



## WAIVER OF FUNDAMENTAL RIGHTS AND NATURAL JUSTICE : MICROSCOPIC JUDICIAL ANALYSIS

**Ripu Daman Gulati**, PhD Research Scholar, Faculty of Law, ISBM, University, Nawapara (Kosmi), Block: Chhura, District: Gariaband, 493996, Chhattisgarh, India

**Dr Shameem Ahmed Khan**, School of Law, ISBM, University, Nawapara (Kosmi), Block: Chhura, District: Gariaband, 493996, Chhattisgarh, India

**Dr Sudhir Kumar**, Kurukshetra University, Thanesar, Haryana 136119, Haryana, India

### *Abstract*

A waiver is an abandonment of right. The assumption behind waiver is that a man is best judge of his interest. If he waives his right, he cannot claim it later. In order to establish waiver it is necessary to establish that the person waiving his right had full knowledge of the right or privilege, and that the right or privilege was conferred principally for his benefit and not principally for the benefit of public, for in the latter case it would be against the policy of the law to allow him to waive it. <sup>1</sup>

**Key Words:** Waiver, Fundamental Rights, Statutory Rights, Natural Justice, Doctrine of Waiver.

### **Introduction**

It is open to a citizen to waive any of the fundamental rights conferred by part 3 of the constitution. These rights have been put in the Constitution not merely for the benefit of the individual but as a matter of public policy for the benefit of the general public. It is an obligation imposed upon the state by the constitution. No person can relive the state of this obligation, because a majority of our people is economically poor, educationally backward and politically not yet conscious of their rights. In such circumstances, it is the duty of this court to protect their right against themselves

### **Doctrine of Waiver**

A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom waiver is claimed had full knowledge of this right and facts enabling him to take effectual action for the enforcement of such right.

*In Motilal Padampat Sugar Mills v. State of U.P.*, the government sought to impose the sales tax. The petitioners agreed to pay half of the normal rate. Thereafter, they challenged the levy. But the government cannot be allowed to raise the plea of waiver for the first time at the

<sup>1</sup> AIR 1976 SC 376



hearing of the writ petition because it had not been taken in its affidavits. He further stated that in the instant case, waiver could not apply as there was nothing to show that the appellants had full knowledge of their right and that they intentionally abandoned it.

### Waiver of Fundamental Rights

The question whether a Fundamental Right can be waived arose before the Supreme Court in *Bashesh Nath v. C.I.T.*<sup>2</sup> The facts of the case were that the appellant whose matter had been referred to the Investigation Commission in pursuance of section 5(1) of the Taxation of Income (Investigation Commission) Act, 1947 entered into a settlement with the department with respect to his income liability arising out of concealment of large amount of his income. He was allowed to pay his tax liability under the settlement in instalment. In the meanwhile, the Supreme Court, in another case,<sup>3</sup> had declared that section 5 (1) of the Taxation of Income (Investigation Commission) was ultra vires the Constitution as it was violative of Article 14.

The assesses paid a few installments even after the Court's ruling, but then stopped making payments on the ground that the settlement became invalid in view of ultra vires character of the relevant law. He invited the Court to hold that he absolved of his obligation under the settlement.

On the other hand, the Government contended that the settlement was enforceable as he had waived his Fundamental Right under Article 14 by his conduct. In an unanimous decision, the Court held in appellant's favour and ruled that there was no waiver by him of his rights. The Court observed :

*“Waiver is voluntary relinquishment or intentional abandonment or relinquishment of a known right, benefit, privilege or advantage, which but for waiver, the party could have enjoyed”.*

According to this test, there was no waiver on the appellant's part as he could not be presumed to know that the Act in question was constitutionally invalid. However judges delivered separate opinions in the Court.

