BASHESHAR NATH

v.

1958

November 19.

THE COMMISSIONER OF INCOME-TAX, DELHI & RAJASTHAN & ANOTHER.

(S. R. DAS, C. J., N. H. BHAGWATI, S. K. DAS, J. L. KAPUR and K. SUBBA RAO, JJ.)

Income-tax—Evasion of taxation—Case referred to Investigation Commission—Commencement of the Constitution—Settlement of case —Constitutional validity of—Waiver of fundamental right, if permissible—Taxation of Income (Investigation Commission) Act, 1947 (30 of 1947), s. 8A—Constitution of India, Art. 14, Part III.

The two questions for determination in this appeal were, (1) whether a settlement under s. 8A of the Taxation of Income (Investigation Commission) Act, 1947 (30 of 1947) made after the commencement of the Constitution was constitutionally valid and (2) whether the waiver of a fundamental right was permissible under the Constitution. The appellant's case was on July 22, 1948, referred by the Central Government under s. 5(1) of the Act to the Investigation Commission for investigation and report. The Commission directed the authorised official under s. 6 of the Act to examine the appellant's accounts. He submitted his final report by the end of 1953. The Commission considered the report heard the assessee and came to the conclusion that Rs. 4,47,915 had escaped assessment. Thereupon the appellant on May 20, 1954, applied to the Commission for a settlement of his case under s. 8A of the Act, agreeing to pay Rs. 3,50,000 by way of tax and penalty at the concessional rate. The Commission reported to the Central Government approving of the settlement, the Central Government accepted it and it was recorded by the Commission. The Central Government directed the recovery of the said amount under s. 8A(2) of the Act. The appellant was permitted to make payments by monthly instalments of Rs. 5,000 and the total amount thus paid up to September 8, 1957, aggregated to Rs. 1,28,000. In the meantime the Income Tax Officer issued a certificate and certain properties of the appellant were attached. Relying on the decisions of this Court in *Suraj Mall Mohta and Co.* v. *A. V. Visvanatha Sastri*, [1955] 1 S.C.R. 448 and *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras*, [1955] 2 S.C.R. 1247, the appellant applied to the Commissioner of Income-tax challenging the validity of the settlement made under s. 8A of the Act on the ground that s. 5(1) of the Act on which it was founded had been declared void by this Court, and claimed that his properties might be released from attachment and the amount paid under the settlement might be refunded to him. On January 29, 1958, the Commissioner of Income Tax sent a reply to the appellant maintaining that the settlement was valid and

that the appellant was bound thereunder to pay up the arrears of instalments and requesting him to continue to pay in future. Against this decision of the Commissioner of Income Tax the appellant came up to the Supreme Court by special leave. It was contended on behalf of the respondent that the Act laid down two distinct and separate procedures, one for investigation and the other for settlement and it was the former alone and not the latter that was affected by the decisions of this Court and that the appellant by voluntarily entering into the settlement had waived his fundamental right founded on Art. 14 of the Constitution.

Held (Per Curiam), that both the contentions must fail.

It was not correct to say that the Taxation of Income (Investigation Commission) Act, 1947, laid down two different procedures, one for investigation and assessment under s. 8(2) of the Act and another for settlement under s. 8A of the Act and assessment in terms of such settlement and that while the decision of this Court in *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras,* declaring s. 5(1) of the Act to be discriminatory and therefore void, affected only the former procedure and not the latter. The Act laid down but one procedure and in entertaining a proposal for settlement as in the investigation itself the Commission exercised the same jurisdiction, and powers and followed the one and the same procedure as laid down by ss. 5, 6 and 7 of the Act. Since the settlement in the instant case was no exception to that rule, it was covered by the decision and must be held to be violative of Art. 14 of the Constitution.

M. Ct. Muthiah v. *The Commissioner of Income-tax, Madras,* [1955] 2 S.C.R. 1247, applied.

The observations made in the majority judgment of this Court in *Syed Qasim Razvi* v. *The State of Hyderabad,* [1953] S.C.R. 589, must be kept strictly confined to the special facts of that case and had no application to the facts of the present case.

Syed Qasim Razvi v. *The State of Hyderabad,* [1953] S.C.R. 589, held inapplicable.

Per Das, C. J., and Kapur, J.—There could be no waiver of the fundamental right founded on Art. 14 of the Constitution and it was not correct to contend that the appellant had by entering into the settlement under s. 8A of the Act, waived his fundamental right under that Article. Article 14 was founded on a sound public policy recognised and valued all over the civilised world, its language was the language of command and it imposed an obligation on the State of which no person could, by his act or conduct, relieve it. As it was not strictly necessary for the disposal of this case, the question whether any other fundamental right could be waived need not be considered in this connection.

Laxamanappa Hanumantappa Jamkhandi v. *The Union of India,* [1955] 1 S.C.R. 769; *Dewan Bahadur Seth Gopal Das Mohta*

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v. *The Union of India*, [1955] 1 S.C.R. 773; *Baburao Narayanrao Sanas* v. *The Union of India*, [1954] 26 I.T.R. 725; *Subedar* v. *State*, A.I.R. 1957 All. 396 and *Pakhar Singh* v. *The State*, A.I.R. 1958 Punj. 294, distinguished and held inapplicable.

Per Bhagwati and Subba Rao, JJ.—There could be no waiver not only of the fundamental right enshrined in Art. 14 but also of any other fundamental right guaranteed by Part III of the Constitution. The Constitution made no distinction between fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of the public policy. There could, therefore, be no justification for importing American notions or authority of decided cases to whittle down the transcendental character of those rights, conceived in public interest and subject only to such limitations as the Constitution had itself thought fit to impose.

Article 13(2) was in terms a constitutional mandate to the State in respect of all the fundamental rights enacted in Part III of the Constitution and no citizen could by waiver of any one of them relieve the State of the solemn obligation that lay on it. The view expressed by Mahajan, C. J., in *Behram Khurshed Pesikaka* v. *The State of Bombay*, [1955] 1 S.C.R. 613, correctly laid down the law on the point. Since the arguments in the instant case had covered the entire field of fundamental rights, there was no reason why the answer should be confined to Art. 14 alone.

Behram Khurshed Pesikaka v. *The State of Bombay*, [1955] 1 S.C.R. 613; *State of Travancore-Cochin* v. *The Bombay Co., Ltd.*, [1954] S.C.R. 1112 and *The State of Bombay* v. *R. M. D. Chamarbaugwala*, [1957] S.C.R. 874, referred to.

Per S. K. Das, J.—It seems clear that Art. 13 itself recognises the distinction between absence of legislative power which will make the law made by an incompetent legislature wholly void, and exercise of legislative power in contravention of a restriction or check on such power, which will make the law void to the extent of the inconsistency or contravention; therefore the mere use of the word "void" in Art. 13 does not necessarily militate against the application of the doctrine of waiver in respect of the provisions contained in Part III of the Constitution.

Behram Khurshed Pesikaka v. *The State of Bombay*, [1955] 1 S.C.R. 613, considered.

Bhikaji Narain Dhakras v. *The State of Madhya Pradesh*, [1955] 2 S.C.R. 589; *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras*, [1955] 2 S.C.R. 1247 and *The State of Bombay* v. *R.M.D. Chamarbaugwala*, [1957] S.C.R. 874, referred to.

There was nothing in the two preambles to the Indian and the American Constitutions that could make the doctrine of waiver applicable to the one and not to the other; since the doctrine

applied to the constitutional rights under the American Constitution, there is no reason why it should not apply to the fundamental rights under the Indian Constitution.

Case-law considered.

But it must be made clear that there is no absolute rule, or one formulated in the abstract, as to the applicability of that doctrine to fundamental rights and such applicability must depend on (1) the nature of fundamental right to which it is sought to be applied and (2) the foundation on the basis of which the plea is raised. The true test must be whether the fundamental right is one primarily meant for the benefit of individuals or for the benefit of the general public.

Where, therefore, the Constitution vested the right in the individual, primarily intending to benefit him and such right did not impinge on the rights of others, there could be a waiver of such right provided it was not forbidden by law or did not contravene public policy or public morals.

As in the instant case the respondents who had raised the plea, had failed to prove the necessary facts on which it could be sustained, the plea of waiver must fail.

Per Subba Rao, J.—Apart from the question as to whether there could be a waiver in respect of a fundamental right, s. 5(1) of the Taxation of Income (Investigation Commission) Act, 1947, having been declared void by this Court in *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras,* as being violative of the fundamental right founded on Art. 14 of the Constitution and such decision being binding on all courts in India, the Commissioner of Income-tax had no jurisdiction to continue the proceedings against the appellant under that Act and the appellant could not by a waiver of his right confer jurisdiction on him.

No distinction could be made under Art. 13(1) of the Constitution between the constitutional incompetency of a legislature and constitutional limitation placed on its power of legislation, for a statute declared void on either ground would continue to be so, so long as the inconsistency continued. As the inconsistency of s. 5(1) of the Act with Art. 14 continued, it must continue to be void.

Keshavan Madhava Menon v. *The State of Bombay,* [1951] S.C.R. 228; *Behram Khurshed Pesikaka* v. *State of Bombay,* [1955] 1 S.C.R. 613 and *Bhikaji Narain Dhakras* v. *State of Madhya Pradesh,* [1955] 2 S.C.R. 589, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 208 of 1958.

Appeal by special leave from the order dated January 29, 1958, of the Commissioner of Income-tax, Delhi & Rajasthan at New Delhi, under s. 8A(2) of the

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Taxation on Income (Investigation Commission) Act, 1947.

Harnam Singh and *Sadhu Singh* for the appellant.

M. C. Setalvad, Attorney-General for India, C. K. Daphtary, Solicitor-General of India, B. Sen and *R. H. Dhebar* for the respondents.

A. C. Mitra and *B. P. Maheshwari*, for the interveners.

1958. November 19. The Judgment of Das, C. J., and Kapur, J., was delivered by Das, C. J. Bhagwati, S. K. Das and Subba Rao, JJ., delivered separate judgments.

Das C. J.

DAS, C. J.—This appeal by special leave filed by one Shri Besheshar Nath hereinafter referred to as "the assessee" calls in question the validity of a settlement made under s. 8A of the Taxation on Income (Investigation Commission) Act, 1947 (30 of 1947), hereinafter referred to as "the Investigation Act". This Act, which came into force on May 1, 1947, by a notification issued by the Central Government under s. (1) (3) thereof, has had a short but chequered career, as will appear from the facts hereinafter stated.

In order to appreciate the several questions canvassed before us it is necessary to refer to the provisions of the impugned Act. Section 3 authorised the Central Government to constitute an Income Tax Investigation Commission (hereinafter called the Commission) and imposed on it the following duties :—

"(a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof;

(b) to investigate in accordance with the provisions of this Act any case or points in a case referred to it under section 5 and make a report thereon (including such interim reports as the Commission may think fit) to the Central Government in respect of all or any of the assessments made in relation to the case

before the date of its report or interim report, as the case may be."

We may skip over s. 4 which dealt with the composition of the Commission. Section 5, which is of importance was as follows:—

"5. (1) The Central Government may at any time before the 30th day of June, 1948, refer to the Commission for investigation and report any case or points in a case in which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before the 30th day of June, 1948, apply to the Commission for the withdrawal of any case or points in a case thus referred, and if the Commission approves of the withdrawal, no further proceedings shall thereafter be taken by or before the Commission in respect of the case or points so withdrawn.

(2) The Commission may, after examining the material submitted by the Central Government with reference to any case or points in a case and making such investigation as it considers necessary, report to the Central Government that in its opinion further investigation is not likely to reveal any substantial evasion of taxation on income and on such report being made the investigation shall be deemed to be closed.

(3) No reference made by the Central Government under sub-section (1), at any time before the 30th day of June, 1948, shall be called in question, nor shall the sufficiency of the material on which such a reference has been made be investigated in any manner by any Court.

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to

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it by the Central Government in respect of any case also require investigation,

it may make a report to the Central Government stating its reasons for such belief and, on receipt of such report, the Central Government shall, notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report."

The date "30th day of June, 1948" appearing in sub-ss. (1) and (3) was, by Act 49 of 1948, substituted by the words "1st day of September, 1948". Section 6 set out the various powers conferred on the Commission and s. 7 prescribed the procedure of the Commission. It is not necessary to set out the various powers and the details of the procedure *in extenso* and it will suffice to say that they have been considered by this Court and pronounced to be much more drastic and harsh than the powers to be exercised and the procedure to be followed by the income tax authorities acting under the provisions of the Indian Income Tax Act, 1922. The relevant portions of s. 8 ran as follows:—

"8. (1) Save as otherwise provided in this Act, the materials brought on record shall be considered by all the three members of the Commission sitting together and the report of the Commission shall be in accordance with the opinion of the majority.

(2) After considering the report, the Central Government shall by order in writing direct that such proceedings as it thinks fit under the Indian Income Tax Act, 1922, the Excess Profits Tax Act, 1940, or any other law, shall be taken against the person to whose case the report relates in respect of the income of any period commencing after the 31st day of December, 1938; and, upon such a direction being given, such proceedings may be taken and completed under the appropriate law notwithstanding the restrictions contained in section 34 of the Indian Income Tax Act, 1922, or section 15 of the Excess Profits Tax Act, 1940, or any other law and notwithstanding any lapse of time or any decision to a different effect given

in the case by any Income tax authority or Income Tax Appellate Tribunal.

(3) .....

.....

(4) In all assessment or re-assessment proceedings taken in pursuance of a direction under sub-section (2), the findings recorded by the Commission on the case or on the points referred to it shall, subject to the provisions of sub-sections (5) and (6), be final; but no proceedings taken in pursuance of such direction shall be a bar to the initiation of proceedings under section 34 of the Indian Income Tax Act, 1922.

(5) .....

.....

(6) .....

.....

(7) Notwithstanding anything to the contrary contained in this Act or in any other law, for the time being in force, any evidence in the case admitted before the Commission or an authorised official shall be admissible in evidence in any proceedings directed to be taken under sub-section (2).

(8) .....

.....

Section 9 barred the jurisdiction of Courts to call in question any act or proceeding of the Commission or any authorised official appointed under s. 6. Section 10 gave power to the Central Government to make rules by notification in the official gazette.

