



International Environmental
Law Research Centre

KACHCHH JAL SANKAT NIVARAN SAMITI

VS.

GUJARAT

(water allocation to Kachchh from Sardar Sarovar)

HIGH COURT OF GUJARAT, JUDGMENT OF 4 OCTOBER 2005

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Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat and 8 Ors, Special Civil Application No. 3358 of 1999, Civil Application No. 1947 of 2005 in Special Civil Application No. 3358 of 1999, Civil Application No. 2374 of 2005 in Special Civil Application No. 3358 of 1999 and Civil Application No. 2241 of 2005 in Civil Application - for Injunction No. 1947 of 2005, High Court of Gujarat at Ahmedabad (Kshitij R. Vyas and Akshay H. Mehta, JJ.), Decision of 4 October 2005.

Judgment

Kshitij R. Vyas, J.

1. The petitioner, Kachchh Jal Sankat Nivaran Samiti, through its Convener and other Citizens of Kachchh, by way of this Public Interest Litigation voiced grievance as regards the meagre allocation of water from Sardar Sarovar Project by the Government to the District of Kachchh which constitute one fourth of the total area of the State which is a 100 percent drought-prone district. The locus standi of the petitioners, as indicated in Paragraph 3.1 of the petition makes the petition of a representative character on behalf of the people of Kachchh voicing their grievance as well as the aspirations of the people. To appreciate the grievances of the petitioners, it is necessary to give certain background of the factual aspects.

2. In the year 1969, the Government of India constituted a Tribunal named Narmada Water Dispute Tribunal (hereinafter referred to as 'NWDT'/Tribunal) headed by Justice V Ramaswamy, a retired Judge of the Supreme Court to decide the inter-state dispute of sharing water of river Narmada. On 16.8.1978, the tribunal declared its award under Section 5(2) read with Section 5(4) of the Inter-State Water Disputes Act, 1956 (for short, 'the Act'). Thereafter, references No. 1, 2, 3, 4 and 5 of 1978 were filed by the Union of India and the states of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan respectively under section 5(3) of the said Act which were heard by the tribunal and on 7.12.1979, gave its final order. The same was published in the Extraordinary Gazette by the Government of India on 12.12.1979. In arriving at its final decision, issues regarding allocation of water, height of dam, hydrology and other related issues came to be subjected to comprehensive and thorough examination by the tribunal. Extensive studies were done by the Irrigation Commission and Drought research Unit of India, Meteorological Department in matters of catchment area of Narmada basin, climate, rainfall, variability of rainfall, and the semi-arid zones and scarcity area of Gujarat. The report also suggests that the tribunal have taken into consideration various technical literature before giving its award.

3. The issue of allocation of Narmada waters at Sardar Sarovar Dam site was determined on the basis of 75 percent dependability at 28 MAF. It further ordered that out of the utilisable quantum of Narmada water, the allocation between the States should be as under: Madhya Pradesh 18.25 MAF, Gujarat 9.00 MAF, Rajasthan 0.50 MAF and Maharashtra 0.25 MAF.

As a result of the award of the tribunal from the Sardar Sarovar Dam and related constructions, the main canal system known as Narmada main canal, 458 km long which is to carry away water meant for irrigation and drinking purposes to the canal systems of Gujarat and Rajasthan is constructed. It may be stated at this stage that the State of Gujarat demanded 20.73 MAF of water out of the total demand of 22.02 MAF of water before NWDT for total 71.38 lakhs acres area. The demand included 6.57 MAF of water for reclaiming and/or irrigating 12.17 lakhs acres of land of the district of Kachchh for area under zone XI-C, Banni and Ranns. However, the tribunal did not consider the demand of the State of Gujarat for Banni and Ranns of Kachchh on the ground that these areas are barren and sparsely populated and the soil is highly saline having, very low permeability and a vertical permeability of nearly nil, a high ground water table and an impervious layer near the ground water surface, high evaporation and low rainfall. Thus, the tribunal rejected the claim of the State for irrigating 11 lakhs acres in Ranns and Banni areas and granted a limited allocation of 9.00 MAF of water in favour of the State of Gujarat. The tribunal has, however, given the concerned states choice to utilise the quantity of water falling to their share in their own way.

4. The State Government, out of 9 MAF water, provided 1.94 MAF water diverted or for irrigation and 1.06 MAF allocated for domestic and industrial use. It appears that because of the limited water allocation, proportionate water requirement for Kachchh region was worked out as 0.15 MAF.

5. The petitioners in this petition, have challenged the decisions of meagre allocation of water to the Kachchh areas on various grounds and are also seeking directions for reconsideration of the decisions taken by the State in relation to allocation of water to Kachchh.

6. We have heard Mr Mihir Joshi, learned Sr. Counsel appearing with Mr N.V. Anjaria for the petitioners, Mr S.N. Shelat, learned Advocate General appearing for respondent No. 1, State of Gujarat and Mr Kamal Trivedi, learned Addl. Advocate General appearing with Ms Sangeeta Vishen for Sardar Sarovar Nigam Ltd. (for short 'SSNL'), respondent No. 2 at length. We have also gone through the entire pleadings and various reports and decisions cited before us.

7. Learned Counsel for the petitioner submitted that the decisions of the state government regarding allocation of water for irrigation to Kachchh district ignores the constitutional imperative of distributing material resources of the community so as best to sub-serve the common good. According to the learned counsel, water of Narmada River apportioned to the State of Gujarat by the NWDT to be allocated for such use and in such areas within its territory as determined by the State, constitutes a material resource of the community. The State is obliged under Article 38(2) of the Constitution to strive to minimise inequalities of income, to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst group of people residing in public areas. By inviting our attention to Article 39(a) of the Constitution, it was submitted that the State was obliged to direct its policy towards securing the right to an adequate means of livelihood and under (b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. According to the learned counsel, 'common good' envisaged in the Constitution is not merely the greatest good of the greatest number but is governed by the key word 'distribute' which is the genus of the article and must be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in the article has a strategic role and the whole article has a mission. By inviting our attention to various authorities on the point as under,

