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WAIVER OF CONSTITUTIONAL RIGHTS IN INDIAN AND AMERICAN CONSTITUTIONAL LAW

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The Supreme Court of India has not been at all reticent in referring to American constitutional decisions and American text writers. But this does not mean that the Indian judges have felt any compulsion to follow the American authorities. This was quite recently dramatically illustrated by the decision and opinions in *Basheshar Nath* v. *Commissioner of Income-tax.* [1]

In that case the appellant Nath and the Central Government of India had agreed to a settlement of the government's claim for unpaid taxes. The settlement had been reached in accordance with procedures established in the Taxation of Income Act, 1947, sometimes referred to as the Investigation Act. After this settlement was reached, the Supreme Court in entirely separate proceedings involving other taxpayers held the Investigation Act unconstitutional as a violation of Article 14 which provides: "The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India." This decision was based on the conclusion that the procedures established by the Investigation Act were more summary and coercive than the procedures established in another equally applicable statute, The Indian Income Tax Act, and that consequently the Income Tax Officers could arbitrarily pick out some persons and subject them to more drastic procedures than were being applied to other persons similarly situated.[2] Despite this decision the appellant Nath continued to make instalment payments in accordance with his settlement agreement for some time thereafter, before defaulting in the payments due, when certain of his properties were attached for the unpaid balance. The appellant then contended that the attachment should be released and the payments previously made refunded because the Investigation Act under which the settlement had been made had been held unconstitutional. The Income Tax Commissioner

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1. A.I.R. 1959 S.C. 149.

2. *Shree Meenakshi Mills Ltd.* v. *A. V. Viswanatha Sastri,* A.I.R. 1955 S.C. 13; *M. Ct. Muthiah* v. *Commissioner of Income-tax*, A.I.R. 1956 S.C. 269.

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responded that the settlement was not affected by the decision on the constitutionality of the statute and demanded continued payments in accordance with the agreement. The taxpayer was then allowed to appeal directly to the Supreme Court, where he did not press his claim for refund but did ask to be relieved of all further payments. The Attorney-General in response argued that the invalidity of the statute did not affect the binding character of the agreement, since that was reached quite apart from the statutory provisions which had been found unconstitutional; and that in addition the appellant, since he had never before challenged the validity of the statute and had voluntarily entered into the settlement, had in effect waived his right to take advantage of the invalidity of the statute.

The five judges composing the bench which disposed of the *Nath* case were unanimous in reaching the conclusion that the appellant should be relieved of his obligations under the settlement, but they had considerable disagreement with respect to the grounds of the decision. They were apparently all agreed that the settlement procedures could not be divorced from the investigatory provisions of the statute and that consequently the statutory provisions governing the settlement were also invalid. There were however several different views expressed regarding the doctrine of waiver and particularly with respect to the applicability of the American precedents cited by the Attorney-General.

Chief Justice S. R. Das, for himself and Justice Kapur, expressed the view that the Court should consider only whether rights under Article 14 of the Constitution could be waived, putting aside the question "Whether any of the other fundamental rights enshrined in Part III of our Constitution can or cannot be waived." [3] The opinion then goes on to point out that the prohibition of Article 14 is "in form an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other articles, e.g. Article 19, do"; that the protection of the Article is not limited to citizens but is available to all persons within the territory of India; that it applies not only to the Government of India but to all local authorities within India; that there are no relaxations or restrictions upon it such as are present in some of the other articles; and finally that it includes all executive action as well as legislative action in the prohibition. In view of these considerations the Chief Justice concluded:

3. A.I.R. 1959 S.C. at 157.

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"It seems to us absolutely clear on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implementing its object of ensuring the equality of status and opportunity which every Welfare State such as India by her Constitution is expected to do and no person can by any act or conduct relieve the State of the obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he certainly cannot give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State." [4]

Having thus confined the rationale of his opinion to Article 14—the equality clause of the Constitution—the Chief Justice was content to dispose of the American authorities cited by the Attorney-General by noting that they concerned waiver of obligations under a contract, deprivation of property without due process of law, or the constitutional right to trial by jury and the like. These he said "have no bearing on the question of the waiver of the equal protection clause of the 14th Amendment which, like our Article 14, is a mandate to the State." [5] Finally, it should be noted that the Chief Justice did not himself pass on the question whether the appellant had in fact waived the constitutional objection. The answer to that question he said depended on facts which had not been properly investigated and which were now academic since the Court was deciding that the objection could not be waived.