On July 22, 1948, the case of the assessee was referred to the Commission in the following terms:—

" Ministry of Finance (Revenue Division)
New Delhi, the 22nd July, 1948.

Under section 5 (1) of the Taxation on Income (Investigation Commission) Act, 1947, the cases of the following persons are hereby referred to the Investigation Commission for investigation and report, as the Central Government has prima facie reasons for believing that each such person has either alone or in combination with the other persons mentioned below, evaded payment of taxation on income to a substantial

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extent. The material available in support of such belief accompanies.

No.	Name
EP. 829/1	Beshashar Nath and Co.
829/2	Lala Beshashar Nath.

Sd./-Pyare Lal,
Deputy Secretary,
Ministry of Finance
(Revenue Division).

The Secretary, Income-tax,
Investigation Commission,
New Delhi."

It is not necessary to set out the annexures that accompanied this order. It appears that the total wealth statement of the assessee was filed on November 10, 1948, and was forwarded to the authorised official. It also appears that from January 8, 1949, to October 14, 1949, the authorised official was engaged in the collection of assessment records of the assessee from the territorial income tax offices and of materials from the Civil Supplies Directorate regarding the assessee. In the meantime by s. 33 of Act 67 of 1949 the following section was inserted in the Act as s. 8A:—

"8A. Settlement of cases under investigation:—

(1) Where any person concerned in any case referred to or pending before the Commission for investigation applies to the Commission at any time during such investigation to have the case or any part thereof settled in so far as it relates to him, the Commission shall, if it is of opinion that the terms of the settlement contained in the application may be approved, refer the matter to the Central Government, and if the Central Government accepts the terms of such settlement, the Commission shall have the terms thereof recorded and thereupon the investigation, in so far as it relates to matters covered by such settlement, shall be deemed to be closed.

(2) For the purpose of enforcing the terms of any settlement arrived at in pursuance of sub-section (1),

the Central Government may direct that such proceedings as may be appropriate under the Indian Income-tax Act, 1922 (XI of 1922), the Excess Profits Tax Act, 1940 (XV of 1940), or any other law may be taken against the person to whom the settlement relates, and in particular the provisions of the second proviso to clause (a) of sub-section (5) of section 23, section 24B, the proviso to sub-section 2 of section 25A, the proviso to sub-section 2 of section 26 and sections 44 and 46 of the Indian Income-tax Act, 1922, shall be applicable to the recovery of any sum specified in such settlement by the Income Tax Officer having jurisdiction to assess the person by whom such sum is payable as if it were income-tax or an arrear of income-tax within the meaning of those provisions.

(3) Subject to the provisions of sub-section (6) of section 8, any settlement arrived at under this section shall be conclusive as to the matters stated therein, and no person whose case has been so settled be entitled to re-open in any proceeding for the recovery of any sum under this section or in any subsequent assessment or reassessment proceeding relating to taxation on income or in any other proceeding before any Court or other authority any matter which forms part of such settlement.

(4) Where a settlement has been accepted by Government under sub-section (1), no proceedings under section 34 of the Indian Income Tax Act, 1922 (XI of 1922), or under section 15 of the Excess Profits Tax Act, 1940 (XV of 1940), shall be initiated in respect of the items of income covered by the settlement, unless the initiation of such proceedings is expressly allowed by the terms of the settlement."

On July 5, 1949, the total wealth statement was received back from the authorised official. Our Constitution came into force on January 26, 1950. The order-sheet shows that the authorised official on May 26, 1950, issued a notice to the assessee fixing the hearing for June 10, 1950, which indicates that the authorised official was proceeding with the investigation set in motion by the reference of the assessee's

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case to the Commission. The assessee appears to have attended on June 6, 1950, with an application for extension of time which apparently was given. On September 30, 1950, the assessee supplied certain statements of his firm. The entry in the order-sheet against the date October 31, 1950, shows that the assessee asked for further extension of time. There appears to be a hiatus of about 3 years and evidently nothing was done until June 9, 1953, when the authorised official fixed the hearing of the case on June 15, 1953. The authorised official submitted his interim report to the Commission on June 9, 1953. The assessee was examined on October 9, 10 and 13, 1953, and the authorised official submitted his final report on October 19, 1953. On January 30, 1954, notice was issued to the assessee to appear before the Commission on February 15, 1954. Presumably to get ready for the hearing the assessee, on February 5, 1954, asked for inspection of certain assessment orders concerning his case, for the return of his lease deed filed by him and a copy of the statement of one L. Kalidas and for production of certain documents before the Commission. The hearing, which had been fixed for February 15, 1954, was adjourned till March 4, 1954. Witness Kalidas was examined on March 4, 1954. On March 29, 1954, the assessee asked for a copy of the deposition given by the witness Durgadas before the Commission. After the evidence was closed notice was issued to the assessee on May 1, 1954, asking him to appear before the Commission on May 19, 1954. On that date the assessee attended, arguments were heard and orders were reserved. Learned counsel for the assessee states that at the close of the arguments on May 19, 1954, the Commission announced its view that the income, profits and gains that had escaped assessment in the hands of the assessee for the period beginning with April 1, 1939, and ending March 31, 1947, were the sum of Rs. 4,47,915, that the Commission also threw a hint that should the assessee accept the said finding he would be granted the benefit of a settlement on the lower concessional basis of payment of 75% and a small penalty of Rs. 14,064

and that in the circumstances the assessee had no other alternative than to make the best of the bad job by proposing a settlement under s. 8A offering to pay Rs. 3,50,000 by way of tax and penalty. This sequence of events is amply borne out by paragraphs 3 and 4 of the settlement application filed by the assessee on May 20, 1954, a copy of which has been produced before us by the respondents. The Commission on May 24, 1954, made a report under s. 8A (1) to the Central Government that it was of opinion that the terms of settlement contained in the application might be approved. The Central Government having accepted the proposed settlement, the Commission had the terms thereof recorded. The Central Government by its Order C No. 74 (9-IT) 54 made on July 5, 1954, under s. 8A (2) of the Investigation Act directed that demand notice in accordance with the said terms be served immediately by the Income Tax Officer and that all such other proceedings under the Indian Income Tax Act or other law as may be necessary be taken with a view to enforce the payment of the demand and that the entire sum of Rs. 3,50,000 be demanded in one sum. It appears, however, that the assessee was allowed to make payments by instalments of Rs. 5,000, per month.

In the meantime on May 28, 1954, this Court delivered judgment in *Suraj Mall Mohta and Co.* v. *A. V. Visvanatha Sastri* (1). In that case in the course of investigation of the case of Messrs. Jute and Gunny Brokers Ltd. which had been referred to the Commission under s. 5 (1) of the Investigation Act, it was alleged to have been discovered by the Commission that Suraj Mall Mohta and Co. had made large profits which they had not disclosed and had thus evaded taxation. A report to that effect having been made on August 28, 1953, by the Commission to the Central Government under s. 5 (4) of the Investigation Act the Central Government on September 9, 1953, referred the case against Suraj Mall Mohta and Co. to the Commission under the provisions of s. 5 (4). On September 15, 1953, the Commission notified Suraj Mall

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Mohta and Co. that their cases had been referred for investigation and called upon them to furnish certain materials, details of which were set out in annexure to the petition. On April 12, 1954, Suraj Mall Mohta and Co. filed a petition under Art. 32 of the Constitution asking for an appropriate writ restraining the Commission from taking any action on the ground that the provisions of the Investigation Act had become void being discriminatory in character. By that judgment this Court held that both s. 34 of the Indian Income Tax Act, 1922, as it then stood, and sub-s. (4) of s. 5 of the Investigation Act dealt with persons who had similar characteristics of being persons who had not truly disclosed their income and had evaded payment of tax on their income but that as the procedure prescribed by the Investigation Act was substantially more prejudicial than the procedure under the Indian Income Tax Act, 1922, sub-s. (4) of s. 5 and the procedure prescribed by the Investigation Act, in so far as it affected persons proceeded against under that sub-section was a piece of discriminatory legislation which offended the provisions of Art. 14 of the Constitution and was, therefore, void and unenforceable.

Sub-section (4) of s. 5 of the Investigation Act having been declared void, Parliament passed the Indian Income Tax Amendment Act (33 of 1954) amending s. 34 of the Indian Income Tax Act, 1922. Paradoxical as it may seem, the result of this amendment was that persons who originally fell only within the ambit of s. 5 (1) of the Investigation Act and formed a distinct class of substantial tax evaders also came within the amended s. 34 of the Indian Income Tax Act, 1922. The position after the amendment, therefore, was that the Income Tax Officers could pick out some of these persons and refer their cases under s. 5 (1) of the Investigation Act and thereby subject them to the drastic and harsh procedure of that Act, while they could deal with other persons similarly situate under s. 34 as amended and apply to them the comparatively more beneficial procedure laid down in the Indian Income Tax Act, 1922. Promptly several applications were

made under Art. 32 of the Constitution complaining that after the amendment of s. 34 of the Indian Income Tax Act, s. 5 (1) of the Investigation Act became discriminatory in that the persons falling within it could be dealt with under the drastic, prejudicial and harsh procedure prescribed by the Investigation Act, while other persons similarly situate and belonging to the same category could at the whim or pleasure of the Income Tax authorities be proceeded against under the more beneficial procedure prescribed under the Indian Income Tax Act. All those applications were disposed of by a common judgment reported as *Shree Meenakshi Mills Ltd.* v. *Sri A. V. Visvanatha Sastri* (1) This Court held that s. 34 of the Income Tax Act, as amended by the Indian Income Tax Amendment Act, 1954 (33 of 1954), operated on the same field as s. 5 (1) of the Investigation Act, and, therefore, s. 5 (1) had become void and unenforceable as the procedure applied to persons dealt with thereunder became discriminatory in character. It should be noted that in none of those petitions disposed of by that judgment had any assessment been made under the Investigation Act and this Court only prohibited further proceedings before the Commission under the Investigation Act. The assessee appellant now before us who had entered into a settlement under s. 8 of the Investigation Act and had been assessed in accordance with the terms of the settlement continued to pay the tax by monthly instalments of Rs. 5,000 as before.

Finally on December 20, 1955, came the decision of this Court in *M. CT. Muthiah* v. *The Commissioner of Income Tax, Madras* (2). In that case the Central Government had under s. 5 (1) of the Investigation Act referred the case to the Commission. The Commission after holding an enquiry recorded its findings and held that an aggregate sum of Rs. 10,07,322-4-3 represented the undisclosed income during the period under investigation. The Commission having submitted its report to the Central Government, the latter acting under s. 8 (2) of the Investigation Act directed that appropriate action under the

(1) [1955] 1 S. C. R. 787. (2) [1955] 2 S. C. R. 1247.

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Indian Income Tax Act, 1922, be taken against that assessee with a view to assess or re-assess the income which had escaped assessment for the period 1940-41 to 1948-49. The Income Tax Officer accordingly issued notices and made the re-assessment for the years 1940-41, 1941-42 and 1943-44 to 1948-49 based upon the finding of the Commission, which was treated as final and conclusive. These assessment orders were served on that assessee. There was, however, no re-assessment order for the year 1942-43. In regard to the assessment orders which had been served the assessee concerned applied to the Commissioner of Income Tax under s. 8 (5) of the Investigation Act for reference to the High Court on questions of law arising out of those re-assessment orders. During the pendency of those proceedings the assessee, in that case on December 6, 1954, filed a petition contending that the provisions of the Investigation Act were illegal, ultra vires and unconstitutional. The majority of this Court held that different persons, though falling under the same class or category of substantial evaders of income-tax, were being subjected to different procedures, one a summary and drastic procedure and the other the normal procedure which gave to the assessees various rights which were denied to those who were specially treated under the procedure prescribed by the Investigation Act and, therefore, the assessments made under s. 8 (2) were void and unenforceable. That was a case of assessment under s. 8 (2) *in invitum* after an investigation under the Investigation Act. The assessee appellant before us, who had at the end of the investigation entered into a settlement and been assessed in accordance with the terms of such settlement, however, went on making payments in discharge of the balance due under the terms of settlement right up to September 8, 1957, when he made the last payment of Rs. 8,000 bringing the aggregate payment up to Rs. 1,28,000.

In the meantime the Income Tax Officer had sent a certificate requesting the Collector of Delhi for the recovery of the balance due by the assessee under the settlement. In execution of that certificate some of

the properties belonging to the assessee situate in Dharamsalla and Hissar were attached. On December 27, 1957, the assessee made an application to the Income Tax Commissioner. After pointing out that between July 5, 1954, and December 27, 1957, the petitioner had paid in all Rs. 1,28,000 towards the discharge of his liability under the settlement and referring to the decisions of this Court in *Suraj Mall Mohta's case* (1) and *Muthiah's case* (2) the assessee submitted that the settlement under s. 8A of the Investigation Act had no force and did not bind the petitioner and that the settlement had been made under the pressure of the situation and in view of the coercive machinery of the Investigation Act and that from either point of view the settlement was not binding. His contention was that when s. 5(1) of the Investigation Act had been held unconstitutional the settlement under s. 8A could not be enforced, for the foundation of the proceedings under s. 8A was the reference under s. 5(1) and the foundation having crumbled down the superstructure must fall with it. Under the circumstances the assessee submitted that the attached properties be released and the amount already recovered under the settlement be refunded. On January 29, 1958, the Income Tax Commissioner sent the following communication to the assessee :—

No. L-228(1)/54-55/17590

Office of the Commissioner of Income Tax, Delhi and Rajasthan, New Delhi.

Dated, New Delhi the 29th January, 1958.

Shri Besheshar Nath,
9, Barakhamba Road,
New Delhi.

Dear Sir,

Sub :—Taxation on Income (Investigation Commission) Act, 1947—Order u/s 8A(2)—Your petition dated 27th December, 1957.

With reference to your petition dated 27th December, 1957, regarding the settlement arrived at

(1) [1955] 1 S.C.R. 448. (2) [1955] 2 S.C.R. 1247.

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under section 8A(2) of the Taxation on Income (Investigation Commission) Act, 1947, I am to inform you that the settlement is valid and binding on you.

2. You are, therefore, requested to make good arrears of instalments which you have not paid recently by 5th February, 1958, and also to continue making the payments in accordance with the instalments scheme agreed to, failing which the recovery proceedings will be vigorously pursued through the usual recovery channels.