(i) *State of Karnataka v. Ranganath Reddy*, AIR 1978 SC 80,

(ii) *Jacob v. Kerala Water Authority* (1991) 1 SCC 28,

(iii) *Madan Mohan Pathak v. Union of India*, (1978) 2 SCC 50,

(iv) *Video Electronic v. State of Punjab*, (1990) 3 SCC 87,

it was submitted that the directive principles enshrined in Articles 38 and 39 must be harmonised with economic unity as well as economic development of developed and under developed areas. Elaborating his submission, it was stated that the special disadvantages of Kachchh in relation to availability of water, availability of an alternative source of livelihood other than agriculture and dependence of a large number of people on such availability of water, would oblige the State to undertake an affirmative action by unequal (higher) allocation of water to the region to bring about real equality. The learned counsel highlighted the circumstances by showing that Kachchh suffers special disadvantages regarding availability of water and its need for water would take precedence over the necessity and/or requirement of water to other regions by inviting our attention to various grounds narrated given in the petition and details of the factual aspects of the case.

8. On minutely examining the aforesaid authorities cited before us wherein, it has been laid down that although Articles 38 and 39 of the Constitution and the directive principles laid down therein are fundamental in the governance of the country, the state is under the obligation to implement them in making laws. The Court can also give vitality and effect by using them as criteria of reasonableness while deciding the question of validity of legislation and executive action. There cannot be any dispute with respect to the principles laid down in the aforesaid decisions. The question which requires to be considered is whether allocation of the water is consistent with the provisions of Articles 39(b) and (c) of the Constitution of India. In other words, whether distribution of Narmada water made by the state to various districts is to sub-serve the common good. It is required to be borne-in-mind that the directive principles of state policy and Article 39 of the Constitution cannot in the very nature of things be enforced by a court of law and therefore, the said decision taken by the State in the present case, cannot be challenged on the ground of violation of the said Article. However, in the instant case, the parties have argued extensively on this question and, therefore, we have to decide the legality and validity of the decision of the state government regarding the distribution of the Narmada Water for Kachchh region.

9. Learned counsel for the petitioner submitted that the decisions of the state government are not based on the relevant criteria/parameters but on irrelevant considerations. The learned counsel has given the relevant parameters for allocation of water as under:

i. That requirement of irrigation should have priority over power;

- ii. That irrigation should be extended to the maximum area within physical limits of command subject to availability of water and in particular to arid border areas to encourage settlement;
- iii. Culturable area;
- iv. Population dependent on water;
- v. Drought areas;
- vi. Economic needs including requirements for irrigation;
- vii. Geography, hydrology, climate;
- viii. Economic and social needs;
- ix. Comparative costs of alternative means of satisfying the economic and social needs of the region;
- x. Availability of other resources;
- xi. To cover as large a part of the State to be commanded by the project as possible;
- xii. To cover special areas where water is relatively scarce and rainfall is undependable even though such areas would be relatively difficult from the point of irrigation;
- xiii. To spread water thinly over the area in order to maximise total returns from water;

10. In the submission of the learned counsel for the petitioners, the decision taken by the State in relation to the allocation of water to Kachchh did not take into account the aforesaid factors but are based on and/or supported by the NWDT award and the reports of the Narmada Planning Group (in short 'NPG') and the D.T. Buch Committee which are irrelevant, inconsequential and in any case do not even support such decisions on facts. He invited our attention to the aforesaid award/reports and submitted that the decision to allocate water of 0.15 MAF for irrigating 42,800 hectares of Kachchh is stated to be based only on the NWDT award. He further submitted that NWDT has not assessed or adjudicated that Kachchh is entitled to irrigation in respect of 1,14,000 acres (42,800 hectares) as this was not even the issue before the tribunal, which was only concerned with equitable apportionment of water amongst party states. He also submitted that in absence of any determination by the NWDT regarding the area to be irrigated in Kachchh and the decision to adopt the purported determination is wholly misconceived. In any case, in absence of any independent justification for seeking to irrigate only 42,800 hectares (1,14,000 acres) out of 23,63,000 hectares of Kachchh (excluding the Ranns and Banni), by inviting our attention to the award of NWDT wherein it was specifically stipulated that for a variety of reasons, it may become necessary to provide water for irrigation to areas not covered by proposals for use of Narmada waters at present and it is therefore, reasonable to give the party states the freedom to vary within their share of water the pattern of water use and the areas to be served by such use within their respective state boundaries as it may consider necessary, the State could not have considered to allocate the water on account of NWDT award.

11. Learned counsel for the petitioner also challenged the said decision of the revision in the allocation of water from 0.203 MAF to 0.256 MAF which is stated to be only on the basis of the report submitted by the Narmada Project Group. By contending that NPG report does not justify or even incorporate a decision/finding regarding enhancement of area or water allocation. Similarly, the revision by the State in the area from 42,800 hectares to 57,300 hectares and of allocation of water from 0.203 MAF to 0.256 MAF which is stated to be only on the basis of this assessment was challenged on the ground that the assertion by the State is vague purported to have been placed on record. He has submitted that the report of D.T. Buch committee whereby a decision was taken to the effect that the revision in the area from 57,300 hectares to 1,12,700 and of allocation of water from 0.256 MAF to 0.496 MAF is stated to be on the basis of the said report. The learned counsel has challenged the decision of the State Government on the basis of D.T. Buch committee's report by contending that this is stated to be a technical study undertaken with the objectives of studying how best irrigation water allocation for Kachchh region from SSP can be further augmented within the constraints of the NWDT Award. The study recommended the option of augmenting water supply by storage of surplus water. This was calculated to be 0.223 MAF. Therefore, it was submitted that this study was not concerned with enhancement of allocation of water from 9 MAF allocated to the State of Gujarat. It was further submitted that enhancement of area from 57,300 hectares to 1,12,700 hectares is mere mathematical extrapolation on the basis that 0.256 MAF would serve 55,700 hectares and therefore, additional

0.223 MAF would pro-rata serve 55,700 (sic) hectares. This indicates that if more water were to be allocated to the region, further additional areas could be brought under irrigation. If this is accepted as a basis, the decision of the State is wholly irrational since determination of area to be irrigated based on the relevant parameters must precede the consequential allocation of water and it cannot be the other way round, more so when the study itself recommends that it is not possible to allocate more water to Kachchh since farmers in central Gujarat, north Gujarat and Saurashtra want more water. Learned counsel criticised the report of Buch Committee by contending that there is no study, finding or averment that land other than 42,800 hectares of Kachchh is unsuitable for irrigation for any reason whatsoever. It is submitted that Buch Committee report in fact finds that there is scope of putting a considerable part of the lands to productive use with spread out irrigation. The fact that the study has recommended pro-rata revision of culturable command area to 1,12,700 hectares underlines the potential of irrigating additional land. However, the study does not assess or determine why land more than 1,12,700 hectares should not be considered for irrigation.