The opinion delivered by Justice Bhagwati was very largely in accord with the opinion of the Chief Justice, except that he saw no reason to limit the reasoning to Article 14 alone. Instead he took the broader ground that "it is not open to a citizen to waive the fundamental rights conferred by Part III of the Constitution." [6] This view also propelled the Justice into a broader consideration of the American authorities cited by the Attorney-General. These he distinguished on the ground that "whatever may be the position in America, no distinction can be drawn here, as has been attempted in the United States of America, between the fundamental rights which may be said to have been enacted in the public interest or on grounds of public policy. Ours is a nascent democracy and situated as we are,

4. *Id.* at 158–159.
5. *Id.* at 159.
6. *Id.* at 160.

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socially, economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the fundamental rights which have been for the first time enacted in Part III of our Constitution."[7] In further support of his view, Justice Bhagwati also argued that the fundamental rights in the Indian Constitution were spelled out with great precision and that the limitations upon them were also spelled out in the Constitution itself, so that there was no justification for reading other limitations into them. Finally, he suggested that "whereas the American Constitution was merely enacted in order to form a more perfect union, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty and was an outline of government and nothing more, our Constitution was enacted to secure to all citizens, Justice, Liberty, Equality and Fraternity and laid emphasis on the welfare of the State and contained more detailed provisions, defining the rights and also laying down restrictions, thereupon in the interests of the general welfare."[8] Therefore, he concludes: "The Constitution adopted by our founding fathers is sacrosanct and it is not permissible to tinker with those fundamental rights by ratiocination or analogy of the decisions of the Supreme Court of the United States of America."[9]

The opinion of Justice S. K. Das differs markedly from the opinion of the Chief Justice and that of Justice Bhagwati in that he reverses the order of the questions presented, considering first whether there has in fact been a waiver of the constitutional objections, and secondly whether such a constitutional objection could be waived. With respect to the first question, after minutely examining the facts, which he considers sufficiently established for this purpose, Justice S. K. Das concludes that the waiver had not been established "particularly when the question of refund of the amounts already paid is no longer a live issue before us."[10] Having reached this conclusion on the facts of the particular case, the Justice recognized that it became unnecessary for him to decide the general constitutional question of waiver. Indeed he suggested that the better practice was to avoid such questions when a reasonable alternative existed. Nevertheless, since his brethren had expressed their views on the constitutional question, he felt obligated to express his own, particularly since he differed from them. Among other things, he was not impressed by the general distinctions suggested

7. *Ibid.*
8. *Id.* at. 162.
9. *Ibid.*
10. *Id.* at 172.

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by Justice Bhagwati between the American Constitution and the Indian Constitution. He was also inclined to the view that some constitutional rights could be waived and others not; that "the crucial question is not whether the rights or restrictions occur in one part or other of the Constitution. The crucial question is the nature of the right given: Is it for the benefit of individuals or is it given for the general public?"[11] Finally, Justice S. K. Das concludes that "where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not fringe on the rights of others, it can be waived provided that such waiver is not forbidden by law and does not contravene public policy or morals."[12]

The opinion of Justice K. Subba Rao is essentially in accord with that of Justice Bhagwati, taking the ground that none of the fundamental rights guaranteed by Part III of the Indian Constitution may be waived. His reasons for rejecting the applicability of the American precedents are, however, somewhat different, at least in emphasis. He says for example: "While it is true that the judgments of the Supreme Court of the United States are of great assistance to this Court in elucidating and solving the difficult problems that arise from time to time, it is equally necessary to keep in mind the fact that the decisions are given in the context of a different social, economic, and political set up, and therefore great care should be bestowed in applying those decisions to cases arising in India with different social, economic and political conditions."[13] In spelling out this idea further, Justice K. Subba Rao adds: "A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms. In such circumstances, it is the duty of this Court to protect their rights against themselves."[14]

Since the judges in *Basheshar Nath* disagreed on the question whether the American cases cited by the Attorney-General would, if followed, support the claim of waiver in the particular case before them, it may be of interest to examine the American precedents in some detail. The earliest case cited by the Attorney-General, *Pierce* v. *Somerset Railway*,[15] involved the claim of impairment of the obligation

11. *Id.* at 176.
12. *Id.* at 178.
13. *Id.* at 180.
14. *Id.* at 183.
15. 171 U.S. 641 (1898).

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of contract embodied in a corporate mortgage by a state law passed after the execution of the mortgage. The state court had held that the parties protesting the impairment of their mortgage rights, had actively proposed, aided and acquiesced in the corporate changes which they now asserted violated their constitutional rights; their long acquiescence, coupled with changed conditions and relations, was held to estop them from questioning the legality of the new corporate organization. The United States Supreme Court held that the finding of estoppel was a sufficient non-federal ground to sustain the state court's judgment, without consideration of the constitutional question.