Your's faithfully,

Sd./- S. K. Gupta,

Commissioner of Income-tax,

Delhi & Rajasthan, New Delhi.

Being aggrieved by the above decision the assessee thereupon moved this Court and obtained special leave to appeal against that order. The appeal has now come up for final disposal before us.

It may be mentioned here that as the respondents are anxious to have the matters of controversy raised in this appeal decided and set at rest by a decision of this Court, the respondents, for the purposes of this appeal, have not insisted on their objection that an appeal does not lie under Art. 136 of the Constitution against an order of the Commissioner of Income Tax. Learned counsel for the assessee also has not pressed his claim for refund of the amounts already paid and has pressed the appeal regarding the balance that remains to be paid under the settlement which is characterised as invalid. Model Knitting Industries Ltd. which has a case pending in the High Court of Calcutta where the same questions as are in issue in the appeal before us, are also in issue has been permitted to intervene and we have heard counsel appearing for that intervener.

In view of the three decisions referred to above learned Attorney General does not seriously contend that the powers conferred on the Commission by s. 6 and the procedure laid down by s. 7 of the Investigation Act are not discriminatory, but what he urges is that none of the said decisions has held that s. 5(1) is

wholly void and inoperative. He says that s. 5(1) only authorises the Central Government to refer certain cases to the Commission. Upon such a reference two lines of procedure are clearly indicated by the Investigation Act, namely, (1) that an investigation may be held *in invitum* following the procedure prescribed and exercising the powers conferred by the Investigation Act and (2) that a settlement may be made under s. 8A. If the first procedure is followed and an assessment is made under s. 8(2) such assessment will undoubtedly be invalid as has been held in *Muthiah's case* (1), but if on a case being referred the settlement procedure is followed then the consequential order of assessment under s. 8A cannot be questioned. We are unable to accept this line of argument as permissible in view of the provisions of the Investigation Act. It will be recalled that when the case of the assessee was referred to the Commission under s. 5(1) on July 22, 1948, there was no provision for settlement in the Act at all. Therefore, that reference, when it was made, consigned the assessee to the only procedure of investigation that was then prescribed by the Act. In the next place it should be remembered that after s. 8A was added in the Investigation Act by s. 33 of Act 67 of 1949 an authorised official was appointed under s. 6(3) to investigate the affairs of the assessee and to examine the books and to interrogate any person or obtain any statement from any person and under sub-s. (4) the authorised official was empowered to exercise the same powers as had been vested in the Commission under sub-ss. (1) and (2) of s. 6. Further, by its own terms s. 8A made it clear that the person concerned in any case referred to the Commission for investigation might apply to the Commission *at any time during such investigation* to have the case settled. Therefore this provision for settlement was an integral part of the entire investigation procedure. It was not a separate or independent procedure apart from the investigation procedure. It is true that there was nothing to prevent the assessee from straightaway

(1) [1955] 2 S.C.R. 1247.

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making a proposal for settlement before any actual step towards investigation was taken by the Income Tax authorities, but before the Commission could refer the proposal for settlement to the Central Government it had to be satisfied that the terms of settlement contained in the application were such as might be approved. For the purpose of satisfying itself the Commission had obviously to go into the facts either by itself or through an authorised official and to consider the materials collected by the authorised official and in the process of doing so had to hold an investigation of some sort and that investigation had necessarily to be made in accordance with the procedure prescribed by the Investigation Act itself. It is, therefore, not correct to say that there could be a proceeding for settlement without any investigation at all. In our opinion s. 8A did not provide for a separate procedure at all. When a case was referred under s. 5(1) it was really for investigation and a settlement was something which could crop up in the process of that investigation just as in the course of a suit parties may arrive at some compromise. In recording the compromise and passing a judgment in accordance with the compromise thereof, the court exercises the same jurisdiction as it exercises in entertaining and disposing of the suit itself. Likewise in entertaining a proposal for settlement the Commission exercised its jurisdiction of investigation under s. 5, followed the procedure prescribed by s. 7 and exercised all its powers under s. 6. As already stated the language of s. 8A itself shows that a settlement can be proposed only *during such investigation.* In our judgment, therefore, the contention of the learned Attorney General that the Investigation Act prescribed two procedures is not well-founded.

Learned Attorney General then points out that the Investigation Act was a pre-Constitution Act and that before the commencement of the Constitution when there was no such thing as a fundamental right, its provisions could not be questioned however discriminatory the procedure may have been. He urges that after the commencement of the Constitution the

assessee has not been subjected to the coercive procedure laid down by the Investigation Act, but voluntarily proposed a settlement which was accepted by the Central Government on the recommendation of the Commission. In that situation he was in the same position as Qasim Razvi had been in and the observations to be found in the judgment of Mukherjea, J., who delivered the majority judgment in *Syed Qasim Razvi* v. *The State of Hyderabad* (1) applied to the present appeal. We do not think it is necessary, for the purpose of this appeal, to go minutely into the facts of *Qasim Razvi's case* (1) with reference to which the observations relied on had been made, or to analyse the correctness of the reasoning adopted in that case, for that can only be done by a larger Bench. We are definitely of opinion, however, that the observations made in the majority judgment should not be extended but must be kept strictly confined to the special facts of that case. In our judgment those observations have no application to the facts of the present appeal before us, for here even after the commencement of the Constitution, the process of investigation continued in that the authorised official went on collecting materials by following the procedure prescribed by s. 7 and exercising the powers conferred on him by s. 6 of the Investigation Act.

The last argument advanced by the learned Attorney General is that if there had been a breach of the assessee's fundamental right by subjecting him to a discriminatory procedure laid down in the Investigation Act, the assessee, by voluntarily entering into a settlement, must be taken to have waived such breach and cannot now be permitted to set up his fundamental right. Immediately two questions arise for consideration, namely, (1) whether the assessee could waive the breach of the fundamental right in question and (2) whether in the facts and circumstances of this case he had actually done so.

Re. (1): In *Behram Khurshed Pesikaka* v. *State of Bombay* (2) there was a general discussion whether a

(1) [1953] S.C.R. 589.
(2) [1955] 1 S.C.R. 613.

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fundamental right could be waived. At page 638 Venkatarama Aiyar, J., observed:—

"The question is, what is the legal effect of a statute being declared unconstitutional. The answer to it depends on two considerations,—firstly, does the constitutional prohibition which has been infringed affect the competence of the Legislature to enact the law or does it merely operate as a check on the exercise of a power which is within its competence; and secondly, if it is merely a check, whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on grounds of public policy. If the statute is beyond the competence of the Legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be the position when a limitation is imposed on the legislative power in the interests of the public, as, for instance, the provisions in Chapter XIII of the Constitution relating to inter-State trade and commerce. But when the law is within the competence of the Legislature and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well settled. (Vide Cooley on Constitutional Limitations, Volume I, pages 368 to 371; Willis on Constitutional Law at pages 524, 531, 542 and 558; Rottschaefer on Constitutional Law at pages 28 and 29-30)."

After referring to three decisions of the American Supreme Court which are also now relied on by the learned Attorney General, the learned Judge concluded as follows:—

"The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under Art. 19 (1) (f) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there

is waiver there is no legal impediment to the enforcement of the law. It would be otherwise if the statute was a nullity; in which case it can neither be waived nor enforced. If then the law is merely unenforceable and can take effect when waived it cannot be treated as *non est* and as effaced out of the statute book. It is scarcely necessary to add that the question of waiver is relevant to the present controversy not as bearing on any issue of fact arising for determination in this case but as showing the nature of the right declared under Art. 19 (1) (f) and the effect in law of a statute contravening it."

When the case came up before the court on review Mahajan, C. J., with the concurrence of Mukherjea, Vivian Bose, and Ghulam Hassan, JJ., said at page 653:—

"In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy.

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Reference to some of the Articles, inter alia, Arts. 15 (1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Arts. 20 and 21."

On that occasion one of us preferred not to express any opinion on this subject and said at page 670 :—

"In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on legislative power or the effect of the declaration under Art. 13(1) being "relatively void". On those topics I prefer to express no opinion on this occasion."

It will, however, be noticed that the observations of the learned judges made in that case did not relate to the waiver of a breach of the fundamental right under Art. 14.

The fundamental right, the breach whereof is complained of by the assessee, is founded on Art. 14 of the Constitution. The problem, therefore, before us is whether a breach of the fundamental right flowing from Art. 14 can be waived. For disposing of this appeal it is not necessary for us to consider whether any of the other fundamental rights enshrined in Part III of our Constitution can or cannot be waived. We take the view that this court should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case before it. We, therefore, confine our attention to Art. 14 and proceed to discuss the question on that footing.

Article 14 runs as follows :—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is the first of the five Articles grouped together under the heading "Right to Equality". The underlying object of this Article is undoubtedly to secure to

all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted, first and foremost that this Article 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., Art. 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this Article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Art. 12, "the State" which is, by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Art. 13. Clause (1) of that Article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, in so

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far as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise cl. (2) of this Article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void. It will be observed that, so far as this Article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other Articles, e.g., Art. 19, cls. (2) to (6). Our right to equality before the law is thus completely and without any exception secured from all legislative discrimination. It is not necessary, for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of Art. 13, for even without the aid of Art. 13 our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* (1) are apposite. Said his Lordship at page 670 that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a court of justice. That apart, the very language of Art. 14 of the Constitution expressly directs that "the State", which by Art. 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination.

Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as

(1) L.R. [1931] A.C. 662.

to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it." I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Art. 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

The learned Attorney General has relied on various passages in text-books written by well-known and eminent writers, e.g., Cooley, Willoughby, Willis and Rottschaefer and on eight American decisions. In considering the statements of law made by American writers and judges the following observations of Patanjali Sastri, C. J., in *The State of Travancore-Cochin and others* v. *The Bombay Co. Ltd.* (1) should constantly be borne in mind :—

"These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them

(1) [1952] S.C.R. 1112, 1120, 1121.

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in the solution of the problems arising under Art. 286 of the Indian Constitution."

(See also *The State of Bombay* v. *R.M.D. Chamarbaugwala* (1)). The American authorities cited by the Attorney General relate to waiver of obligations under a contract, of the deprivation of right to property without due process of law or of the constitutional right to trial by jury and the like. They have no bearing on the question of the waiver of the equal protection clause of the 14th Amendment which, like our Art. 14, is a mandate to the State. It is significant that no American decision is forthcoming which upholds the waiver of the breach of that clause. When a case of breach of any of the fundamental rights akin to what are dealt with in the American authorities will come before us it will, then, be the time for us to discuss those authorities and to consider their applicability in the matter of the interpretation of the corresponding provisions of our Constitution. For the moment we prefer to confine our observations to a consideration of waiver of the breach of the fundamental right under Art. 14.

Learned Attorney General has relied on three decisions of this Court: (1) *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India* (2), (2) *Dewan Bahadur Seth Gopal Das Mohta* v. *The Union of India* (3) and (3) *Baburao Narayanrao Sanas* v. *The Union of India* (4) in support of his thesis that a breach of Art. 14 may well be waived by a person. In none of those cases, all of which were disposed of on the same day (October 21, 1954) was the question of waiver specifically or seriously discussed. As learned counsel appearing for the intervener points out, the first of the above mentioned cases proceeded on the footing that as Art. 265 was not a fundamental right conferred by Part III, it could not be enforced under Art. 32. Learned counsel for the intervener further submitted that the decision in the 2nd case mentioned above could also be explained on that basis and on the further ground that proceeding under Art. 32 was not

(1) [1957] S.C.R. 874, 918.
(2) [1955] 1 S.C.R. 769.
(3) [1955] 1 S.C.R. 773.
(4) [1954] 26 I.T.R. 725.

intended to be used for obtaining relief against the voluntary action of a person and that appropriate remedy for recovery of money lay in a suit. The decision in the 3rd case proceeded on the same basis and did not carry the matter any further. It is impossible to treat any of those decisions as representing the considered opinion of this Court on the question of waiver of a breach of the fundamental right under Art. 14 of the Constitution. Reference was also made by the learned Attorney General to the decision of a Single Judge of the Allahabad High Court in *Subedar* v. *State* (1) where it was held that Art. 20(3) conferred merely a privilege and that such privilege could always be waived. It was overlooked that if a person voluntarily answered any question then there was no breach of his fundamental right at all, for the fundamental right is that a person shall not be compelled to incriminate himself. That case, therefore, is not a case of waiver at all. The case of *Pakhar Singh* v. *The State* (2) is also, for the same reason, not a case of waiver.

Re. (2): The answer to this question depends upon facts which have not been properly investigated. The appeal is against the order of the income tax authorities which order makes no reference to the plea of waiver. Further the filing of the statements of case having been dispensed with, we have not had the benefit of the statement of facts on which this plea is said to be founded. The view taken on question (1), however, relieves us of the necessity of going into this question.

On a consideration of the nature of the fundamental right flowing from Art. 14, we have no doubt in our mind that it is not for a citizen or any other person who benefits by reason of its provisons to waive any breach of the obligation on the part of the State. We are, therefore, of the opinion that this appeal should be accepted, the order of the Income Tax Commissioner, Delhi, dated January 29, 1958, should be set aside and all proceedings now pending for implementation of the order of the Union Government dated July 5, 1954,

(1) A. I. R. 1957 All. 396.
(2) A. I. R. 1958 Punj. 294.

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should be quashed and that the assessee appellant should get the costs of this appeal.

BHAGWATI, J.—I agree with the reasoning adopted and the conclusion reached in the judgments prepared by My Lord the Chief Justice and my brother, S. K. Das, J., in regard to the ultra vires character of the proceedings adopted under s. 8-A of the Taxation on Income (Investigation Commission) Act, 1947 (30 of 1947), and the void character of the settlement reached thereunder. As regards the parts of the judgments which deal with the question whether a fundamental right guaranteed by the Constitution can be waived at all, I find myself in agreement with the judgment prepared by my brother, Subba Rao, J., and am of the opinion that it is not open to a citizen to waive the fundamental rights conferred by Part III of the Constitution.

