Orissa Irrigation Act 1959, ss. 12-19.
5. The Madhya Pradesh Irrigation Act 1931, s. 27.
6. S. 28.
7. S. 26.
8. S. 29.

The rule that no prescriptive rights of easement can be claimed against the government in the waters of rivers, streams etc. is also found in section 2 of the Indian Easements Act 1882. This section provides that the law of easements contained in the Act will not derogate from any right of the government to regulate the collection, retention and distribution of the water 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. In India, from time immemorial, the government has the right of regulating the supply and distribution of water from either natural or artificial source for purposes of irrigation. The ordinary right of landholders against the government to get water sufficient to irrigate their fields is not an easement within the meaning of section 4 of the Indian Easements Act. In fact section 2(a) of the Act expressly saves the right of government in the water of natural rivers and streams and other public irrigation works from the operation of the Act. No prescriptive easement can derogate from the government's right to control irrigation was the view expressed in *Mahankali Lakshmiah* v. *Karnam Narayanappa*.[9] In a suit by plaintiffs for recovery of possession of certain lands from their defendant lessees, the plaintiffs asked for a declaration of their rights and an injunction restraining the defendants from causing obstruction to the flow of water from a government channel to the suit lands. The government was not made a party to the suit. Negativing the prayer for declaration and injunction as the plaintiffs had established no right against anybody in the water of the channel, the court stated :

> It is impossible for a person to acquire an easement in water in a Government channel when that water has been supplied by Government for the purpose of irrigating land and in fulfilment of the duty cast upon them to supply water to lands which they classify as wet. Therefore no easement can possibly be acquired.[10]

However, the doctrine that the right of the government to control the supply and distribution of irrigation waters is not merely a proprietary right but is a sovereign right was expounded by the Madras High Court in *Secretary of State* v. *Nageswara Iyer*,[11] where it was observed :

> A right by prescription can be acquired as against the proprietary right of another but not as against the sovereign right which under the Indian law the state possesses to regulate the supply

9. 34 M.L.J. 425 (1918).
10. *Id.* at 430.
11. A.I.R. 1936 Mad. 923.

of water in public streams so as to utilize it to the best advantage.[12]

The proposition laid down in the *Mahankali* case was reinforced in the *Nageswara Iyer* case that it is impossible for anyone to claim against government an easement that will interfere with the right of the government to regulate irrigation waters.

Scope of Government's Right to Control and Regulate Irrigation

Though the government's right to regulate irrigation in natural waters is paramount and sovereign in character, it cannot be exercised arbitrarily. The government's right is subject to the riparian getting the same quantity to which he is entitled by custom. Further, the right of government to regulate the distribution of water of tank could only be exercised without violating the proprietray rights of others. This was the purport of the decision in *Secretary of State* v. *Palaniyappa Pillai*.[13]

Further, the paramount right of the government to regulate irrigation is subject to the rule laid down in *Robert Fisher* v. *Secretary of State*,[14] that in the process of such control and regulation, the government should not inflict injury on other riparian owners or diminish the supply which the irrigators have hitherto utilized. This view of law has been reaffirmed in other cases. In *Ramachandra* v. *Narayanasami*,[15] where in a suit between irrigators it appeared that the first defendant in pursuance of an order of the sub-collector made on a petition preferred by him, had opened a new irrigation channel thereby materially reducing the supply of water necessary for the cultivation of the plaintiff's land and causing damage to him, it was held that the order of the sub-collector was in excess of the power he had for regulating the supply of water for irrigation purposes. The government's right, it was held, did not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy.[16]

A similar view was taken in *Collector of Nasik* v. *Shamji*.[17] There a dam had been in existence across a river for more than 280 years and all through the years two villages received equal supply of water from separate sluices in the dam. The government, deciding that one village required less water than the other, reduced the size of the sluice supplying

12. *Id.* at 926.
13. 41 I.C. 24 (1917).
14. 2 I.C. 325 (1909).
15. I.L.R. (1893) 16 Mad. 333.
16. See also *Krishna Ayyar* v. *Venkatachala Mudali*, 7 M.H.C.R. 60.
17. I.L.R. (1883) 7 Bom. 209.

water to the former. On a suit being filed, it was held that assuming that the dam was constructed by the government for purposes of irrigation to the two villages, the continuous, undisturbed user for such a length of time was held to be amply sufficient to justify a presumption of an original grant from the government. The government was held not to have power arbitrarily to curtail or interfere with the rights of irrigators to the enjoyment of the water.