12. On the basis of the Water and Power Consultancy Services (WAPCOS) report in relation to allocation of surplus water recommends irrigation of 3,12,000 hectares, it was submitted that the said fact once again highlights the fact that the restriction of area to 42,800 hectares at the first stage was wholly unjustified and by correctly identifying land for irrigation a substantially higher allocation of water ought to have been made by the State at the first stage itself. It was further submitted that the claim for 42,800 hectares appears to be based on redundant planning. Initially a limited area of Kachchh was proposed to be irrigated from the Saurashtra branch canal by lift system. This is why Kachchh is placed under zone XI relating to Saurashtra, though it is an independent district. The other part of Kachchh district was proposed to be served through the Banni branch canal. Presently the Kachchh branch canal takes off from the main canal itself and carries water by flow, and the Banni branch was done away with after the NWDT award, though it was to carry water for irrigating 1.60 lakhs acres of Kachchh mainland and reinstated only in part thereafter, despite which the same area of 42,800 hectares has been proposed to be irrigated.

13. Learned counsel also challenged the decisions of the State Government by contending that the same are arbitrary, discriminatory and unconstitutional since far from undertaking affirmative action by positive discrimination in water allocation for Kachchh on account of its special facts and disadvantages as contended above, the State has allocated a lower share of water and adopted a lesser area of Kachchh, than would otherwise come to its share even on proportionate/equal allocation by producing the following relevant comparative data regarding allocation of water:

District	Cultivable area (ha)	Average rainfall (mm)	Alternative sources (local irrigation projects-ground water)	SSP irrigation (ha)	Water allocation (MAF)
Bharuch	5,07,800	877	Yes	1,59,559	0.668
Vadodara	5,93,000	917	Yes	2,62,310	1.170
Panchmahals	5,47,400	1,026	Yes	6,201	0.028
Kheda	5,36,100	769	Yes	1,01,876	0.454
Gandhinagar	51,900	533	Yes	9,608	0.043
Ahmedabad	6,76,200	782	Yes	3,67,379	1.484
Mehsana	7,53,200	613	Yes	1,93,194	0.740
Banaskantha	9,25,600	751	Yes	2,55,071	1.138
Surendranagr	7,82,500	487	Yes	3,47,711	1.494
Bhavnagar	7,03,100	620	Yes	64,475	0.267
Rajkot	8,10,800	594	Yes	44,716	0.199
Kachchh	23,63,100	340	No	1,12,700	0.496

It was submitted by the learned counsel that the above table indicates the discriminatory allocation of water and area for Kachchh, which would amount to discrimination even otherwise. Finally, he submitted that the decision making process suffers from lack of transparency, undue haste and premeditation. To elaborate the same, it was submitted that the decision/s regarding allocation of water to Kachchh, despite their public importance, have not

been formally expressed at all at any stage and that the State has not even produced the decisions regarding allocation of water to Kachchh. It was submitted that it is not known as to who has taken the decision or the procedure adopted for the same. There is no contemporaneous record establishing considerations/factors which have weighed with the Government in taking the decisions. In support of this, our attention was invited to a decision rendered by the apex court in the case of *Gulabrao v. State of Gujarat*, (1996) 2 SCC 26 wherein the apex court observed that the cabinet is the driving and steering body responsible for governance and its primary function is to formulate policies in conformity with the directive principles of the Constitution and carry on the executive function of the state as per the Constitution and the laws.

13.1. One more decision was cited by the learned counsel in the case of *R.K. Jain v. Union of India*, (1993) 4 SCC 119. In Paragraph 25 it was observed that the cabinet is a constitutional mechanism to ensure that before important decisions are reached, many sides of the questions are weighed and considered which would mean that much work must be done beforehand in inter-departmental discussion and preparation.

14. Applying the aforesaid principles to the present case, it was submitted that the decision to allocate water for 42,800 hectares of Kachchh area for irrigation was taken within 24 hours of the award of the NWDT on 16.5.1978, this would go to show that the pre-meditation is apparent since even after the NWDT clarified the issue in its amended final award on 7.12.1979 that within its territory each State had the freedom to vary the area and use of water as found necessary, there was no reconsideration of the matter. It was further submitted that there is no decision on record adopting either wholly or in part any recommendations of the NWDT, NPG report or the D.T. Buch Committee report, particularly in the context of the fact that all the reports contemplate further studies.

15. Mr Shelat has submitted that this petition itself is misconceived. Since there is no enforceable right in favour of the petitioners to receive water for irrigation purpose, only out of limited 7.94 MAF allocated by the tribunal to the state. He has submitted that the state has taken decisions from time to time to increase the quantity of water to Kachchh district and at present total availability of water for irrigation purpose would be 1.496 MAF. It is his submission that while determining the quantity of water for allocation to Kachchh district, the State has kept in view the interest of all concerned and also the factors relevant for this purpose. He has placed reliance on several decisions of the apex court which will be discussed at appropriate places in the judgment.