The question of waiver came to be argued before us in this way. If the proceedings and the settlement under section 8-A of the Act were void as aforesaid, the respondent contended that the appellant had waived the fundamental right enshrined in Art. 14 of the Constitution and was therefore not entitled to challenge the settlement. This was only by way of reply to the contention of the appellant and was not set out in proper details in any affidavit filed on behalf of the respondent. The learned Attorney-General, however, relied upon the application made by the appellant before the Investigation Commission and the contents thereof as also the payments made by the appellant from time to time both before and after the pronouncement of our decision in *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras* (1) in order to support this plea of waiver and the arguments before us proceeded on that basis. No objection was taken by either of the parties before us to the issue of waiver being decided on such materials and the question was argued at considerable length before us. The arguments moreover extended to the whole field of fundamental rights and were not confined to Art. 14 only.

(1) [1955] 2 S. C. R. 1247.

We, therefore, see no reason why we should refrain from pronouncing our opinion on that question.

The preamble to our Constitution, Art. 13 and the language in which the fundamental rights have been enacted lead to one conclusion and one conclusion only that whatever 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 for the benefit of the individual and those enacted in public interest or on grounds of public policy. Ours is a nascent democracy and situated as we are, 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. The limitations on those rights have been enacted in the Constitution itself, e.g., in Arts. 19, 33 and 34. But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution, there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution.

The genesis of the declaration of fundamental rights in our Constitution can be traced to the following passage from the Report of the Nehru Committee (1928):—

"Canada, Australia and South Africa have no declaration of rights in their Constitutions but there are various articles to be found in the Constitution of the Irish Free State which may properly be grouped under the general head "fundamental rights". The reason for this is not far to seek. Ireland is the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India. The first concern of the people of Ireland was, as indeed it is of the people of India to-day, to secure fundamental rights that have been denied to them. The other dominions had their rise from earlier British

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settlements which were supposed to have carried the law of England with them. Ireland was taken and kept under the rule of England against her own will and the acquisition of dominion status by her became a matter of treaty between the two nations. We conceive that the constitutional position in India is very much the same. That India is a dependency of Great Britain cannot be denied. That position can be altered in one of two ways—force or mutual consent. It is the latter in furtherance of which we are called upon to recommend the principles of a constitution for India. In doing so it is obvious that our first care should be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances.*"

At the Round Table Conference that preceded the making of the Government of India Act, 1935, therefore, the Indian leaders pressed for a Bill of Rights in the proposed Constitution Act, in order to bind the administration with certain declarations of individual rights. This was, however, rejected by the Simon Commission with these observations:

"We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless unless there exist the will and means to make them effective."

The framers of our Constitution however followed the American view represented by the famous words of Jefferson in preference to that expressed by the Simon Commission:—

"The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflictive and irreparable. They are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread....."

(Vide Basu's Commentary on the Constitution of India, Vol. 1, p. 74).

and incorporated the fundamental rights in Part III of our Constitution.

The object sought to be achieved was as the preamble to the Constitution states "to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity of the Nation": and Art. 13 provided:—

"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void....."

"Laws in force" were defined in Art. 13(3) to include:

"Laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas"

and they were declared void, in so far as they were inconsistent with the provisions of this Part, to the extent of such inconsistency. As regards laws to be enacted after the commencement of the Constitution, the State, in the wider significance of the term as including "the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India" (Vide Art. 12) was enjoined not to make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause was to the extent of the

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contravention declared void. It will be seen that the prohibition was thus effective both against past laws as well as future laws and both were equally void in so far as they were " inconsistent with " or " in derogation of " the fundamental rights enshrined in Part III of the Constitution. No distinction was made between the past laws and future laws in this respect and they were declared void to the extent of the inconsistency or the extent of the contravention as the case may be, leaving the unoffending parts thereof untouched.

It will be also seen that under Art. 13(2) an admonition was administered to the State not to enact any law which takes away or abridges the rights conferred by this Part and the obligation thus imposed on the State enured for the benefit of all citizens of Bharat alike in respect of all the fundamental rights enacted in Part III of the Constitution. No distinction was made in terms between the fundamental rights said to have been enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy.

The question then arises whether a breach of the obligation thus imposed on the State can be waived by a citizen. To borrow the words of My Lord the Chief Justice " In the face of such unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the Constitutional mandate merely because a citizen told the State that it may do so ? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that " True, you directed me not to take away or abridge the rights conferred by this Part, but this citizen said that I could do so, for he had no objection to my doing so." I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit." It is absolutely clear on a perusal of Art. 13(2) of the Constitution that it is a constitutional mandate

to the State and no citizen can by any act or conduct relieve the State of the solemn obligation imposed on it by Art. 13(2) and no distinction can be made at all between the fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy.

What then is the basis of this distinction which has been strenuously urged before us that there are certain fundamental rights which are enacted only for the private benefit of a citizen, e.g., rights of property, which can be waived by him and there are other fundamental rights enacted for the public good or as a matter of public policy which it would not be open to a citizen to waive even though he were affected by the breach thereof. Reliance is placed in this behalf on certain decisions of the Supreme Court of the United States of America, passages from Willoughby, Willis and Rottschaeffer quoted in the judgment of T. L. Venkatarama Aiyar, J., in *Behram Khurshed Pesikaka* v. *The State of Bombay* (1) and the observations of the said learned Judge in that case adopting the said distinction. (Vide pp. 638-643 of the Report). I am afraid this distinction cannot be accepted. There is nothing in the terms of the various articles embodying the fundamental rights in Part III of our Constitution which warrants such a distinction. The fundamental rights are enacted with all precision and wherever limitations on their exercise are thought of they are also similarly enacted. Such constitutional limitations are to be found within the terms of the articles themselves and there is no justification for reading in the terms of the articles anything more than what is expressly stated therein. There is further this distinction between the American Constitution and ours that whereas the American Constitution was merely enacted in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for common defence, promote the general welfare and secure the blessings of liberty and was an outline of government and nothing more, our Constitution was

(1) [1955] 1 S.C.R. 613.

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enacted to secure to all citizens, Justice, Liberty, Equality and Fraternity and laid emphasis on the welfare state and contained more detailed provisions, defining the rights and also laying down restrictions thereupon in the interest of the general welfare, etc. As observed by Willis in his Constitutional Law at p. 477 :—

"The conflict between man and the state is as old as human history. For this reason some compromise must be struck between private liberty and public authority. There is some need of protecting personal liberty against governmental power and also some need of limiting personal liberty by governmental power. The ideal situation is a matter of balancing one against the other, or adjusting conflicting interests."

"In the United States Constitution an attempt has been made to strike a proper balance between personal liberty and social control through express limitations written into the Constitution and interpreted by the Supreme Court, by implied limitations created by the Supreme Court, and by the development of the governmental powers of regulation, taxation, and eminent domain by the Supreme Court." (Ibid pp. 477-478),

whereas our Constitution has expressly sought to strike the balance between a written guarantee of individual rights and the collective interests of the community by making express provisions in that behalf in Part III of the Constitution. (Vide *Gopalan* v. *State of Madras*) (1).

Moreover in the matter of considering the statements of law made by the text book writers in America and the dicta of the judges of the Supreme Court there in the various decisions cited before us, we must bear in mind the following admonition of Patanjali Sastri, C. J., in the *State of Travancore-Cochin* v. *The Bombay Co., Ltd.* (2).

"These clauses are widely different in language, scope and purpose, and a varying body of doctrines

(1) [1950] S.C.R. 88.

(2) [1952] S.C.R. 1112, 1120.

and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under Art. 286 of the Indian Constitution "

or for the matter of that, articles embodying the fundamental rights in Part III of our Constitution (See also *The State of Bombay* v. *R. M. D. Chamarbaugwala*) (1).

The rights conferred on citizens may be thus classified: (i) statutory rights; (ii) constitutional rights; and (iii) fundamental rights. One need not consider the statutory rights in this context but the constitutional rights are those created and conferred by the Constitution. They may or may not be waived by a citizen, as stated in the text books and the decisions of the Supreme Court of the United States of America above referred to. But when the rights conferred are put on a high pedestal and are given the status of fundamental rights, which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g., fundamental rights which are enshrined in Part III of the Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto and other constitutional rights which are enacted in other provisions, for instance in Arts. 265 and 286 and in Part XIII of the Constitution), they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen. The Constitution adopted by our founding fathers is sacrosanct and it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America. The only manner in which that can be done is by appropriate amendment of the Constitution and in no other manner whatever.

There is no difficulty whatever in working out this position and to my mind the difficulties pointed out

(1) [1957] S.C.R. 874, 918.

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are more imaginary than real. If a citizen wanted to assert his fundamental right under the circumstances envisaged for instance in the judgment of my brother S. K. Das, J., and made an application for a writ under Art. 32 or Art. 226 of the Constitution he would be promptly confronted with the argument that the Court should in the exercise of its discretion refuse him the relief prayed for. The remedy is purely discretionary and no Court in those circumstances would exercise its discretion in his favour (Vide *Dewan Bahadur Seth Gopal Das Mohta* v. *Union of India* (1), *Baburao Narayan Savas* v. *Union of India* (2) and *Laxmanappa Hoonmantappa Janakhandi* v. *Union of India* (3). Even then he might merely obtain a relief declaring the legislation *ultra vires* the Constitution and the Court would not grant him any consequential relief. For that relief he would have to approach the regular courts of law, when all questions of law, apart from the mere constitutionality of the provision would be considered by the Court on a contest between the parties, e.g., estoppel, acquiescence, limitation and the like (Compare our observations in *Sales Tax Officer, Banaras* v. *Kanayalal Mukundlal Saraf* (4)). The only thing which parties would be concluded by would be the adjudication as to the *ultra vires* character of the measure in question and the citizen would not be entitled to the relief claimed merely for the asking. These considerations, therefore, do not militate against the position that a citizen cannot waive the fundamental rights conferred upon him by Part III of the Constitution.

I fully endorse the opinion expressed by Mahajan, C. J., in *Behram Khursheed Pesikaka* v. *The State of Bombay* (5) at page 653 :—

"We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a

(1) [1955] 1 S.C.R. 773. (2) [1954] 26 I.T.R. 725.
(3) [1955] 1 S.C.R. 769.
(4) Civil Appeal No. 87 of 1957 decided on September 23, 1958.
(5) [1955] 1 S. C. R. 613.

sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

This, in my opinion, is the true position and it cannot therefore be urged that it is open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights in the manner attempted to be done.

The result is however the same and I agree with the order proposed by My Lord the Chief Justice.

S. K. Das J.

S. K. DAS, J.—This is an appeal by special leave from an order dated January 29, 1958, passed by the Commissioner of Income-tax, Delhi, respondent no. 1 before us, in circumstances which are somewhat unusual and out of the ordinary. We shall presently relate those circumstances; but at the very outset it may be stated that two questions of far-reaching importance fall for consideration in this appeal. One is the validity of a settlement made under s. 8A of the Taxation on Income (Investigation Commission) Act, 1947 (30 of 1947) hereinafter referred to as the Act, after the coming into force of the Constitution on January 26, 1950, and the second is if a fundamental right guaranteed by the Constitution can be said to have been waived by the appellant in the circumstances of this case.

The appellant before us is Basheshar Nath, whom we shall hereafter call the assessee. As we have already stated, the Commissioner of Income-tax, Delhi, is the first respondent. The second respondent

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is the Union of India. We also allowed the Model Knitting Industries, a limited liability Company with its registered office in Calcutta, to intervene in the appeal, on the ground that the intervening Company has a case pending in the High Court of Calcutta where the same questions are in issue. We have also heard the intervener in support of the appeal.

On behalf of the appellant it has been contended that the Commissioner of Income-tax, Delhi, is a tribunal within the meaning of Art. 136 of the Constitution and exercised judicial functions when it passed the impugned order of January 29, 1958. The respondents pointed out, however, that the so-called order was nothing but a reply which respondent no. 1 gave to a communication received from the assessee. However, the respondents have waived any preliminary objection to the maintainability of the present appeal, and the learned Attorney General appearing for the respondents has frankly stated before us that he is raising no such preliminary objection, as the Union Government is equally anxious to have a decision on the question, very important from its point of view and with far-reaching financial consequences, as to whether a settlement made under s. 8A of the Act after January 26, 1950, and the orders passed thereon by the Union Government are valid. We have, therefore, proceeded on the footing that the present appeal is competent, and have considered it unnecessary to decide in the abstract the more general question as to the circumstances in which an order made by a revenue authority like the Commissioner of Income-tax partakes of the character of a judicial or quasi-judicial order.

Now, for the facts and circumstances which have led up to this appeal. The Act received the assent of the Governor-General on April 18, 1947, and came into force on May 1, 1947. On July 22, 1948, the case of the assessee was referred to the Investigation Commission, constitued under s. 3 of the Act. The reference was made under s. 5(1) of the Act, and it stated that the Central Government had *prima facie* reasons for believing that the assessee either alone or

in combination with other persons evaded payment of taxation on income to a substantial extent, and therefore the case of the assessee was sent to the Investigation Commission for investigation and report. The period of investigation was from April 1, 1939 to March 31, 1947. The report of the Investigation Commission which has been made available to us shows that the case against the assessee was that he carried on a business of supplying tents, executing contract works, and commission agency for some textile mills on a fairly extensive scale, both individually and in partnership with his brother. It appears that the total wealth statement of the assessee was filed on November 10, 1948, and was forwarded to an authorised official appointed under s. 6(3) of the Act. From January 8, 1949 to October 14, 1949 the authorized official was engaged in the collection of assessment records of the assessee from the income-tax authorities and of materials from the Civil Supplies Directorate. On July 5, 1949, the total wealth statement was received back from the assessee and the order-sheet shows that on May 26, 1950, (that is, after the coming into force of the Constitution) the authorised official issued a notice to the assessee fixing the hearing for June 10, 1950. The assessee then asked for time, and it appears that for a period of about three years till June, 1953, nothing was done. Thereafter, the authorised official held a preliminary investigation and computed intially that the undisclosed income of the assessee for the period in question was Rs. 12,07,000; on further scrutiny and examination of accounts and after hearing the assessee's explanation, the authorised official reduced the amount in his final report, submitted sometime towards the end of 1953, to Rs. 9,56,345. The Investigation Commission considered the report of the authorised official, heard the assessee, and came to the conclusion that the total amount to be assessed in the hands of the assessee was Rs. 4,47,915. In their report dated May 24, 1954 the Investigation Commission said:

"During the course of the hearing before us, the assessee as well as his Auditors applied for a

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settlement after admitting liability for the aforesaid sum. In the circumstances, we consider it proper to allow the assessee the benefit of a settlement on the lower concessional basis of 75% of evaded income payable by way of tax and a moderate penalty of Rs. 14,064.....The assessee accepting our findings both as regards the amount of income that escaped assessment and the amount of tax and penalty payable, offered a settlement. In the circumstances, we recommend the acceptance by the Government of the assessee's offer of a settlement."