The next decision cited, *Shepard* v. *Baron*,[16] was a case where certain property owners had petitioned for public improvements to be made in the public highway adjoining their land. The act under which the improvement was to be made also provided for the assessment of the adjoining lands for the cost of the improvement in accordance with the number of feet fronting on the improvement. After the improvement was made, the petitioning property owners claimed that the method of assessment provided by the statute was unfair and deprived them of property without due process of law. The Supreme Court refused to consider the constitutional objection on the ground that "when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted upon general principles of justice and equity, to claim that the action which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person."[17]

The third case, *Wall* v. *Parrot Silver & Copper Co.*,[18] was a suit by minority stockholders to set aside a sale of all the property of the corporation to another company; they challenged as unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment the applicable statute which permitted two-thirds of the stockholders to approve such a sale. The statute also provided that dissenting shareholders were to be paid the cash value of their stock which was to be appraised in accordance with a procedure established by the statute. The Court held that it did not have to consider the constitutional challenge to the statutes because the complaining stockholders "by their action in instituting a proceeding for the valuation

16. 194 U.S. 553 (1904).
17. *Id.* at 568.
18. 244 U.S. 407 (1917).

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of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them." [19]

The final case cited by the Attorney-General, which might be considered to have some resemblance to the *Nath* case,[20] was *Pierce Oil Co.* v. *Phoenix Refining Co.*,[21] in which the oil company challenged as invalid under the due process clause an order of the Corporation Commission of the state declaring that it was a common carrier of oil under state law and must therefore carry in its pipe line oil produced and tendered to it by the Phoenix Company. The Supreme Court held that since the statutes under which the order was made were in effect when the company first qualified to do business in the state, and in view of the "large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business", the constitutional claim "must be pronounced futile to the point of almost being frivolous." [22] The Court also added: "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." [23]

Comparison of the factual situations presented in the American cases with that presented in the *Nath* case will immediately suggest one distinguishing factor which might well be regarded as of fundamental significance. In all of the American cases the course of conduct treated as the basis of waiver or estoppel resulted from the voluntary initiative of the complaining party. The extent to which, in each particular case, this initiative should be regarded as really voluntary rather than the result of indirect compulsion varies of course in the particular cases, and in some of them may even be so debatable as to raise some question regarding the justice and soundness of the decision. In the first two cases mentioned above, *Pierce* v. *Somerset* and *Shepard* v.

19. *Id.* at 411.

20. The other cited cases, which are more easily distinguishable, were *Patton* v. *United States*, 281 U.S. 276 (1930) (consent to be tried by a jury of less than twelve); *United State* v. *Harry Murdock* 284 U.S. 141 (1931) (privilege against self-incrimination); *Adams* v. *United States ex rel McCann*, 317 U.S. 269 (1942) (assistance of counsel). Of all of these personal rights, it may be fairly said that the Constitution grants the right, *i.e.*, jury trial, assistance of counsel, or the privilege against self-incrimination, but does not force it upon one. If one consciously elects to proceed without the protection and loses, one cannot then elect to be tried again with the benefit of the protection.

21. 259 U.S. 125 (1922).

22. *Id.* at 128.

23. *Id.* at 128–129.

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Baron, this doubt does not seem to bulk very large since it does appear quite clearly that the complaining party had taken some initiative and had cheerfully accepted the benefits flowing from their actions until it came time to suffer the burdens. It also appeared that innocent third parties would be substantially injured if the complaining parties were now allowed to escape from the obligations that they had voluntarily assumed. Consequently, it is difficult to believe that the Supreme Court of India would have decided the same cases any differently than the American courts did.

Similarly in the *Parrot* case the complaining parties had themselves initiated proceedings under the statute which they now assailed; here, however, the question might be raised as to whether they really had much choice since the corporate action they were attacking had already been consummated and they had to take some action to protect their rights. The real question seemed to be whether they should be allowed simultaneously to follow two inconsistent courses of action, namely seek the cash payment provided in the statute and simultaneously, in another action, attack the validity of the same statute as applied to the same transaction. Here too it seems unlikely that the Indian court would have come out any differently in ultimate result than did the American court.