*S.R. Das, C.J. and Kapoor, J.*, confined their opinion to the fundamental right involved in the case and held that right under article 14 cannot be waived. *Bagwati and subba Rao, JJ.*, held that it is not to open to a citizen to waive any of the Fundamental Rights guaranteed by Part 3 of the Constitution. *S.K das, j.* took the view that Fundamental Rights may be waived, except on grounds of public policy.

<sup>2</sup> AIR 1959 SC 149

<sup>3</sup>*Suraj Mall Mohta and Co. v. A.V. VishwanathSastri, AIR 1954 SC 545*



In course of time, *Bhagwati, J.*'s opinion has become the binding norm and the position is that no Fundamental Right can be waived.<sup>4</sup>

The doctrine of waiver cannot be invoked where the legislature passing the statute lacks the very competence to enact the law. In *Behram Khurshid v. State of Bombay*,<sup>5</sup> *Venkatarama Ayyar, J.* seems to be correct when he observed :

*"If the statute is beyond the competence of the legislature, as for example, when the State enacts a law which is within the exclusive competence of the Union, it would be a nullity."*<sup>6</sup>

Thus, it is in such a case that there would be no question of waiver.

### Waiver of Statutory Rights

Whether a person can waive his right or not depends on consideration of two factors. *First*, whether the statute guaranteed rights exclusively in favor of the person concerned or third persons as well. The doctrine of waiver cannot be applied in the latter case.<sup>7</sup>

*Secondly*, even if the statute vests rights exclusively in the person waiving that right, still the waiver may not be allowed on the grounds of public policy, public interest or public morality.

Thus, in *Murlidhar v. State of U.P.*,<sup>8</sup> the Court came to consider the question of waiver of statutory right on the ground of public policy. In this case section 3 of the UP. (Temporary) Control of Rent and Eviction Act, 1947 provided that no suit would be filed by a landlord against a tenant for his eviction without the permission of the District Magistrate. However, an agreement was concluded between the parties that no party would claim the statutory benefit. The landlord filed a suit for eviction of the tenant without obtaining the permission of the District Magistrate.

The question posed before the Court was whether section 3 was enacted for the benefit of tenants or whether there was a '*public policy underlying it which precluded a tenant from waiving its benefit.* It was held by the Court that section 3 was founded on public policy and was

<sup>4</sup> *Yousuf Ali AbudullaFazalbhhot v. M.S.kasbekar, AIR 1982 Bom.143*

<sup>5</sup> AIR 1955 SC 123

<sup>6</sup> Ibid, at p. 139

<sup>7</sup> Andrews, Estoppel Against Statutes, 29 M.L.R. 1,4 (1966)

<sup>8</sup> AIR 1974 SC 1924



*“intended to protect the weaker section of the community with a view to ultimately protecting the interest of the community in general by creating equality of bargaining power.”*

On the other hand, such provisions of Rent Control Act as are for the benefit of the landlord can be waived by him, for he is not in the same bargaining position as a tenant.<sup>9</sup>

In *Director of Inspection of Income Tax v. Pooran Mal and Sons*,<sup>10</sup> under section 132 (5) of the Income Tax Act, 1961, the Income Tax Officer passed an order for retaining seized silver bars within ninety days but without giving reasonable opportunity of hearing to the petitioner. A petition was filed before the High Court under Article 226 for issue of Writ. The High Court passed an order quashing the I.T.O.'s order but allowing him to look into the matter afresh after giving an opportunity to hear the petitioner. After hearing the petitioner, a similar order as the one before was passed again. A writ petition was filed challenging the validity of the said order on the ground that the ITO had no jurisdiction to pass the impugned order after the prescribed time. The High Court gave him relief. But in appeal the Supreme Court upheld the said order on the ground of waiver.

It was held that as the period of limitation prescribed by section 132 (5) “*is intended for the benefit of the persons like the respondents*”, they could waive it and that they had in fact waived it.