The Central Government accepted the settlement under s. 8A of the Act and on July 5, 1954, passed an order under s. 8A(2) directing the issue of a demand notice by the Income-tax Officer concerned for a sum of Rs. 3,50,000 (including the penalty of Rs. 14,064) on the assessee and further directing that "all such other proceedings under the Indian Income-tax Act or under any other law, as may be necessary, should be taken with a view to enforcing the payment of the demand and the terms and conditions of settlement." Though under the terms of settlement no instalments were given, it appears that the assessee was allowed to pay the amount at the rate of Rs. 5,000 per month. It further appears that up to and including September 8, 1957, the assessee had paid in all a sum of Rs. 1,28,000 towards the demand. In December, 1955 was given the decision of this Court in *M. CT. Muthiah* v. *The Commissioner of Income-tax, Madras* (1), in which the majority of Judges held that s. 5(1) of the Act was *ultra vires* the Constitution, as it was discriminatory and violative of the fundamental right guaranteed by Art. 14 of the Constitution by reason of two amendments which were made in s. 34 of the Indian Income-tax Act, 1922—one in 1948 by the enactment of the Income-tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948) and the other in 1954 by the enactment of the Indian Income-tax (Amendment) Act, 1954 (33 of 1954). Sometime earlier than the aforesaid decision, the Income-tax Officer concerned had sent a

(1) [1955] 2 S.C.R. 1247.

recovery certificate to the Collector, New Delhi, and the assessee stated that in execution of the said certificate his properties situated in Dharamsala and Hissar were attached. On December 27, 1957, the assessee filed a petition to the Income-tax Commissioner, Delhi, in which after stating the relevant facts, the assessee claimed that, after the decision in Muthiah's case (1), the settlement made under s. 8A of the Act had no force and was not binding on him: the assessee then prayed that the attached properties should be released from attachment and the amounts recovered under the terms of settlement refunded to him. On January 29, 1958, the Commissioner of Income-tax sent the following reply—

"With reference to your petition dated 27th December 1957 regarding the settlement arrived at under section 8A(2) of the Taxation on Income (Investigation Commission) Act, 1947, I am to inform you that the settlement is valid and binding on you.

2. You are, therefore, requested to make good the arrears of instalments which you have not paid recently by 5th February, 1958 and also to continue making the payments in accordance with the instalments' scheme agreed to, failing which the recovery proceedings will be vigorously pursued through the usual recovery channels."

The assessee asked for and obtained special leave from this Court on February 17, 1958, to appeal from the aforesaid order. In the appeal as orginally filed in pursuance of the special leave granted to the assessee, the prayer portion was inadvertently left out. Subsequently, the assessee prayed that—(a) the report of the Investigation Commission dated May 24, 1954, be quashed, (b) the settlement made on the basis of the report and the directions given by the Central Government in pursuance thereof and the proceedings for recovery of arrears of tax be all quashed, and (c) the amounts already recovered may be ordered to be refunded. With regard to the last prayer, we may state here that it was not pressed before us and we are relieved from the task, at least in this appeal, of

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deciding in what circumstances and on what considerations a refund of tax voluntarily paid can be claimed.

Therefore, the first and foremost question before us is the validity of the settlement made under s. 8A of the Act. On behalf of the assessee the main argument is that s. 5(1) of the Act having been held *ultra vires* the Constitution, the very foundation for the report of the Investigation Commission has disappeared and a settlement based thereon is neither valid, nor can it be enforced. On behalf of the respondents, the learned Attorney General has contended that there is no decision of this Court which has held that s. 5(1) of the Act is wholly void and on a proper construction of the various sections of the Act, it will be found that there are two separate and distinct procedures or jurisdictions which the Investigation Commission may follow or exercise: one is investigation and the other relates to settlement. He has submitted that the jurisdiction conferred on the Investigation Commission under s. 8A, which was inserted in the Act in 1949 by s. 33 of Act 67 of 1949, is not affected by the decision in Muthiah's case (1), and if the Investigation Commission had jurisdiction to entertain an application from the assessee for settlement, approve of the same, and refer it to the Central Government, the latter had also jurisdiction to accept it under sub-s. (1) and make necessary orders under sub-s. (2) of s. 8A. In short, the argument of the learned Attorney General is that there is nothing in Muthiah's decision (1), which renders s. 8A constitutionally invalid.

It is necessary to read at this stage the relevant provisions of the Act in so far as they bear upon the problems before us. We have said that the Act came into force on May 1, 1947. This was before the coming into force of the Constitution of India, and no question of the violation of any fundamental rights guaranteed by the Constitution arose on that date. Section 3 of the Act empowers the Central Government (now Union Government) to constitute a Commission to be called the Income-tax Investigation

(1) [1955] 2 S. C. R. 1247.

Commission, whose duties shall be (to quote the words of the section)—

"(a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof;

(b) to investigate in accordance with the provisions of this Act any case or point in a case referred to it under section 5 and make a report thereon (including such interim reports as the Commission may think fit) to the Central Government in respect of all or any of the assessments made in relation to the case before the date of its report or interim report, as the case may be."

We are concerned in this appeal with the duty of the Commission referred to in s. 3(b) above. Section 4 deals with the composition of the Commission, details whereof are unnecessary for our purpose. Sub-sections (1), (2) and (4) of s. 5 are relevant to the problems before us and must be read:

"5(1). The Central Government may at any time before the 1st day of September 1948 refer to the Commission for investigation and report any case or points in a case in which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before the 1st day of September, 1948 apply to the Commission for the withdrawal of any case or points in a case thus referred, and if the Commission approves of the withdrawal, no further proceedings shall thereafter be taken by or before the Commission in respect of the case or points so withdrawn.

(2) The Commission may, after examining the material submitted by the Central Government with reference to any case or points in a case and making such investigation as it considers necessary, report to the Central Government that in its opinion further investigation is not likely to reveal any substantial

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evasion of taxation on income and on such report being made the investigation shall be deemed to be closed.

(3).....

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation,

it may make a report to the Central Government stating its reasons for such belief and, on receipt of such report, the Central Government shall, notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report."

Section 5 as originally enacted mentioned the date 30th of June, 1948, but by Act 49 of 1948 the date substituted was "1st day of September, 1948". Section 6 states the powers of the Commission, and they may be summarised thus:

(a) the Commission has power to require any person or banking or other Company to give information on relevant points;

(b) it has power to administer oaths and all the powers of a civil court to take evidence, enforce the attendance of witnesses etc;

(c) it has power to impound and retain a document in its custody;

(d) it has power to ask an authorised official to examine accounts and interrogate any person;

(e) it has power to give directions to an authorised official;

(f) it has power to close the investigation and make a best of judgment assessment in respect of a person who refuses or fails to attend in person, to give evidence or produce documents etc; and

(g) it has power of seizure, search etc. in certain specified circumstances.

Sections 6A and 6B deal with the power of the Commission to tender immunity from prosecution and to withdraw such tender. Section 7 states the procedure to be followed by the Commission, sub-ss. (2), (4) and (6) whereof need only be referred to here:

"7(2) In making an investigation under clause (b) of section 3, the Commission shall act in accordance with the principles of natural justice, shall follow as far as practicable the principles of the Indian Evidence Act, 1872 (I of 1872), and shall give the person whose case is being investigated a reasonable opportunity of rebutting any evidence adduced against him; and the power of the Commission to compel production of documents shall not be subject to the limitation imposed by section 130 of the Indian Evidence Act, 1872 (I of 1872), and the Commission shall be deemed to be a court and its proceedings legal proceedings for the purpose of sections 5 and 6 of the Bankers' Books Evidence Act, 1891 (XVIII of 1891).

(3).....

(4) No person shall be entitled to inspect, call for, or obtain copies of, any documents, statements or papers or materials furnished to, obtained by or produced before the Commission or any authorised official in any proceedings under this Act; but the Commission, and after the Commission has ceased to exist such authority as the Central Government may in this behalf appoint, may, in its discretion, allow such inspection and furnish such copies to any person:

Provided that, for the purpose of enabling the person whose case or points in whose case is or are being investigated to rebut any evidence brought on the record against him, he shall, on application made in this behalf and on payment of such fees as may be prescribed by Rules made under this Act, be furnished with certified copies of documents, statements, papers and materials brought on the record by the Commission.

(5) .....

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(6) In any proceedings under this Act, the Commission may, in its discretion, admit in evidence and act upon any document notwithstanding that it is not duly stamped or registered."

Section 8 states in effect what the Commission shall do on the conclusion of the investigation: it states that the materials brought on the record shall be considered by all the members, and the report shall be in accordance with the opinion of the majority. Sub-section (2) of s. 8 gives the Central Government power to direct reopening of assessment proceedings on the report of the Commission. Sub-section (4) states that in the assessment or reassessment proceedings in pursuance of a direction given under sub-s. (2), the findings recorded by the Commission shall be final, subject to the provisions of sub-ss. (5) and (6). Then comes s. 8A which must be quoted in full:

"S. 8A(1) Where any person concerned in any case referred to or pending before the Commission for investigation applies to the Commission at any time during such investigation to have the case or any part thereof settled in so far as it relates to him, the Commission shall, if it is of opinion that the terms of the settlement contained in the application may be approved, refer the matter to the Central Government, and if the Central Government accepts the terms of such settlement, the Commission shall have the terms thereof recorded and thereupon the investigation, in so far as it relates to matters covered by such settlement, shall be deemed to be closed.

(2) For the purpose of enforcing the terms of any settlement arrived at in pursuance of sub-section (1), the Central Government may direct that such proceedings as may be appropriate under the Indian Income-tax Act, 1922 (XI of 1922), the Excess Profits Tax Act, 1940 (XV of 1940) or any other law may be taken against the person to whom the settlement relates, and, in particular, the provisions of the second proviso to clause (a) of sub-section (5) of section 23, section 24B, the proviso to sub-section (2) of section 25A, the proviso to sub-section (2) of section 26 and sections 44 and 46 of the Indian Income-tax Act, 1922

shall be applicable to the recovery of any sum specified in such settlement by the Income-tax Officer having jurisdiction to assess the person by whom such sum is payable as if it were income-tax or an arrear of income-tax within the meaning of those provisions.

(3) Subject to the provisions of sub-section (6) of section 8, any settlement arrived at under this section shall be conclusive as to the matters stated therein, and no person whose case has been so settled shall be entitled to reopen in any proceeding for the recovery of any sum under this section or in any subsequent assesssment or reassessment proceeding relating to taxation on income or in any other proceeding before any court or other authority any matter which forms part of such settlement.

(4) Where a settlement has been accepted by Government under sub-section (1), no proceedings under section 34 of the Indian Income-tax Act, 1922 (XI of 1922), or under section 15 of the Excess Profits Tax Act, 1940 (XV of 1940), shall be initiated in respect of the items of income covered by the settlement unless the initiation of such proceedings is expressly allowed by the terms of the settlement."

Section 9 bars the jurisdiction of courts, but it is not disputed that if any of the provisions of the Act are *ultra vires* the Constitution, s. 9 will neither cure the defect nor stand in the way of the assessee. Section 10, the last section, gives the Central Government power to make rules.

The above recital gives a brief conspectus of the main provisions of the Act. It is necessary now to refer to a few earlier decisions of this Court with regard to some of these provisions. The earliest in point of time is the decision in *Suraj Mall Mohta and Co.* v. *A. V. Viswanatha Sastri* [1], where sub-s. (4) of s. 5 of the Act and the procedure prescribed by the Act in so far as it affected the persons proceeded against under that sub-section, were held to be discriminatory and therefore void and unenforceable. No opinion was, however, expressed on the validity of s. 5(1) of the Act.

(1) [1955] 1 S.C.R. 448.

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In *Shree Meenakshi Mills Ltd., Madurai* v. *Sri A. V. Viswanatha Sastri* (1), it was held that after the coming into force on July 17, 1954, of the Indian Income-tax (Amendment) Act, 1954, (33 of 1954) which operated on the same field as s. 5(1) of the Act, the provisions of s. 5 (1) became void and unenforceable as being discriminatory in character. It was further held that when an Act was valid in its entirety before the date of the Constitution, that part of the proceedings regulated by the special procedure and taken during the pre-Constitution period could not be questioned however discriminatory it might have been, but the discriminatory procedure could not be continued after the coming into force of the Constitution. In that case (Meenakshi Mills' case (1)) the Investigation Commission had not even commenced the proceedings though a period of seven years had elapsed and the investigation was pending when the writ petitions were filed. In those circumstances it was held that the proceedings before the Investigation Commission which had become discriminatory could no longer be continued. Then came the decision in *M. CT. Muthiah* v. *The Commissioner of Income-tax, Madras* (2). The facts relevant to that decision were that the Investigation Commission held an enquiry into three cases and submitted a report on August 26, 1952, finding a particular sum to be the undisclosed income during the investigation period. The Central Government accepted the report and passed an order under s. 8(2) of the Act on September 16, 1952. Notices under s. 34 of the Indian Income-tax Act were then issued and reassessments except for one year were made on the findings of the Commission, which were treated as final and conclusive. The re-assessment orders were served on the assessees in February and May 1954. On December 6, 1954, the assessees filed their writ petitions challenging the constitutionality of s. 5 (1) of the Act. It was held by the majority that s. 5 (1) was discriminatory and violative of the fundamental right guaranteed under Art. 14 of the Constitution, because s. 34 of the Indian Income-tax Act, 1922 as

(1) [1955] 1 S.C.R. 787. (2) [1955] 2 S.C.R. 1247.

amended in 1948 operated on the same field and from and after January 26, 1950, it included the strip of territory which was also occupied by s. 5 (1) and two substantially different laws of procedure, one more prejudicial to the assessee than the other, could not be allowed to operate on the same field in view of the guarantee of Art. 14 of the Constitution. In the result it was held that barring those cases which were already concluded by reports made by the Commission and directions given by Government before January 26, 1950, the cases which were pending before the commission for investigation as also assessment or re-assessment proceedings which were pending on January 26, 1950, were hit by Art. 14. The assessment orders were accordingly quashed as being unconstitutional.