15.1. Mr Trivedi submitted that the initial allocation of water for irrigation in case of Kachchh district was based on adjudication of water dispute by NWDT which was made after extensive study of all relevant factors which came to be approved even by the apex court. He has further submitted that against the total demand of 22.02 MAF water by the State of Gujarat before the NWDT including the demand of 6.57 MAF for Kachchh, only 9 MAF water, i.e. 7.94 MAF for irrigation and 1.06 MAF for domestic purpose was allocated to the State. He has further submitted that even thereafter the demand of Kachchh district has been considered several times and gradual increase in the quota for the said district has been made. He has brought to our notice the fact that initially as per the award of the tribunal 0.15 MAF was allocated for Kachchh district which was increased from time to time and ultimately 1.583 MAF quantity of water has been earmarked for the said district. He has also stated that in terms of percentage of the increase is from 6.25 percent to 13.7 percent. According to Mr Trivedi, out of the total irrigable mainland i.e. 10.25 lakh ha, 5.14 ha, will be irrigated with the help of Narmada water which forms a substantial portion of the main land. Lastly, he has submitted that so far as the requirement of water is concerned, the allocation of water to Kachchh district will fully meet the requirement. He has also placed reliance on certain decisions of the apex court and we will refer to the same during the course of discussion.

16. In order to appreciate the aforesaid contentions, it is necessary to examine the stand taken by the respondents in the replies filed by them. In the affidavit-in-reply filed by Mr S.N. Khajanchi, Deputy Secretary, Narmada Water Resources and Water Supply Department, Government of Gujarat, Sachivalaya, it was *inter alia* pointed out that the allocation of share of water for a region within the State of Gujarat is a policy decision arrived at by the state government having regard to the award of the NWDT, detailed multi-disciplinary planning studies undertaken and completed in the period 1981-1984 in consultation with the World Bank to formulate a comprehensive Sardar Sarovar Project (SSP) and technical report of augmentation of water allocation for Kachchh region under the Sardar Sarvar Project by Shri Buch. At this stage, it may be stated that there is no dispute to the fact that part of the statement of claim of the State before the NWDT, report of the Narmada Planning Group, report of WAPCOS, correspondence between the officers of the State/SSP and others, minutes of meetings etc. have been produced only at the time of hearing in the course of arguments of the respondents, and that the petitioners have been given copies of such documents at the time of their production. Reverting back to the reply-affidavit of the State Government wherein it has been pointed out that the State has made attempts to maximise social and economic

benefits from the SSP within the framework of the decision of the NWDT for 13 agro-climatic regions for agriculture water planning and water allocations arrived at for all the regions of the state. It is also stated that any attempts to enhance water allocation for one region is likely to affect the need of the other regions. The policy decision involved consideration of competing claims on scarce water resources to be made available i.e. 9 MAF from SSP. In Paragraph 4 of the said affidavit-in-reply, it is pointed out that the State of Gujarat demanded 22.02 MAF of water for 71.38 lakh acres before the NWDT. The demand included 6.57 MAF of water for the district of Kachchh for 12.17 lakh acres including the areas of Rann and Banni.

17. The NWDT however, did not concede the demand of the State of Gujarat for Banni and Great and Little Rann of Kachchh area on the ground that the area is barren and sparsely populated, the soil is highly saline, very low permeability, a vertical permeability of nearly nil, a high ground water table and an impervious layer near the ground water surface, high evaporation and low rainfall. It was concluded with the quantity of water indicated by the State, the project would be highly uneconomic. The tribunal, therefore, rejected the claim of the State for irrigating 11 lakhs areas in Rann and Banni regions. We may reproduce the observations of the tribunal in that behalf as under (NWDT volume I, page No. 75)

Culturable Command Area (CCA) in Gujarat

6.5.2. In the first place, we see no reason why the area under Mahi command (6.33 lakh acres) should be included under Narmada command. This area is already irrigated or intended to be irrigated by Mahi waters under the sanctioned Mahi right bank canal project, Stage-I (Ex.G/342(iv)(i)). Stage-I has already been completed by Gujarat which comprises a diversion weir at Wanakbori and Mahi right bank canal works. Gujarat made no proposal for including this area in Narmada command originally before the Khosla Committee but Dr Khosla on his own initiative, suggested that Mahi area should be brought under the Narmada Command so that 1.58 MAF of water may be released for the use of border areas of Rajasthan. As regards the Great and Little Rann of Kachchh and Banni area also, we see no justification for Gujarat's claim to irrigate these areas from Narmada. Gujarat has claimed to 6.36 MAF of water for this area on the basis of CCA of 11.03 lakh acres and delta of 5.8 ft (at canal head). Gujarat made no claims for the Great Rann of Kachchh and Banni area before the Khosla Committee. So far as the Little Rann is concerned, the Dutch team was of the opinion that desalination was a great problem and the soil studies made by Gujarat did not furnish sufficient basis to show that desalination was possible. In any case, these areas are admittedly barren and sparsely populated. The soil conditions in this area are characterised by high salinity, a very low horizontal permeability, a vertical permeability of nearly nil, a high ground water table and an impervious layer near the ground water surface. The whole area is also subject to high evaporation and low rainfall. There is no adequate evidence produced by Gujarat that these areas are capable of being reclaimed at reasonable cost. Neither the past experiments conducted at the Soil Research Institute, Baroda nor the experiments conducted at Umreth on 36 acres of land could be extrapolated to this area. The pilot plot in Banni area on the light soils has no doubt shown the possibility of growing crops but Gujarat has not investigated or furnished data from which design parameters for effective reclamation of the area could be derived. Even if it is assumed that the area could be reclaimed and developed with the quantity of water indicated by Gujarat, the project would be highly uneconomic. A delta of 3.8 ft at field head has been proposed for the area. Taking into consideration 50 percent towards transit loss, the delta at canal head will be 5.8 ft. We, therefore, accept the argument of Maharashtra and Madhya Pradesh that the claim of Gujarat for 6.36 MAF of water for irrigating 11 lakh acres in Ranns and Banni should be rejected. Our assessor, Dr Ambika Singh has expressed the same view in his report, ex. C-5. For these reasons, we are of the opinion that the Mahi Command area, the Little and Great Ranns of Kachchh and Banni area should be excluded from the computation of the equitable share of Gujarat.

18. The tribunal also did not accede to the request of the state for Mahi Command Area and considered 5,402 lakh acres as CCA. The tribunal, however, considered the entitlement of water for 49,796 lakhs acres for the State of Gujarat in respect of zones 1 to 11 indicated in the statement of claim. The district of Kachchh was covered under zone XI-C in the said statement of claim, which was in addition to the claim for Banni area and Rann area of Kachchh. The claim in respect of the Kachchh region was 1.14 lakhs acres.