Further, in *State of Madras* v. *Md. Ghani*,[18] it has been held that the government cannot abdicate its duty of seeing to the equitable distribution of the supply of water between the *ryotwari* tenants under each channel source. When the supply of water of one ryot is interfered with by another, the government is bound to see that the channel is not interfered with by the latter, unless the government supply some other equally efficient source of irrigation to the former and ensure that the wrong-doer is stopped from such interference in one or more of the five ways, namely, abatement, penalty, action on trespass and for damages, declaration and injuction and prosecution under section 430 of the Indian Penal Code. It was held in this case that though the government were entitled to regulate the flow and supply of water to *ayacut* lands, they could not permit the plaintiff to put up cross-bunds so as to impede the free flow of water to the lands which are registered *ayacut*.

The rights and obligations as between the state and the irrigators in India in the matter of irrigation rest largely on unrecorded customs and practices.[19] In *Basvana* v. *Narayana*,[20] the irrigator's right to supply of water was expressed thus :

> The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by the Government as the source of supply for his fields, and he must accept the method or machinery by which Government supplies that water. He has no right to insist that his supply shall come from any particular source or any other source than that recognised by Government, or that it shall come by any particular channel, nor can he prescribe against Government for such right by user otherwise for any length of time.

This proposition of law was reaffirmed in other cases also. In

18. A.I.R. 1959 Mad. 464.
19. *Sankaravadivelu Pillai* v. *Secy. of State*, I.L.R. (1905) 28 Mad. 72 ; *Secy. of State* v. *Muthuveerama Reddy*, I.L.R. (1911) 34 Mad. 82.
20. A.I.R. 1931 Mad. 284 at 286.

Venkatasami v. *Chenga Reddi*,[21] it was laid down that the irrigators could not dictate to government that any particular channel should be the source of their irrigation. In *Secretary of State* v. *Muniappan Chetty*,[22] the court rejected the claim of the plaintiff that he was entitled to get water flowing from a particular sluice. The government is entitled to alter the source of supply provided there is no diminution of facilities.

On the question as to what is the extent of the irrigator's right to get supply of water, it has been laid down that he is entitled to customary or accustomed supply of water so far as water is available.[23] This would mean that the corresponding obligation of the government in this matter is negative rather than positive. Its obligation is not to find the sufficient supply of water at any cost on pain of being held liable in damages for default but only not to interfere with the necessary supply if and so far water is available. The essentially negative character of the right of the irrigators as against government in the matter of customary supply is seen in *Secretary of State* v. *Muthuveerama Reddi*[24]. In this case the plaintiff sued the Secretary of State for damages to the extent of one year's value of crop because the government officials did not repair the *calinguala* which regulated the supply of irrigation to his land and which had fallen into disrepair. It was pointed out that a mere statutory duty did not enable an aggrieved person to bring an action for non-feasance in the absence of a common law liability and that in the Madras Presidency there was no custom or practice which could sustain such a claim. It was, therefore, held that no action would lie for mere failure to repair, when repair was necessary to enable the irrigator to obtain his usual supply.

That the customary right of supply extends to wet lands is made clear in *Annaswami* v. *Manicka*.[25] There, the water of a natural stream was diverted by the plaintiffs into a tank and for over thirty years it had been the customary method to take the water of the stream for augmenting the supply of the tank without which it would have been impossible to cultivate the land registered as wet under the ayacut of the tank. It was held that the government must be taken to have impliedly recognized that as customary method of supply for the irrigation of the wet fields. The fact that the stream was not pointed out as the source of irrigation in the settlement register could not curtail the right of the plaintiffs to receive water according to the customary method and it was not open to the government to interfere with that method of supply.