Now, we come back to the problems before us: (1) what is the effect of Muthia's decision (1) in the present case, and (2) does the Act contemplate two separate and distinct, but severable, procedures or jurisdictions —one relating to investigation and the other to settlement, so that the vice of discrimination (if any) attaches to the investigation procedure only and not to the other?

We do not see how the learned Attorney General can escape from the position that Muthia's decision (1) holds in express terms that s. 5 (1) of the Act was hit by Art. 14 of the Constitution on and after January 26, 1950. The *ratio* of the decision was thus explained in the majority judgment at page 1260, 1261:—

"After the 8th September, 1948, there were two procedures simultaneously in operation, the one under Act XXX of 1947 and the other under the Indian Income tax Act with reference to persons who fell within the same class or category, viz., that of the substantial evaders of income-tax. After the 8th September, 1948, therefore, some persons who fell within the class of substantial evaders of income-tax were dealt with under the drastic and summary procedure prescribed under Act XXX of 1947, while other

(1) [1955] 2 S.C.R. 1247.

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persons who fell within the same class of substantial evaders of income-tax could be dealt with under the procedure prescribed in the Indian Income-tax Act after service of notice upon them under the amended section 34(1) of the Act. Different persons, though falling under the same class or category of substantial evaders of income-tax, would, therefore, be subject to different procedures, one a summary and drastic procedure and the other a normal procedure which gave to the assessees various rights which were denied to those who were specially treated under the procedure prescribed in Act XXX of 1947.

The legislative competence being there, these provisions, though discriminatory, could not have been challenged before the advent of the Constitution. When, however, the Constitution came into force on the 26th January, 1950, the citizens obtained the fundamental rights enshrined in Part III of the Constitution including the right to equality of laws and equal protection of laws enacted in article 14 thereof, and whatever may have been the position before January 26, 1950, it was open to the persons alleged to belong to the class of substantial evaders thereafter to ask as to why some of them were subjected to the summary and drastic procedure prescribed in Act XXX of 1947 and others were subjected to the normal procedure prescribed in section 34 and the cognate sections of the Indian Income-tax Act, the procedure prescribed in Act XXX of 1947 being obviously discriminatory and, therefore, violative of the fundamental right guaranteed under article 14 of the Constitution."

That *ratio* is equally applicable in the present case, and if s. 5(1) of the Act is unenforceable after January 26, 1950, the reference made thereunder against the assessee must also fall after that date and with it must go overboard all that was done under the drastic and summary procedure prescribed under the Act after January 26, 1950. Two possible arguments that (1) substantial evaders whose cases were referred by the Central Government for investigation by the Commission

before September 1, 1948, formed a class by themselves and (2) that proceedings having started before the Commission under a reference valid at the time when it was made cannot be affected by any subsequent amendment of the Income-tax Act, 1922, were raised, but not accepted in Suraj Mall Mohta's, Meenakshi Mills' or Muthia's case (1) (2) (3). There has been some argument before us as to how the two procedures—one prescribed under the Income-tax Act, 1922, and the other under the Act—compare and contrast with each other; but this is a point which was canvassed at great length in each of the three cases mentioned above. This Court found in unequivocal terms that the procedure prescribed under the Act was more summary and drastic, and in Suraj Mall Mohta's case the substantial differences between the two procedures were summarised at pp. 463-466 of the report. We do not propose to cover the same ground again, but content ourselves with drawing attention to what was pointedly said in Suraj Mall Mohta's case (1), namely, that it was conceded on behalf of Government that the procedure prescribed by the impugned Act in ss. 6 and 7, which we have read earlier, was more drastic than the procedure prescribed in ss. 37 and 38 of the Indian Income-tax Act. It was stated therein that though in the first stages of investigation there was some similarity between the two procedures, the overall picture was not the same.

The learned Attorney General has not seriously contested the correctness of this position, but has argued that what we are concerned with in the present case is not the mere possibility of a differential treatment, but what actually was done by the Commission in the case of the present assessee after January 26, 1950. He has submitted that the assessee was not subjected to any differential treatment in fact, and has invoked to his aid the ratio of our decision in *Syed Qasim Razvi* v. *The State of Hyderabad* (4), where the majority judgment laid down the following tests: in a case where part of the trial cannot be challenged as

(1) [1955] 1 S.C.R. 448.
(2) [1955] 1 S.C.R. 787.
(3) [1955] 2 S.C.R. 1247.
(4) [1953] S.C.R. 589.

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bad, it is incumbent on the court to consider, *first*, whether the discriminatory provisions of the law can be separated from the rest and even without them a fair measure of equality in the matter of procedure can be secured, and *secondly*, whether the procedure actually followed did or did not proceed upon the discriminatory provisions and it was stated that a mere threat or possibility of unequal treatment was not sufficient to invalidate the subsequent proceedings. A reference was there made to the earlier decisions of this Court in *Keshavan Madhava Menon* v. *The State of Bombay* (1), and *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (2), and the decision in Lachmandas's case (supra), again a majority decision, was distinguished on two grounds: first, the question as to whether after eliminating the discriminatory provisions it was still possible to secure a fair measure of equality with the normal procedure was neither raised nor considered; secondly, it was assumed that it was not possible to proceed with the trial without following the discriminatory procedure and as that procedure became void on the coming into force of the Constitution, the jurisdiction to proceed under that procedure came to an end. Applying the tests laid down in the majority decision of Syed Qasim Razvi's case (3), the learned Attorney General has contended that in the present case the discriminatory provisions can be separated from the rest of the Act, and the assessee was not in fact subjected to any discriminatory procedure. He has sought to distinguish Muthia's case on the same ground, viz., that the re-assessments made in that case were actually based on a discriminatory procedure.

In our view the ratio of the majority decision in Syed Qasim Razvi's case (3) has no application in the case under our consideration, and the principle which applies is what was laid down in Lachmandas's case (2). The majority decision is Syed Qasim Razvi's case proceeded on the finding (to quote the words of Mukherjea, J., who delivered the majority judgment) that "although there were deviations in certain particulars,

(1) [1951] S. C. R. 228. (2) [1952] S. C. R. 710.
(3) [1953] S. C. R. 589.

the accused had substantially the benefit of a normal trial". The minority judgments, however, very pertinently pointed out that the discriminatory provisions were an integral part of the Regulation under which the accused person in that case was tried and in fact the discriminatory provisions were applied. Bose, J. (as he then was) expressed the view (at p. 618) " that in testing the validity of a law, it is irrelevant to consider what has been done under it, for a law is either constitutional or not and the validity or otherwise cannot depend upon what has been accomplished under its provisions."

It is, we think, unnecessary to go into the controversy which arises out of the two views expressed above. For the present case, it is sufficient to say that (1) the discriminatory provisions are an integral part of the procedure prescribed under the Act which cannot be separated from the rest; and (2) we are satisfied that the report which led to the settlement was made by the Investigation Commission in pursuance of and as a direct result of the discriminatory procedure which it followed. Indeed, the Investigation Commission followed the only procedure of investigation prescribed under the Act, which was a drastic and summary procedure, and if that procedure became void on the coming into force of the Constitution, the jurisdiction of the Investigation Commission practically came to an end (see Lachmandas's case, supra).

It is necessary to explain here why we cannot accept the contention of the learned Attorney General that there are two procedures or two jurisdictions under the Act. What in substance is the effect of the provisions of the Act, in so far as they relate to the Commission's duty under s. 3 (b)? The Commission receives a reference under s. 5 (1) if it does not proceed under s. 5 (2), it exercises such of its powers under s. 6 as it considers necessary. It then follows the procedure laid down in s. 7 and submits its report under s. 8. On that report, the Central Government takes action under s. 8 (2). If, however, the assessee applies for settlement, even then the Commission has the duty to report to Government if the terms of settlement are

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approved by it. To fulfil this duty, the Commission must get the materials by exercising its powers under s. 6 and by following the procedure laid down in s. 7. That is exactly what was done in the present case. An authorised official was asked to examine the accounts etc. under s. 6 (3). He examined the accounts and submitted an interim report in 1953. He followed the procedure laid down in the Act with regard to inspection of documents, examination of witnesses etc. He then submitted a final report. The Commission then heard the assessee on May 19, 1954, and reserved orders. On May 20, 1954, after the assessee knew what the final finding of the Commission was going to be, he filed an application for settlement. The Commission made its final report four days after. It is difficult to understand how in the circumstances stated above, it can be said that the Commission followed a non-discriminatory procedure or that it had two jurisdictions—one relating to investigation and the other to settlement. The jurisdiction was really *one*, and the procedure followed also the *same*. It is not as though the Act provided a separate procedure for purposes of effecting a settlement; nor is this a case where a settlement has been made without applying any of the provisions relating to investigation. A full investigation was made, and after the assessee had been subjected to the drastic and summary procedure under the Act, he was told what the result of the investigation was. Then, he made an application for settlement, which was approved by the Commission under s. 8A.

We are accordingly of the view that the learned Attorney General has failed to make out his case that (1) Muthia's decision (1) does not apply and (2) the settlement under s. 8A of the Act is a legally valid settlement by reason of the severability or non-application of the discriminatory procedure under the Act in the case of the assessee.

This brings me to the second question, that of waiver of a fundamental right, which is as important as it is complex. It is a question on which unfortunately we

(1) [1955] 2 S.C.R. 1247.

have not been able to achieve unanimity. It is beset with this initial difficulty that the present appeal is not from a judgment or order rendered after the trial of properly framed issues; it is from an order which merely rejected the prayer of the assessee that his properties attached in execution of the recovery certificate should be released and the amounts paid under the terms of the settlement refunded. The question of waiver was neither raised, nor tried; and the necessary facts were not ascertained or determined by the revenue authority concerned. Unfortunately, the filing of a statement of their case by the parties was also dispensed with, the result whereof has been that the question of waiver has been urged for the first time in the course of arguments here. We have, however, heard full arguments on it, and I proceed to consider it on such materials as have been placed before us. It is necessary to make one point clear. The respondents have raised the plea of waiver, and the onus lies heavily on them to establish the essential requirements in support of the plea.

Two points arise in this connection: (1) have the respondents established, on the materials before us, the necessary facts on which a plea of waiver can be founded; and (2) if so, can a fundamental right guaranteed by the Constitution be waived at all. If the first point is answered in the negative, the second point need not be answered in the abstract. On behalf of the respondents, it has been submitted that assuming (without conceding) that the discriminatory provisions of the Act were applied in the case of the assessee before he asked for a settlement, the materials on record show that he never objected to the procedure adopted, voluntarily asked for a settlement, got by the settlement the benefit of reducing his liability for both tax and penalty, and paid without demur the following instalments (some even after Muthia's decision (1))—

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Payments made up to April 55		10,000
Payment made on	10- 5-55	5,000
,,	19- 6-55	5,000
,,	7- 7-55	5,000
,,	13- 8-55	5,000
,,	7- 9-55	5,000
,,	15-10-55	5,000
,,	10-11-55	5,000
,,	15-12-55	5,000
,,	8- 2-56	5,000
,,	13- 2-56	5,000
,,	7- 3-56	5,000
,,	14- 5-56	5,000
,,	19- 5-56	5,000
,,	13- 6-56	5,000
,,	6- 8-56	5,000
,,	7- 9-56	5,000
,,	9-10-56	5,000
,,	10-11-56	5,000
,,	23-12-56	5,000
,,	14- 1-57	5,000
,,	29- 3-57	5,000
,,	4- 6-57	5,000
,,	8- 9-57	8,000
		1,28,000

The learned Attorney General has in this connection referred us to the application for settlement which the assessee had made to the Commission, wherein the following statements were made :—

"In view of the fact that though no disclosure statement had been made before the submission of his reports by the authorised official, still during the enquiry before the Commission, the assessee and his auditors admitted their liability to tax in respect of the aforesaid sum of Rs. 4,47,915, the Commission was of the opinion that the assessee should be granted the benefit of a settlement on the lower concessional basis of payment of 75 per cent. of the undisclosed income by way of tax. The Commission was also of the opinion that the assessee should pay by way of penalty a sum of Rs. 14,064.

The assessee accepts the conclusions of the Commission as regards the amount of income that escaped assessment, the tax payable thereon and the penalty payable as aforesaid."

On the basis of these statements, the learned Attorney General has argued that there is no foundation for the suggestion made on behalf of the assessee that the application for settlement was made "under the pressure of circumstances and in view of the coercive machinery of the Act." He has submitted that the necessary facts on which the plea of waiver is founded have been established, and he has relied on three cases decided by this Court, where according to him the effect of the decisions was to accept such a plea in circumstances very similar: *Dewan Bahadur Seth Gopal Das Mohta* v. *The Union of India* (1); *Baburao Narayanrao Sanas* v. *The Union of India* (2); and *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India* (3). On behalf of the assessee, it is contended on the contrary that the necessary facts to found a plea of waiver are totally absent in the present case, and none of the aforesaid three decisions which were all pronounced on the same day proceed on a plea of waiver.

Two of the three decisions referred to above relate to a settlement made under s. 8A and the third to an order made under s. 8(2) of the Act. All the three decisions were pronounced on applications made under Art. 32 of the Constitution, and not on any appeal from an order of the revenue authority. In Gopal Das Mohta's case (1) the argument urged was, *inter alia*, that ss. 5, 6, 7 and 8 of the Act were invalid and *ultra vires* as they contravened the provisions of Arts. 14, 19 (1) (f), and 31 of the Constitution and the prayer made was that the entire proceedings should be quashed as also all orders made by the Central Government in pursuance of the settlement under s. 8A. In rejecting the argument and prayer, Mahajan, C. J., who delivered the judgment of the Court said at p. 776—

(1) [1955] 1 S.C.R. 773. (2) [1954] 26 I.T.R. 725.
(3) [1955] 1 S.C.R. 769.

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"In our judgment this petition is wholly misconceived. Whatever tax the petitioner has already paid, or whatever is still recoverable from him, is being recovered on the basis of the settlement proposed by him and accepted by the Central Government. Because of his request for a settlement no assessment was made against him by following the whole of the procedure of the Income-tax Act. In this situation unless and until the petitioner can establish that his consent was improperly procured and that he is not bound thereby he cannot complain that any of his fundamental rights has been contravened for which he can claim relief under art. 32 of the Constitution. Article 32 of the Constitution is not intended for relief against the voluntary actions of a person. His remedy, if any, lies in other appropriate proceedings."