19. The claim of the State Government in respect of the share of water was 22.02 MAF of water. The tribunal did not accept the demand and concluded that the requirement of the State of Gujarat was 11,656 MAF of water. Even then, the tribunal, having regard to the availability of water, limited the allocation to 9 MAF of water in favour of the State.

20. The deponent has further deposed in Paragraph 4.6 of the affidavit that the claim having been reduced with the limited water allocation, proportionate water requirement for Kachchh region was worked out as 0.15 MAF. Annexure D to the reply is a statement showing the water requirement to be considered in favour of the Kachchh region with reduced water allocation and reduced CCA.

21. We may, at this stage state that this was the first decision taken wherein proportionate water requirement for Kachchh region was considered and worked out. It is further stated by the deponent that after the award of the tribunal, multi-disciplinary planning studies were undertaken in consultation with the World Bank to formulate a comprehensive Sardar Sarovar Project. The NPG prepared a project plan for SSP and forwarded it to the Government of India and the World Bank. These documents form the basis for investment clearance of the Planning Commission and the Government of India in October 1988. The project plan carved out 13 agro-climate regions for agriculture water planning and water allocation. It was based upon consideration of mean annual rainfall, land irrigability class, ground water quality and quantity and drainage conditions. After the Narmada Command was divided into 13 agro-climate zones in which Kachchh district falls under zone No. 13 for 42,800 ha water of 0.203 MAF was allocated for Kachchh instead of 0.15 MAF. Subsequently, the area was revised to 57,300 ha after detailed assessment with a water allowance of 0.256 MAF. Subsequent to whatever has been stated in Paragraph 5 of the affidavit, it has further been pointed out that the region of Kachchh has also been allocated water to serve 948 villages and 10 urban centres by allocation of 0.049 MAF and allocation of 0.037 MAF for industries. The following table would show the operative water allocation for the region of Kachchh:

<u>Item</u>	<u>Allocation</u>	
a) Allocation for irrigation to serve 57,300 ha of CCA	0.256	MAF
b) Allocation for water supply to 948 villages and 10 urban centres	0.049	MAF
c) Allocation for industries	0.037	MAF
<hr/>		
Total:	0.0342	MAF

It was therefore, submitted that the allocation of water supply is not 2 percent as indicated by the petitioners but water allocation is 0.342 MAF, which constitutes 3.8 percent out of the allocated water (9 MAF). Out of water allocation of 9 MAF, 7.94 MAF is for irrigation purpose. Considering this, the water allocated to Kachchh for irrigation is 0.256 MAF which is 3.22 percent of water share to the state for irrigation. According to the deponent, no injustice has been done to the residents of Kachchh region. The deponent has also produced extracts from the technical report examined as Paragraph 7 and 7.2 of the affidavit-in-reply. Para 8 of the affidavit-in-reply, it has been pointed out the total area in the district for land utilisation purpose during 1993-94 is 19.58 lakh ha. By producing the statistics of land utilisation in Kachchh during the year 1993-94 and the details given therein, it was submitted that cultivable area of the district is 11.66 lakh hectares after deducting area of forests, barren and uncultivable land and land put to non-agriculture use from reporting area of 19.58 lakh hectares. According to the deponent, this clearly shown the submission made by petitioner regarding 23.63 lakhs hectares of cultivable area of Kachchh district is not correct. Thus, considering the worked out figure of 1.6 percent of cultivable area, the water allocation to Kachchh for irrigation is 3.22 percent of water allocation to State for irrigation, the deponent has thus disputed the figure of 2.11 percent shown by the petitioners as incorrect.

22. In Paragraph 9 of the affidavit-in-reply by producing a statement showing district wise area as per the original plan and subsequently revised by the State Government, it has been pointed out that under the revised plan, the region of Kachchh has been considered for 57,307 hectares as against 42,817 hectares originally planned which is more than 33 percent from the original plan. Similarly, in Paragraph 10, by producing statement showing the population figure of different districts and water allocation for Narmada command, vide annexure 'H', it has been pointed out that population of Kachchh region is 10.501 lakhs which is 4.89 percent of the total population of the State, to which the Government has allocated 3.8 percent of water from allocation of 9 MAF to State. The water allocation to Kachchh for irrigation use works out to 3.22 percent out of allocation of 7.94 MAF and for domestic and industrial use, it works out to 8.2 percent out of allocation of 1.06 MAF to State. Likewise, in Paragraph 11, by taking a sympathetic view looking to the need of Kachchh region, a study has been carried out for augmentation of water to Kachchh by Shri D.T. Buch, Consultant to Narmada Planning Group and the recommendations of Shri D.T. Buch are under active consideration and if it is feasible, the respondents will not hesitate to implement them.

23. On behalf of the State Government, Mr I.I. Momin, Under Secretary, Narmada Water Resources and Water Supply Department has filed further affidavit-in-reply to the rejoinder to the affidavit filed by Keshavji Dedhiya, petitioner No. 2 dated 16.10.2000. In the rejoinder affidavit, in Paragraph 3 (b) he has stated after referring to recommendations of the technical committee of Shri D.T. Buch as under:

(b) The utilisable water of Kachchh district using surplus monsoon water of Narmada under SSP through the balancing storage and lifting of water thereafter, so as to augment the culturable command to 1,12,700 ha from 57,300 ha. He has in Paragraph 3.3 highlighted various aspects considered by him. In Paragraph 5, he has stated that apart from the petitioners, other leading citizens of the Kachchh District who had made representations to the State Government on the same line as being made by the petitioners, who were informed by communication dated 22.11.1993 regarding the discussion that took place at the Nigam as well as before the Chief Minister on 13.6.1993.