In *Superintendent of Taxes v. O.N. Trust*,<sup>11</sup> the petitioners were granted from the High Court interim orders staying the tax proceedings against them on basis of invalidity of the Act. But the Supreme Court held the Act to be valid. In the meantime, the statutory time limit for issuing notices for initiating assessment proceedings had expired. The Government contended that the petitioners should be deemed to have waived their right to receive notices within the time-limit by their conduct in obtaining Stay Orders from the High Court. The Supreme Court by majority refused to accept the contention.

The majority observed “*A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent. A procedural provision may be waived by conduct or agreement*”.<sup>12</sup>

In this case the issue of notice related to the exercise of jurisdiction and could not be waived.

<sup>9</sup>*Lachoo Mal. v. RadheyShayam*, AIR 1971 SC 2213

<sup>10</sup> AIR 1975 SC 67

<sup>11</sup> AIR 1975 SC 2065

<sup>12</sup>*ibid*, at p.2071.



In *State of Kerala v. Aluminium Industries Ltd.*,<sup>13</sup> the petitioners submitted their sales-tax return showing their taxable turnover and paid the tax accordingly. However, later, they came to know that some part of the turn-over was not taxable under the Constitution.

It was, therefore, that they applied for refund. Taking the plea of waiver, the government refused to refund the money to the petitioners. It was ruled that there was no question of waiver as the mistake of law was common to both the parties.

### Waiver of Natural Justice

A person may waive his objection to his matter being decided by a person subject to the disqualification of bias. Thus in *A.C. Cooper v. Union of India*,<sup>14</sup> the bench adjudicating upon the constitutionality of the statute nationalising the 14 major Banks consisted of two judges having some shares in some of the Nationalised Banks. On behalf of the Government of India, the Attorney-General waived the objection against those judges hearing the case. Thereafter, the Bench proceeded with the hearing.

Waiver may be inferred if the party or his legal representative knew of the disqualification of the judge but acquiesced in the proceeding by raising no objection in the proceeding at the earliest practicable opportunity. The Supreme Court has propounded the principle in the following words:<sup>15</sup>

*“The alleged bias in a member of the Tribunal does not render the proceeding invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of his right to challenge the presence of the member in the Tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question.”*

As regards the position of waiver with respect to other aspect of natural Justice there is judicial authority for the proposition that if the initial notice is bad, acquiescence by the party does not preclude him from subsequently contesting it.<sup>16</sup> However, the rest of the hearing may be waived by not taking advantage of it as it is meant for the benefit of the affected person.

<sup>13</sup> (1965) 15 STC 669 (SC)

<sup>14</sup> AIR1970 SC 564

<sup>15</sup> *ManakLal v. Prem Chand*. AIP 1957 S.C at 43

<sup>16</sup> *Munnich v. Godstone Rural District Council*, (1966) 1 WLR 427



Thus, in a disciplinary proceeding under Article 311 of the Constitution,<sup>17</sup> an Opportunity was afforded to a civil servant to explain his conduct but, he did not avail it. The Court held that the principles of natural justice were not violated if the inquiry was conducted *ex parte*.<sup>18</sup>

## CONCLUDING REMARKS

From the explanation above, it may be concluded that a person is always free to waive out their rights, whether they are statutory or contractual. The doctrine of waiver is completely compatible with the estoppel principle because it plays a crucial part in acts of waiver. There is no real consideration needed to exercise a right that has been waived because waiver is consensual in nature and always requires two or more parties.

The public policy and interest vested in the right sought to be waived must be taken into consideration, and this has its own limitations that must be determined from the facts of each instance. This is something that cannot be ignored. The fundamental rights, on the other hand, are so fundamental and important to the public's interest that they are currently completely prohibited with no exceptions.

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<sup>17</sup>*ShahoodulHaque v. Registrar, Co-operative societies, Bihar*, AIR 1971 SC 1896

<sup>18</sup>*Farid Ahmed v. Ahmedabad Municipality*, AIR 1976 SC 2095