There has been a good deal of argument before us as to the true effect of the decision in Gopal Das Mohta's case (1). While I recognise that the reason stated for the decision, viz., that Art. 32 is not intended for relief against voluntary actions of a person, comes very near to saying that a person has waived his protection in a given case since whatever injury he may incur is due to his own act rather than to the enforcement of an unconstitutional measure against him, I am unable to hold that the decision proceeded strictly on the doctrine of waiver; it is perhaps true to say that some of the observations made therein are of a "Delphic nature to be translated into concreteness by the process of litigating elucidation" (to borrow the words of Frankfurter, J., in *Machinists* v. *Gonzales* (2). It seems to me that the decision proceeded more upon the scope of Art. 32 than upon the doctrine of waiver. I am fortified in this view by the circumstance that in a decision given only a month earlier (see *Behram Khurshed Pesikaka* v. *The State of Bombay* (3)) the same learned Chief Justice expressed himself strongly, though tentatively, against introducing in our Constitution the doctrine of waiver as enunciated by some American Judges in construing the American Constitution, without a fuller discussion of the matter. The report of Gopal

(1) [1955] 1 S.C.R. 773. (2) (1958) 356 U.S. 617, 619.
(3) [1955] 1 S.C.R. 613, 653, 654.

Das Mohta's case (1) does not contain any reference to the doctrine of waiver, and it is obvious that no fuller discussion of the doctrine took place in that case. It is not, therefore, reasonable to hold that the effect of Gopal Das Mohta's case is to uphold the doctrine of waiver. Babu Rao's case (2) merely followed Gopal Das Mohta (1) and gave no separate reasons. Laxmanappa Jamkhandi's case (3) dealt with an order under s. 8(2) of the Act and said at p. 772:—

"From the facts stated above it is plain that the proceedings taken under the impugned Act XXX of 1947 concluded so far as the Investigation Commission is concerned in September, 1952, more than two years before this petition was presented in this Court. The assessment orders under the Income-tax Act itself were made against the petitioner in November, 1953. In these circumstances we are of the opinion that he is entitled to no relief under the provisions of Article 32 of the Constitution. It was held by this Court in Ramjilal v. Income-tax Officer, Mohindargarh, [1951] S.C.R. 127, that as there is a special provision in Article 265 of the Constitution, that no tax shall be levied or collected except by authority of law, clause (1) of Article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Art. 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32. In view of this decision it has to be held that the petition under Article 32 is not maintainable in the situation that has arisen and that even otherwise in the peculiar circumstances that have arisen it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court."

Here, again, there is no reference to the doctrine of waiver, and the case was decided on the ambit and scope of Art. 32 of the Constitution.

I would hold, therefore, that the decisions of this Court relied on by the learned Attorney General do

(1) [1955] 1 S.C.R. 773. (2) [1954] 26 I.T.R. 725.

(3) [1955] 1 S.C.R. 769.

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not help him in establishing waiver. Let me now examine the circumstances on which the learned Attorney General founds his plea of waiver. Indeed, it is true that the assessee submitted to the discriminatory procedure applied to him by the Commission; he also asked for a settlement under which he agreed to pay 75% of his alleged tax liability and a small amount of penalty; he made some payment in instalments even after Muthia's decision in December, 1955. Do these circumstances amount to waiver? It is to be remembered that in 1953-1954 when the discriminatory procedure of the Act was applied to him and the report against him was made by the Commission on which the settlement is based, the assessee did not know, nor had it been declared by a court of competent jurisdiction that s. 5(1) of the Act was *ultra vires*. In his application for a settlement, he said clearly in paragraph 3 that the Commission announced it as its view that the income, profits and gains that had escaped assessment in the hands of the assessee was Rs. 4,47,915. The assessee also knew that under the Act this finding was final and binding on him. If in these circumstances, the assessee made an application for settlement, can it be said that it is a voluntary or intentional relinquishment of a known right? I venture to think not. It has been said that 'waiver' is a troublesome term in the law. The generally accepted connotation is that to constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence. (See *Dawson's Bank Limited* v. *Nippon Menkwa Kabushiki Kaisha*) (1). What is the known legal right which the assessee intentionally relinquished or agreed to release in 1953-1954? He did not know then that any part of the Act was invalid, and I doubt if in

(1) (1935) L.R. 62 I.A. 100, 108.

the circumstances of this case, a plea of 'waiver' can be founded on the maxim of 'ignorance of law is no excuse'. I do not think that the maxim "ignorance of law is no excuse' can be carried to the extent of saying that every person must be presumed to know that a piece of legislation enacted by a legislature of competent jurisdiction must be held to be invalid, in case it prescribes a differential treatment, and he must, therefore, refuse to submit to it or incur the peril of the bar of waiver being raised against him. I do not think that such pre-science is a necessary corollary of the maxim. On the contrary, the presumption, if any, which operated at the relevant time was the presumption that a law passed by a competent legislature is valid, unless declared unconstitutional by a court of competent jurisdiction. Furthermore, I do not think that any inference of waiver can be retrospectively drawn from the instalments paid in 1956-57, particularly when the question of refund of the amounts already paid is no longer a live issue before us. It would, I think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver: this would make constitutional rights depend for their vitality on the accident of a timely challenge and render them illusory to a very large extent.

I hold, therefore, that the necessary foundation for sustaining the plea of waiver has not been laid in this case, and the onus being on the respondents, the plea must fail.

In view of my finding that the necessary foundation on facts for sustaining the plea of waiver has not been laid in this case, it becomes unnecessary to decide, in the abstract, the further question if a right guaranteed by any of the provisions in Part III of the Constitution can be waived at all. I am of the view that this Court should indeed be rigorous in avoiding to pronounce on constitutional issues where a reasonable alternative exists; for we have consistently followed the two principles (a) that "the Court will not anticipate a question of constitutional law in

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advance of the necessity of deciding it" (Weaver on Constitutional Law, p. 69) and (b) "the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (ibid, p. 69).

My Lord the Chief Justice and my learned brother Kapur, J., have however expressed the view that the fundamental right guaranteed under Art. 14 cannot be waived; my learned brethren, Bhagwati and Subba Rao, JJ., have expressed the view that none of the fundamental rights guaranteed by the Constitution can be waived.

I greatly regret to have to say that I have come to a conclusion different from theirs with regard to this question, and as they have thought fit to express their views on it I proceed now to explain why I have come to a conclusion different from those of my learned brethren on this question.

This question was mooted, though not fully answered, in Behram Khurshed Pesikaka's case (1). Venkatarama Aiyar, J., expressed his views at pages 638 to 643 of the report. Mahajan, C. J., with whom Mukherjea, Vivian Bose and Ghulam Hasan, JJ., concurred, expressed his views at pages 651 to 655 of the report, and my Lord the Chief Justice as Das, J., reserved his opinion on the question. The view which Venkatarama Aiyar, J., expressed was this: if the constitutional provision which has been infringed affects the competence of the legislature which passed the law, the law is a nullity; as for example, when a State enacts a law which is within the exclusive competence of the Union; when, however, a law is within the competence of the legislature which passed it and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity, but is merely unenforceable; such unconstitutionality can be waived and in that case the law becomes enforceable. He said that in America this principle was well settled and he referred to Cooley on Constitutional Limitations, Volume 1, pages 368 to 371; Willis on Constitutional Law at

(1) [1955] 1 S.C.R. 613, 653, 654.

pages 524, 531, 542 and 558; Rottschaefer on Constitutional Law at pages 28 and 29-30. He then referred to certain American decisions in support of his views and then said :—

"The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals.....It is open to any person whose rights have been infringed to waive it and when there is waiver, there is no legal impediment to the enforcement of the law. It will be otherwise if the statute was a nullity; in which case it can neither be waived nor enforced. If then the law is merely unenforceable and can take effect when waived, it cannot be treated as non est and as effaced out of the statute book."

The contrary view expressed by Mahajan, C. J., can be best explained in his own words :

"We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of the Parliament and the State legislatures as conferred by Arts. 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution."

His Lordship then referred to Art. 13 of the Constitution and said that it was a clear and unequivocal mandate of the fundamental law prohibiting the State from making any laws which came into conflict with Part III of the Constitution. His Lordship added :

"In our opinion the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter.....Without finally expressing an opinion on this question, we

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are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of the Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

It would appear that the two main reasons which Mahajan, C. J., gave in support of the views expressed by him were these. Firstly, he held that the effect of Art. 13 of the Constitution was to prohibit the State from making any laws which came into conflict with Part III of the Constitution and he recognised no such distinction as was drawn by Venkatarama Aiyar, J., between absence of legislative power (that is, incompetence of the legislature) and non-observance of provisions which operate merely as a check on the exercise of legislative power. He thought that absence of legislative power and check on the exercise of legislative power were both aspects of want of legislative power. Secondly, he referred to the preamble and the scheme of Part III of the Constitution in support of his view that the doctrine of waiver did not apply. I shall take these reasons in the order in which I have stated them.

First, as to the effect of Art. 13 of the Constitution. Article 13 is in two parts: the first part deals with "all laws in force in the territory of India immediately before the commencement of this Constitution" and says that so far as such laws are inconsistent with the provisions of Part III, they shall to the extent of such

inconsistency be void; the second part deals with laws made after the commencement of the Constitution and says that "the State shall not make any law which takes away or abridges the rights conferred by Part III" of the Constitution and any law made in contravention of cl. (2) of Art. 13 shall to the extent of the contravention be void. It seems clear to me that the Article itself recognises the distinction between absence of legislative power which will make the law made by an incompetent legislature *wholly* void, and exercise of legislative power in contravention of a restriction or check on such power, which will make the law void to the extent of the inconsistency or contravention. The use of the words "to the extent of the inconsistency" and "to the extent of the contravention" indubitably points to such a distinction, and indeed this was pointed out in *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh* (1). This was an unanimous decision of this Court and several earlier decisions including the decision in Kesavan Madhava Menon's case (2), on which Mahajan, C. J., placed so much reliance, were considered therein. The decision in Behram Khurshed Pesikaka (3) was also considered, and then the following observations were made with regard to Art. 13 of the Constitution at p. 598—

"Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution, as was held in Keshavan Madhava Menon's case. The law continued in force even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. In short, Art. 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Art. 19(1)(g) read with cl. (6) as it then stood ineffectual, nugatory and devoid of any legal

(1) [1955] 2 S.C.R. 589. (2) [1951] S.C.R. 228.
(3) [1955] 1 S.C.R. 613, 653, 654.

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force or binding effect only in respect of the exercise of the fundamental right on or after the date of the commencement of the Constitution.....All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Art. 13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes."

The aforesaid view expressed in Bhikaji Narain's case (1) was accepted in many later decisions including the decision in Muthia's case (2). The same distinction was again referred to in another unanimous decision of this Court in *The State of Bombay* v. *R.M.D. Chamarbaugwala* (3) where at p. 885 it was observed:

"The Court of Appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State), its operation extends beyond the boundaries of the Province or the State, for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra territorial operation. If the impugned law satisfies both these tests, then finally the court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislature. The impugned law has to pass all these three tests."

Therefore, the mere use of the word "void" in Art. 13 does not necessarily militate against the application of the doctrine of waiver in respect of the provisions contained in Part III of our Constitution. Under the American Constitution also, a law made in violation of a constitutional guarantee is struck down, because under Art. VI of that Constitution, "the Constitution and the laws of the United States which

(1) [1955] 2 S.C.R. 589. (2) [1955] 2 S.C.R. 1247.

(3) [1957] S.C.R. 874.

shall be made in pursuance thereof.....shall be the supreme law of the land." I am unable, therefore, to accept the view that Art. 13 shows that the doctrine of waiver can never be applied in respect of the provisions in Part III of the Constitution.

Let me now go to the second reason. Is there anything in the preamble and the scheme of our Constitution, with particular reference to Part III, which will make the doctrine of waiver inapplicable ? Let me first place the two preambles side by side :

Preamble to our Constitution.	*Preamble to the American Constitution, 1787.*
"We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens : justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity of the nation; in our Constituent Assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution."	"We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Undoubtedly, there is difference in phraseology and emphasis: more than a century and half had passed between the two Constitutions; many world events of far-reaching social and economic consequences had taken place in the meantime, and men's ideas had undergone radical changes. It may be that the dominant purposes, as shown by the preamble, of the

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American Constitution were: (a) to form a more perfect Union; (b) to establish justice; (c) to insure domestic tranquillity; (d) to promote general welfare; and (e) to secure the blessings of liberty. In our Constitution, the emphasis is on the Welfare State—on Justice, Liberty, Equality and Fraternity. But the question before us is the limited question of the application of the doctrine of waiver. I do not find anything in the two preambles which will make the doctrine applicable in one case and not applicable in the other.

It is necessary to refer here to one important distinction between the two Constitutions. Speaking broadly, the American Constitution of 1787, except for defining the enumerated powers of the Federal Government and limiting the powers of the States, was an outline of government and nothing more. Its provisions were written in general language and did not provide minute specifications of organisation or power. It contemplated subsequent legislation and interpretation for carrying the provisions into effect. In other words, it was early recognised that the Constitution was not self-executing. The Indian Constitution is more detailed, and in Part III of the Constitution are provisions which not merely define the rights but also state to what extent they are subject to restrictions in the interests of general welfare, etc. In other words, there is an attempt at adjustment of individual rights with social good, and in that sense the limitations or restrictions are also defined. But I do not think that this distinction has any particular bearing on the question at issue before us. The rights as also the restrictions are justiciable, and an interpretation of the rights given and of the restrictions imposed, by courts of competent jurisdiction is contemplated.