24. At this stage, it is also necessary to see the further affidavit-in-reply filed on behalf of respondent No. 1 by the Under Secretary to the Government, Narmada Water Resources and Water Supply Department which is at page No. 316 of the record of the petition. In Paragraph 4 of the said reply, it has been pointed out that for sizing of canal system only technical considerations have weighed with the government. The command of SSP has been divided into 13 different agro-climatic zones based on mean annual rainfall, land irrigability class, ground water quality and quantity and drainage condition. It is stated that zone-wise requirements, region-wise delta in mm/ha are worked out and capacity of branch canals has been worked out for peak water requirement. As regards governing criteria for utilising, allocating, distributing and conveying water, he has submitted that after the award of the tribunal, detailed project report was prepared considering the area pleaded before the tribunal and admitted by the tribunal. For utilising allocated water for irrigation, the command has been divided into 13 agro-climatic zones and zone wise delta was finalised. It is stated that the allocation of water, therefore, is done having regard to the provisions made in the award. The area posed before the tribunal is finally adopted for coverage excluding Rann/Banni area which have not been accepted by the tribunal.

24.1. In Paragraph 5, it has been pointed out that Khosla Committee report was not accepted by the states and, therefore, the matter was required to be referred to the tribunal. The state government has in fact, placed its demand of water for Rann and Banni area. However, the tribunal did not consider the requirement of irrigation/reclamation of Banni and Rann area. In that view of the matter, the Khosla Committee report may not be relevant for determination of allocation of water available pursuant to the award of the NWDT. It was further pointed out that the area posed before the tribunal in Zone I to XI was considered by the tribunal and the same is followed for implementation.

24.2. We have also gone through the affidavit filed by Mr S.J. Desai, Secretary (Narmada), Narmada Water Resources, Water Supply and Kalpsar Department on behalf of respondent No. 2 wherein he has practically taken the stand taken by respondent No. 1.

25. Having considered the issues involved in the petition and the submissions advanced before us and having considered the various authorities cited before us, it really appears to us that the NWDT made the award as a result of 10 long years of adjudication wherein the state of Gujarat provided various details based on various data and studies, well-established norms of engineering and planning and the principles laid down in IS: 5968-1970 through as many as 1,288 exhibits and has demanded 22.02 MAF of water for irrigation including drinking and industrial water requirement. This includes demand of 6.57 MAF of water for reclaiming and/or irrigating 12.17 lakh acres of land of the Kachchh district. Therefore, it cannot be said that the demand of the state for allocation of water as a whole and for the Kachchh district in particular, as placed before the NWDT, is without any study or data. The aforesaid set of facts would further go to suggest that the State has, in fact, while keeping in mind the interest of Kachchh district, has demanded before the NWDT, 6.57 MAF of water for reclaiming and/or irrigating 12.17 lakh acres of land for the Kachchh district. However, while allocating in all 9 MAF for irrigation and 1.06 MAF (for domestic purposes) for Gujarat state, the NWDT declined to consider 11.03 lakh acres (4.46 lakh hectares) of land of the Rann and Banni and granted only 0.15 MAF of water for irrigating 1.05 lakh acres (42,800 hectares) of land. We have already reproduced the reasonings of the tribunal in the foregoing paragraphs and, therefore, it is not necessary to reproduce the same. Thus, the NWDT has, in fact, reduced the share available to Gujarat, i.e. 7.94 MAF for irrigation as against demand of 20.73 MAF. Under the circumstances, the State has no option but to allocate the water in favour of the regions within, keeping in mind the limited availability of water, full supply level of main canals, topography of the area, height of the dam and the FSL of Narmada main canal at its off take point having been fixed by the tribunal. The full supply level of Kachchh branch canal at its off take point is 49.65 and compliance with the parameters laid down in Indian Standard Guide for planning and lay out of canal system for irrigation. In this circumstance, we do not find fault with the State in accepting the award of the NWDT in toto

without resorting to the options available to it in refixing the distribution of the water to regions within the State. It is quite understandable that the State did not want to waste further time by depriving the people of the benefits arising out of the award of the tribunal, else no public interest would have been served by the present allocation. From the subsequent exercises undertaken by the State, it clearly appears to us that the State has in fact looked after the welfare of the people of Kachchh by setting up NPG by Resolution dated 7.4.1981 to function at the policy making level and report directly to the Narmada High Power Committee with an objective to formulate medium and long term plans including distribution system. Chapter VI of the NPG provides discussion on the command. The command area is fixed on the basis of the areas included by NWDT for the purpose of considering requirements of Narmada Water for irrigation in Gujarat. Three-fourths of the command is drought-prone. The command area has essential need for agriculture development as well as financial and economical capacity to absorb irrigation water. It is to be noted that CCA was revised in the light of the discussion with the World Bank Mission in May 1983 on 21 July 1983 to revise the CCA to 57,300 hectares (0.256 MAF). For Kachchh region it was revised to 57,300 hectares with 0.256 MAF. Not only that but at the request of the State Government Technical Report on augmentation of water allocation for Kachchh region was presented by Shri D.T. Buch. There were deliberation about the said report with the petitioners. The State Government approved the same on 24 February 2000. The petitioners have virtually challenged the legality and propriety of the award and the reports on various grounds stated in the petition. In view of the above, it is not possible for us to accept the same. Frankly speaking the various details given by the petitioners challenging those decisions have made the entire petition involving disputed questions of facts and, therefore, it is just not possible for this court to deal with the same in this petition under Article 226 of the Constitution of India.

26. Having heard the learned advocates for the petitioners and the respondents, the main question that may arise for our consideration is as to the relief prayed for in the petition to direct the state government to allocate water of river Narmada from Sardar Sarovar Project to the Kachchh district for irrigation of minimum 15 lakh acres of land, out of 7.94 MAF water made available for irrigation purpose by the NWDT, is justified or not.

27. As already stated above, the learned Advocate General appearing for respondent No. 1 has submitted that there is no enforceable right to receive water for irrigation purpose only out of limited 7.94 MAF allocated pursuant to the award of the Tribunal. He submitted that drinking water is the basic need of every individual and every village of Kachchh is to be provided with drinking water. Therefore, no grievance can be made by the petitioners if for irrigation purpose in view of the limited resources particular quantity of water is made available. He has submitted that at the instance of the petitioner, water allocated to other regions cannot be reduced resulting into disequilibria effects in the state. To substantiate his submissions, he has invited our attention to certain authorities. In the case of *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 194, while dealing with the right to work and adequate means of livelihood, the Supreme Court has observed as under:

The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21.