21. A.I.R. 1930 Mad. 621.
22. A.I.R. 1938 Mad. 509.
23. *Secretary of State* v. *Narayanaswami Pillai*, A.I.R. 1936 Mad. 692.
24. I.L.R. (1911) 34 Mad. 82.
25. A.I.R. 1937 Mad. 957.

What is "accustomed user" in terms of the irrigator's right to supply of water ? Is it limited by the nature of registry of irrigated lands in the revenue accounts ? What is meant by registered wet lands ? For purposes of irrigation and collection of land revenue, the lands are classified as "wet" and "dry" and further, the "wet" lands are classified and registered in revenue accounts as single crop, double crop etc. If an irrigator has been given water sufficient to enable him to raise a second crop on land registered as single crop wet, can the state be justified in refusing him the supply of water required at the last stage to mature the second crop on his land ? In other words, though the irrigator undertook the cultivation of a second crop with knowledge of the risk of a failure of w ter supply, should government deny water to him at its will and pleasure despite the availability of water ? In *Secretary of State* v. *Nageswara Iyer*,[26] the court held that government "officers have no right to arbitrarily deny to a ryotwari holder water which for years he has been accustomed to receive for second crop cultivation on his lands."[27] This would mean that the power of the state to interfere with the customary supply of water to irrigators ought to be decided with reference to the accustomed user and not with reference to the registry of lands.

(*ii*) Ground Waters

The existing irrigation Acts do not define the ownership of sub-surface or ground water which is considered as belonging to the owners of the land. But in view of the vital importance to the nation of ground water for agriculture in different parts of the country, it is essential for the government to extend control over it and to provide for its methodical and systematic regulation in conjunctive use with surface water.

The Mysore Irrigation Act contains provisions for control by the state over the construction of wells in areas where public irrigation works are constructed or are proposed to be constructed. When the state government is of the view that in the interests of proper irrigation from any irrigation work constructed or proposed to be constructed, it is necessary to control the construction of wells in any area or areas, it may notify such areas. Thereupon, no person can construct any well in the areas notified without the previous sanction of the government, which may be given subject to such conditions as may be imposed by the government.[28]

Some states have enacted legislation regulating irrigation by tube-wells.[29]

26. A.I.R. 1936 Mad. 923.
27. *Id.* at 928.
28. The Mysore Irrigation Act 1965, s. 4(2).
29. For instance, the Uttar Pradesh legislature has enacted the State Tube-wells Act 1936 and the Punjab legislature has enacted the Punjab State Tube-well Act 1954.

In areas of plentiful ground water, such as the alluvial Indo-Ganga plain of the north and the deltaic plains of the south, the stage may not have been reached when the control of shallow aquifers say within thirty metres of the surface is necessary. In the drought areas, with scanty ground water sources, the necessity to control all ground water may exist.

It may be suggested that state governments should have the legal power to regulate ground water but may exempt waters down to a particular depth, say thirty metres in alluvial plains, from control. It may be pointed out that the Union Ministry of Irrigation and Power has favoured legislation to control ground water use and levy charges for conjunctive use of surface and ground water resources. The union government has already prepared a model bill for the control and regulation of ground water and has circulated it to the states. It favours a single organisation to be entrusted with the task of integrated development of surface and ground water. A major portion of the public sector outlay of Rs. 515.7 crores earmarked for minor irrigation in the Fourth Plan is proposed to be spent on ground water. So far large-scale development of ground water for irrigation has taken place in the alluvial regions in the north-western part of India including Punjab, Haryana, a part of western Uttar Pradesh and in coastal region of Tamil Nadu, Andhra Pradesh and Gujarat.[30]

30. The Hindustan Times, June 22, 1972.