This brings us finally to the *Pierce* case which is perhaps the most questionable example of the application of the doctrine of waiver. This is because it is difficult to see how the Pierce Oil Company could have challenged the statute except by coming into the state and proceeding to do business in the way it did. This does not mean, however, that the decision is questionable, particularly since the Court, before mentioning the doctrine of waiver, had already indicated that the constitutional claim was "futile to the point of being almost frivolous." It should also be noted that when a state has sought to impose upon the entry of a foreign corporation conditions which the Court regarded as presenting serious constitutional difficulties, it was not inhibited by the doctrine of waiver from considering them under the doctrine of unconstitutional conditions.[24]

Just how the Indian judges who indulged in such sweeping statements about the non-waivability of constitutional rights would have distinguished situations such as those presented in the American cases is of course somewhat more hazardous to suggest. Nevertheless, it

24. Compare *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1 (1960) (taxation of assets outside the state); *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922) (a denial of access to federal courts). See Henderson, *The Position of Foreign Corporations in*

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may be of some significance that these same judges uniformly limited their discussion to the doctrine of waiver and carefully eschewed the word estoppel. Perhaps they would regard certain types of affirmative conduct in which the complaining party had taken the initiative and had received certain benefits as a result, as creating an estoppel against the party challenging the validity of his own action. In the *Nath* case, on the other hand, it might be said that the taxpayer had no choice with respect to the initiation of proceedings under the Investigation Act. His only choice had been whether to accept the settlement offered.[25] Furthermore, it might also be said that the government suffered no irreparable prejudice as a result of the settlement. It had merely delayed in insisting on full payment, which it was now free to do.

It may also be of some interest to put the converse of the question just discussed, and ask how the United States Supreme Court would be likely to decide the question presented in *Basheshar Nath,* assuming all the relevant facts were similar. This question is even more difficult to answer, since no closely analogous case has been found. The situation may be considered to have some resemblance to *Ashwander* v. *Tennessee Valley Authority,*[26] in which minority stockholders sought to set aside a contract made by their corporation for the sale of power lines to the Tennessee Valley Authority on the ground that the statute establishing the Authority was unconstitutional. The government contended that the stockholders were estopped from asserting a cause of action on behalf of their corporation because the corporation was making purchases of electricity from the Authority, because the purchases were wholly voluntary, and because one who accepts the benefits of a statute is estopped to assert that it is invalid. Mr. Justice Brandeis thought that this objection was sound and three other members of the Court joined in his opinion. Chief Justice Hughes, however, writing for the majority of the Court, disposed of the objection quite summarily, saying: " We think that the principle is not applicable

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American Constitutional Law (1918); Hale, " Unconstitutional Conditions and Constitutional Rights," 35 *Col. L. Rev.* 321 (1935); Note, "Unconstitutional Conditions," 73 *Harv. L. Rev.* 1595 (1960); Anno: " License Regulation—Right to Attack," 65 *A.L.R. 2d,* 660 (1959).

25. Justice S. K. Das suggested in his opinion that the taxpayer had no real choice with respect to acceptance of the settlement offer because under the Act the Commission finding as to the amount due was "final and binding on him." 46 A.I.R. 1959 S. C. at 172. If this be a correct statement of the law, his only choice was to contest the validity of the statute itself.

26. 297 U.S. 288 (1936).

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here."[27] It was also argued that a proceeding by the Corporation before a state commission for approval of the contract, coupled with delay in the bringing of the stockholders' suit, created an estoppel, but the Chief Justice answered this by saying: "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities.[28] Despite the short shrift which the Chief Justice thus accorded to the claim of estoppel, it is not so clear that he would have been equally unsympathetic to the claim if the corporation itself, rather than the minority stockholders, had been seeking to disavow the contract which it had voluntarily made. It also may be suggested that in *Basheshar Nath*, unlike *Ashwander*, the government had substantially changed its position on the faith of the agreement, because it had withheld for several years from pressing for the full amount of its claim.

But in examining these Indian and American cases, the more interesting comparison is not so much in the results themselves, as in the ways of arriving at those results. In this respect, most of the Indian opinions are particularly striking in that they all, with the exception of the opinion of Justice S. K. Das, consider the question whether a constitutional right can be waived before they consider the question whether the claim of waiver has been made out on the particular facts. The opinion of S. K. Das reads much more like a typical American opinion in that he first examines the facts in detail to determine whether the claim of waiver has been established, remarking that this is especially appropriate in order to avoid deciding an important question of constitutional law. Justice S. K. Das is also more sensitive than the other Justices to the factual differences in the cases cited by the Attorney-General, as compared with the cases before the court, and more skeptical of the applicability, even under American law, of the doctrine of waiver to the latter situation. It is true that the Chief Justice in his opinion also notes that the precedents cited by the Attorney-General are distinguishable from the case before the Court, but his distinction is based on the ground that they concerned a different constitutional provision, rather than on differences in the facts constituting the asserted waiver. Whether these differences in approach, to the extent that they have been justifiably noticed, reflect only idiosyncrasies of individual justices, or whether they reflect to some extent basic attitudes towards the whole field of law, or even national habits of thinking, are questions enticing to speculate upon, but outside the realm of this particular paper.

27. *Id.* at 323.
28. *Ibid.*

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