28. In the case of *Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703 the Supreme Court has made following observations:

It is not normally within the domain of any court to weigh the pros and cons of the policy or scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When the Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on resources. It is also based on expert opinion. It would be dangerous if the court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set on affidavits. The Court would dissuade itself from entering into this realm which belong to the executive.

In our opinion, the above observations would answer the submissions advanced by the learned counsel of the petitioners. We are not here to weigh the pros and cons of the policy or scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, unless it is arbitrary or violative of any constitutional, statutory or any other provision of law. Needless to say that the petitioners have not challenged these decisions on the ground that they are arbitrary nor have they pointed out that they are

unconstitutional or violative of statutory or any other provisions of law. The Government, in the instant case, decided to accept the award of the NWDT which is based on the expert opinion and now we are asked to test the utility, beneficial effect etc. of the policy on the basis of the affidavit filed before us. Besides this, the issues raised in the petition are not justiciable in view of the following:

(i) There are no judicially manageable standards for adjudication for allocation of water in favour of any region within the State. How much water is to be released from the canal, how much water is to be left for other regions are the issues which are not expertise to the judicial review. There are no manageable standards to appreciate the evidence. It requires expertise in irrigation management system and water resources management in respect of which matters, there are always more than one opinion. The government is the best judge as it gathers information, material from various sources including the administrators assigned with the duty to manage irrigation system.

(ii) The decisions involve balance of competing claims of the public resources. The issues to be determined are polycentric. The state government examined the matter from the overall interest of the state. The enhancement of allocation for one region will result in reduction of the irrigation water to the other region. The interest of one region would be pitted against the other region. All decisions which require delicate balancing and consideration of complex, social and economical considerations cannot be brought under the judicial scrutiny.

(iii) The State is divided into several districts and the inter se distribution of the water is not to be considered in isolation. If the contention of the petitioners were to be accepted, the court has to come to the conclusion that no public interest is served by allocating water to the other regions.

(iv) The allocation of water is, therefore, as per allocation preferred before the tribunal. Out of the total water available only 12 districts are given water. Out of 12 districts some villages are left out. The constraints in allocation of water is technical, topographical and geographical.

29. Apart from that, determining the choice of priorities and formulating perspective thereof is a matter of policy and it is not within our domain to interfere with the sole question of efficacy or otherwise of such policy unless the same is vitiated or in violation of any provisions of the statute or Constitution of India.

29.1. In the case of *Narmada Bachao Andolan v. Union of India*, reported in (2000) 10 SCC 664, it has been observed by the apex court that

in case of projects of national importance where the Union of India and/or more than one state(s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period of time at the highest level of the states and the Union of India and more so when the project is evaluated and approval granted by the Planning Commission, then there should be no occasion for any court carrying out any review of the same or directing its review by any outside or 'independent' agency or body. In a democratic set up, it is for the elected Government to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken then unless and until it can be proved or shown that there is a blatant illegality in the undertaking of the project or in its execution, the Court ought not to interfere with the execution of the project.

29.2. In the case of *BALCO Employees Union v. Union of India*, AIR 2002 SC 350, it was observed that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt, a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a Court of law, but a public interest litigation at the behest of a stranger ought not to be entertained.

30. Mr Kamal Trivedi, learned Additional Advocate General appearing for respondent No. 2 submitted that this Court may not intervene in the matter of judicial review of administrative action and/or decision and/or policy relating to any matter (including allocation of water), for balancing the relevant consideration by deciding as to what quantity of water should be available to each region since such a direction may result in unmanageable situation leading to unimaginable consequences. In support of his say, he has invited our attention to the following decisions:

(i) *Shri Sachidanand Pandey v. WB*, AIR 1987 SC 1109;

(ii) *Tata Cellular v. Union of India*, (1994) 6 SCC 651;

(iii) *Pennar Delta Auyacutdars Association v. Government of Andhra Pradesh*, AIR 2000 AP 317;

(iv) *Union of India v. S.B. Vohra*, (2004) 2 SCC 150.

As observed earlier, the challenge in this petition is against the administrative action taken after due deliberations, in absence of any arbitrariness and/or malafide, we see no reason to interfere in the matter. Even at the cost of repetition, we may say that this court cannot go into the question as to how much water is to be released from the canal for Kachchh and how much water is to be left for other regions which are the issues of not expertise to the judicial review. In our opinion, the government is the best judge, as said earlier. The various criteria/parameters for allocation of water suggested by the learned counsel for the petitioners have been appreciated and considered by the NWDT and subsequent reports by the experts in great details. May be they were not appreciated in the line and the way in which the petitioners wanted them to be appreciated. That would not render the decisions bad by calling as 'non-application' of mind which warrants our interference. Thus, in our view, the issues raised in the petition are not justiciable.

31. At this juncture, we may consider the claim of respondent No. 2 which is in the form of submissions made by Mr Trivedi to the effect that the petitioners have got more than what they have actually demanded for. In support of this submission, Mr Trivedi has drawn our attention to the relief clause and in particular to clause (A) of Paragraph 29 of the petition which is as under:

(A) Your Lordship will be pleased to issue a writ of or in the nature of mandamus or any other appropriate writ, order or direction directing the respondents to reconsider their decision of allocating 2 percent share of water to the district of Kachchh in view of what is pleaded in this petition.

The aforesaid clause would clearly show that the allocation of water that has been demanded for the district of Kachchh by the petitioner is 2 percent. Mr Trivedi has thereafter drawn our attention to the representation made to the concerned Minister dated 5.9.1995 wherein it has been demanded that through three branch canals of Kachchh Gross Command Area of total 6 lakhs hectares is required to be covered. Further, our attention has also been drawn to the annexures to the said representation which is in the form of a statement which shows that demand for the 2,94,297 hectares as cultivable command area is made against the cultivable command area of 5,88,594 hectares (6 lakh acres). On the basis of this demand, a detailed discussion has been made in the meeting which was convened for this purpose wherein the representatives of the petitioners were present. Thus, it is clear that during that time, the demand of the petitioners for cultivable common area was to the extent of 2,94,297 hectares. Mr Trivedi has thereafter brought to our notice that how from time to time, in accordance with the various recommendations and increase in the allocation of Narmada water to the Kachchh district has been made. He has drawn our attention to the details which have been arranged in a tabular form which show that between the period 1968 and 1978, demand before the NWDT of Kachchh district (excluding Banni and Rann areas) was 0.21 MAF covering about 46,150 hectares of irrigated land. Later on as per the award of the NWDT dated 16.8.1978, it was reduced to 0.15 MAF covering about 42,800 hectares. The award is dated 16.8.1978 and in the month of August 1978 itself the respondent increased the quantity of water from 0.15 MAF to 0.203 MAF and thereafter in the month of July 1983, it was increased to 0.256 covering area of 57,300 hectares. These details also include the demand made by the petitioners vide its representation dated 5.9.1995 wherein it was requested to cover CCA to the extent of 2,94,297 hectares. It further shows that besides this, on 24.3.2000, the quantity of water was increased from 0.256 to 0.496 (0.58 inclusive of domestic and irrigation) hectares which was sufficient to cover 12,700 hectares. This increase was made on the basis of the recommendation made in the report of Shri D.T. Buch. These details further show that in the month of October 2002, the respondent decided to allocate 1.00 MAF water from the monsoon spill over on the basis of WAPCOS report which should cover 2,00,000 hectares of lands. Over and above this, the provision was also made for domestic consumption which increased the quantity of water from the main supply to 0.583 MAF. In view of the same, the say of the respondents is that at present, the total quantity of water that has to be allocated to the Kachchh district is 1.583 MAF covering an area of 3,12,700 hectares against the claim of 2,94,297 hectares. The aforesaid details would clearly show that as compared to the original claim made by NWDT for Kachchh district is 0.21 MAF, as per the present decision, the quantity of water to the extent of 1.583 MAF is decided to be allocated. Consequently, the area likely to receive the benefit is increased from 42,150 hectares to 3,12,700 hectares, which in our opinion is a substantial increase even considering the demand that was made by the petitioners in September 1995 i.e. 2,94,297 hectares.

Thus, in our opinion, the demand of the petitioners is adequately met with and there is no reason now for the petitioners to make any grievance on the ground that Kachchh district has been meted out with discriminatory treatment.

32. A faint attempt has been made by the learned counsel Mr Joshi that a quantity of 1.583 MAF water includes 1.00 MAF from monsoon spill over which cannot be taken into account at all since it is not certain that every year the State supply would be available. He has, therefore, submitted that the supply of water to Kachchh district should be to the extent of 2 percent of the total Narmada water allocation. We do not agree to the submission of Mr Joshi since it has been stated by the respondents that so far as the Narmada allocation is concerned, certainty is to the extent of 75 percent whereas it is to the extent of 65 percent in the allocation of monsoon spill over. There is hardly any difference between the two. If there is failure in monsoon, there would be hardly any water supply from the Narmada allocation also, leave apart the monsoon spill over. But when there is 65 percent of certainty of the supply from the spill over, the same cannot be ignored and it is required to be taken into account.

32.1. Further, it is also evident from the record that the total irrigable main land in the Kachchh district comes to 10.95 lakh hectares as per the official figure. Out of this, 3,12,700 hectares of land in the district is to be irrigated with the help of 1.538 MAF water. Added to this there is 1,40,000 hectares of land which at present are being irrigated with the help of groundwater and also 67,000 hectares of land which is being irrigated by other schemes, total 5.40 lakh hectares to be irrigated out of 10.95 lakh hectares of irrigable main land. These figures would make the picture very clear and they show that the petitioners are to receive substantial benefit than what they have actually demanded. We therefore, do not find any discriminatory treatment having been meted out to the petitioners.

33. In view of what has been discussed above, we are clearly of the view that the petitioners have no enforceable right to receive water for irrigation as per their claim from the allotted share of 7.92 MAF to the State of Gujarat, determined by the NWDT. This is particularly in view of the fact that each and every part of Kachchh district has been provided with drinking water which is the basic requirement.

In view of what is discussed above, we answer the questions posed to us as under:

(i) There are no judicially manageable standards for adjudication for allocation of water in favour of any region within the State. How much water is to be released from the canal, how much water is to be left for other regions is the subject matter of irrigation management system and water resources management in respect of which there are always more than one opinion and the Government is the best judge to allocate resources and to consider the overall interest of the public of the region.

(ii) All decisions which require delicate balancing and consideration of complex, social and economic considerations cannot be brought under judicial scrutiny.

(iii) If the petitioners' contention is accepted, this Court will have to record conclusions namely;

(a) Public interest is not served by the present allocation.

(b) It would be better served if other regions are not entitled to allocation to the extent determined by the state so as to make water available to Kachchh region.

(c) Water is made available to only 12 districts. Out of that 12 districts, some villages are left out, and therefore, it is necessary that the State should reconsider its policy of allocation of water.

We are afraid, it is not possible for us to record these conclusions as any directions that may be given may result in unmanageable situation leading to unimaginable consequences.

(iv) When the state government has accepted the decisions of the tribunals regarding allocation of water, it cannot be termed as 'arbitrary'. The fact that there is no opposition from any other region except Kachchh district, it is reasonable to conclude that other regions are satisfied with the allocation of water.

The State was justified to accept the recommendations of NWDT without any modification. Any decision on the part of the State to change the decision of the tribunal regarding allocation of water to its districts would have further delayed the benefits already accrued from the award of the tribunal.

(v) The state shall in particular direct its policy towards ownership and control of the material resources of the community so that they are distributed as best to sub-serve the common good within the meaning of Article 39(b) of the Constitution of India which cannot be attracted in this case in view of the fact that the word common good used in the said Article is not for the Kachchh region only since it applies to other regions of the State. Therefore, the decision of the state government in the instant case is consistent with the provisions of Article 39 of the Constitution of India.

34. In view of these findings, we see no merit in this petition and the same is rejected. Rule discharged. The interim relief, if any, stands vacated.

In view of the order passed in the main matter, Civil Applications No. 194, 2374 and 2241 of 2005 stand disposed of.

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