Indeed, I recognise that there is a constitutional policy behind the provisions enacted in Part III of the Constitution. In a sense, there is a legislative policy in all statutory enactments. In my opinion, the crucial question is not whether there is a constitutional or legislative policy behind a particular provision, but the question is—is the provision meant

primarily for the benefit of individuals or is it for the benefit of the general public? That distinction has, I think, been recognised in more than one decision. Take, for example, an ordinary statutory enactment like s. 80 of the Code of Civil Procedure which says that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after a notice in writing has been given, etc. There is undoubtedly a reason of public policy behind this provision, but it is open to the party for whose benefit the provision has been made to waive notice and indeed the party may be estopped by his conduct from pleading the want of notice. As the Privy Council pointed out in *AL. AR. Villavar Chettiar* v. *Government of the Province of Madras* (1), there is no inconsistency between the propositions that the provisions of a section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided. The question then is—is there anything in the statute which militates against the application of the doctrine of waiver to such right, subject to the safeguards and precautions necessary for the application of the doctrine, provided the right is for the benefit of individuals?

I am conscious that rights which the Constitution itself characterises as fundamental must be treated as such and it will be wrong to whittle them down. But are we whittling down fundamental rights when we say that the question of waiver of fundamental rights cannot be answered in the abstract—by a general affirmative or a general negative; the question must always depend on (a) the nature of the right guaranteed and (b) the foundation on the basis of which the plea of waiver is raised. It is to be remembered that the rights guaranteed by Part III of the Constitution are not confined to citizens alone. Some of the rights are guaranteed to non-citizens also. Moreover, they are not all rights relating to justice, liberty, equality and fraternity; some of the provisions define the rights

(1) (1947) L.R. 74 I.A. 223, 228.

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while others indicate the restrictions or checks subject to which the rights are granted. Article 33, for example, does not give any right to any person; on the contrary it gives power to Parliament to modify the rights conferred by Part III in their application to certain categories of persons. Article 34 lays down a restriction on rights conferred by Part III while martial law is in force in any area. It is not, therefore, quite correct to say that all the provisions in Part III grant fundamental rights, though the heading is 'Fundamental Rights'.

There is, I think, a three-fold classification: (1) a right granted by an ordinary statutory enactment; (2) a right granted by the Constitution; and (3) a right guaranteed by Part III of the Constitution. With regard to an ordinary statutory right there is, I think, no difficulty. It is well recognised that a statutory right which is for the benefit of an individual can in proper circumstances be waived by the party for whose benefit the provision has been made. With regard to a constitutional right, it may be pointed out that there are several provisions in our Constitution which do not occur in Part III, but which yet relate to certain rights; take, for example, the rights relating to the Services under the Union and the States in Part XIV. I do not think that it can be seriously contended that a right which is granted to a Government servant for his benefit cannot be waived by him, provided no question of jurisdiction is involved. I may refer in this connection to the provisions in Part XIII which relate to trade, commerce and intercourse within the territory of India. These provisions also impose certain restrictions on the legislative powers of the Union and of the States with regard to trade and commerce. As these provisions are for the benefit of the general public and not for any particular individual, they cannot be waived, even though they do not find place in Part III of the Constitution. Therefore, 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 for the general public?

That, in my opinion, is the true test. I may here state that the source of the right—contractual or statutory—is not the determining factor. The doctrine of waiver is grounded on the principle that a right, statutory or otherwise, which is for the benefit of an individual can be waived by him. I am aware that a right which is for the benefit of the general public must in its actual operation relate to particular individuals, in the same way as a right for the benefit of individuals will in its actual operation arise in connection with individual A or individual B. The test is not whether in its operation it relates to an individual. The test is —for whose benefit the right has been primarily granted for the benefit of the general public or for individuals?

Let me now apply this test to some of the provisions in Part III of the Constitution. These provisions have been classified under different heads: (1) right to equality, (2) right to freedom, (3) right against exploitation, (4) right to freedom of religion, (5) cultural and educational rights, (6) right to property and (7) right to constitutional remedies. There can be no doubt that some of these rights are for the benefit of the general public. Take, for example, Art. 23 which prohibits traffic in human beings, etc; so also Art. 24 which says that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. I do not wish to multiply examples and it is sufficient to state that several of these rights are rights which are meant primarily for the benefit of the general public and not for an individual. But can we say the same thing in respect of all the rights? Let us take Art. 31, which says that no person shall be deprived of his property save by authority of law and that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation, etc. Take a case where a man's property is acquired under a law which does not fix the amount of compensation or specify the principles on which or the manner in which the compensation is to be determined and given. The man whose

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property is taken may raise no objection to the taking of his property under such law. Indeed, he may expressly agree to Government taking his land for a public purpose under the law in question, though it does not comply with the requirements as to compensation. Can such a man after two or three years change his mind and say that the law is invalid and his land on which a school or a hospital may have been built in the meantime should be restored to him, because he could not waive his fundamental right? In my opinion, if we express the view in the abstract that no fundamental right can ever be waived, many startling and unforeseen results may follow. Take another example. Suppose a man obtains a permit or a licence for running a motor vehicle or an excise shop. Having enjoyed the benefit of the permit for several years, is it open to him to say when action is proposed to be taken against him to terminate the licence, that the law under which the permit was granted to him was not constitutionally valid? Having derived all the benefit from the permit granted to him, is it open to him to say that the very Act under which a permit was granted to him is not valid in law? Such and other startling results will follow if we decide in the abstract, by a general negative, that a fundamental right can never be waived. Take Art. 32, which is a right to a constitutional remedy, namely, the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III. It is now well settled by several decisions of this court that the right under Art. 32 is itself a fundamental right. Suppose a person exercises that right and initiates appropriate proceedings for enforcement of a fundamental right. Later he thinks better of it and withdraws his application. Still later he changes his mind. Can he then say that he could not waive his right under Art. 32 and the order passed on his application for withdrawal had no legal validity? We may take still another example. Under Art. 30(1) of the Constitution, all minorities, whether based on religion or language, have the right to establish and administer educational institutions of

their choice. Suppose, there is a minority educational institution and the minority has the right to administer that institution, but they want grant from Government. The minority may have to surrender part of its right of administration in order to get Government aid. Can the minority waive its right? Such a question arose for consideration in the advisory opinion which we gave in connection with the Kerala Education Bill and, so far as I have been able to understand, the effect of our opiniou is that the minority can surrender part of its right of administration of a school of its own choice in order to get aid from Government. If we now hold that the minority can never surrender its right, then the result will be that it will never be able to ask for Government aid.

I do not see any such vital distinction between the provisions of the American Constitution and those of our Constitution as would lead me to the conclusion that the doctrine of waiver applies in respect of constitutional rights guaranteed by the American Constitution but will not apply in respect of fundamental rights guaranteed by the Indian Constitution. Speaking generally, the prohibition in Part III is against the State from taking any action in violation of a fundamental right. The word 'State' in that Part includes the Government and Parliament of India as also the Government and Legislature of each of the States and also all local or other authorities within the territory of India or under the control of the Government of India. The American Constitution also says the same thing in effect. By Art. VI it states that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. It is well settled in America that the first ten amendments to the original Constitution were substantially contemporaneous and should be construed in *pari materia*. In many of the amendments the phraseology used is similar to the phraseology of the provisions of Part III of our Constitution.

The position under the American Constitution is

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well settled and a succinct statement of that position will be found in Rottschaefer on Constitutional Law, pp. 28-29. The learned author has summarised the position thus:

"There are certain constitutional provisions that may be waived by the person for whose protection they were intended. A person who has waived that protection in a given instance may not thereafter raise the issue that his constitutional rights have been infringed in that instance, since whatever injury he may incur is due to his own act rather than to the enforcement of an unconstitutional measure against him.

.....

A person who would otherwise be entitled to raise a constitutional issue is sometimes denied that right because he is estopped to do so. The factor usually present in these cases is conduct inconsistent with the present assertion of that right, or conduct of such character that it would be unjust to others to permit him to avoid liability on constitutional grounds. A person may not question the constitutionality of the very provision on which he bases the right claimed to be infringed thereby, nor of a provision that is an integral part in its establishment or definition. The acceptance of a benefit under one provision of an Act does not ordinarily preclude a person from asserting the invalidity of another and severable provision thereof, but there are exceptions to this rule. The promoters of a public improvement have been denied the right to contest the validity of the rule apportioning its cost over the benefited lands, and a person who has received the benefits of a statute may not thereafter assert its invalidity to defeat the claims of those against whom it has been enforced in his own favour. A state is estopped to claim that its own statute deprives it of its property without due process of law; but it is permitted to assert that its own statute invades rights that its constitution confers upon it. Prior inconsistent conduct will not, however, preclude a person from asserting the invalidity of an act if under all the circumstances its assertion involves no

unfairness or injustice to those against whom it is raised."

The learned Attorney General placed reliance on the following decisions: (1) *Pierce* v. *Somerset Railway* (1); (2) *Wall* v. *Parrot Silver and Copper Company* (2); (3) *Pierce Oil Corporation* v. *Phoenix Refining Company* (3); (4) *Shepard* v. *Barron* (4); (5) *United States* v. *Murdock* (5); (6) *Patton* v. *United States* (6); and (7) *Adams* v. *United States* (7). The position in America is so well settled that I think it is unnecessary to examine the aforesaid decisions in detail. I need only refer to the observations of Frankfurter, J., in William A. Adam's case (supra). The observations were made in connection with a case where a trial was held without a jury at the request of the accused person himself in spite of the guarantee of Amendment VI. The observations were—

" What was contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience."

I have not been able to find any real reason on the basis of which the decisions given above with regard to the American Constitution can be held to be inapplicable to similar cases arising under the Indian Constitution.

Two subsidiary reasons have been given for holding that the position under the Indian Constitution is different. One is that ours is a nascent democracy and, therefore, the doctrine of waiver should not apply. With respect, I am unable to concur in this view. I do not think that we shall be advancing the cause of democracy by converting a fundamental right into a fetter or using it as a means for getting out of an

(1) (1898) 171 U.S. 641.
(2) (1917) 244 U.S 407
(3) (1922) 259 U.S. 125
(4) (1904) 194 U.S. 553.
(5) (1931) 284 U.S. 141.
(6) (1930) 281 U.S. 276.
(7) (1942) 317 U.S. 269.

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agreement freely entered into by the parties. I appreciate that waiver is not to be light-heartedly applied, and I agree that it must be applied with the fullest rigour of all necessary safeguards and cautions. What I seriously object to is a statement in the abstract and in absolute terms that in no circumstances can a right given by any of the provisions in Part III of the Constitution be waived. Another point taken is that the provisions in Part III embody what are called 'natural rights' and such rights have been retained by the people and can never be interfered with. I am unable to acquiesce in this. The expression 'natural rights' is in itself somewhat vague. Sometimes, rights have been divided into 'natural rights' and 'civil rights', and 'natural rights' have been stated to be those which are necessarily inherent or innate and which come from the very elementary laws of nature whereas civil rights are those which arise from the needs of civil as distinguished from barbaric communities. I am unable, however, to agree that any such distinction is apparent from the provisions in Part III of our Constitution: all the rights referred to therein appear to be created by the Constitution. I do not think that Locke's doctrine of 'natural rights', which was perhaps the authority for the American Declaration of Independence, played any part in the enactment of the provisions of Part III of our Constitution. The doctrine which has long since ceased to receive general acceptance, has been thus explained by E. W. Paterson (see Natural Law and Natural Rights, Southern Methodist University Press, Dallas, 1955, p. 61):

"The theory of natural rights, for which we are indebted to the seventeenth-century English philosopher, John Locke, is essentially different from the theories of natural law just discussed in that it lacked the two important characteristics above mentioned: the concept of an immutable physical order and the concept of divine reason.....He begins with the purpose of justifying the existence of a government with coercive powers. What inconveniences would arise if there were no government? Men would live in a 'stage of nature'; to avoid confusion with the

political state I shall call this a 'condition of nature'. In such a condition man would be free to work, to enjoy the fruits of his labour, and to barter with others; he would also be free to enforce the law of nature (whose precepts Locke did not define) against every other man. Since Locke was an optimist about human nature he thought men would get along pretty well in this lawless condition. Yet the condition of nature is for Locke a fiction like the assumption of a frictionless machine in mechanics. The chief disadvantages that men in this condition would suffer were, he thought, the absence of an established law, the absence of a known and impartial magistrate to settle disputes, the absence of a power sufficient to execute and enforce the judgment of the magistrate. Moved by these inconveniences, men would enter into a social compact with each other whereby each would transfer to a third person, the government, such rights over his person and property as the government must have in order to remove these inconveniences. All other rights, privileges, and immunities he reserved, as a grantor of land conveys the fee simple to his son and reserves a life estate to himself. These reserved rights were 'natural' rights because they had originated in the condition of nature and survived the social compact."

There are, in my opinion, clear indications in Part III of the Constitution itself that the doctrine of 'natural rights' had played no part in the formulation of the provisions therein. Take Arts. 33, 34 and 35 which give Parliament power to modify the rights conferred by Part III. If they were natural rights, the Constitution could not have given power to Parliament to modify them. Therefore, I am of the view that the doctrine of 'natural rights' affords nothing but a foundation of shifting sand for building up a thesis that the doctrine of waiver does not apply to the rights guaranteed in Part III of our Constitution.

The true position as I conceive it is this: where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not impinge on the right of others, it

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can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals.

In the case before us, I have held that there is no foundation on facts to sustain the plea of waiver. Therefore, I would allow the appeal with costs. The order of the Commissioner of Income-tax, Delhi, dated January 29, 1958, must be set aside and all proceedings now pending for implementation of the order of the Union Government dated July 5, 1954, must be quashed.

Subba Rao J.

SUBBA RAO, J.—I have had the advantage of perusing the judgments of my Lord the Chief Justice and my learned brother, S. K. Das, J. I agree with their conclusion, but I would prefer to express my opinion separately in regard to the question of the applicability of the doctrine of waiver to the fundamental rights.

This case raises a most serious and important question, viz., whether the doctrine of waiver operates on the fundamental rights enshrined in the Constitution, a question not confined to the immediate purpose of this litigation, but to the public in general. The question is bound to arise frequently, and the varying observations already expressed by the learned Judges of this Court would lend scope for conflicting decisions involving parties in unnecessary litigation and avoidable hardship. The question was directly raised and fully argued before us. In the circumstances, I cannot share the opinion of my learned brother, S. K. Das, J., that this Court should avoid a decision on this question and leave it to be decided in a more appropriate case.

The facts have been fully stated by my Lord the Chief Justice in his judgment and I need not restate them.

The learned Attorney General contended that in the American Law the principle of waiver was applied to rights created by the Constitution except in cases where the protection of the rights was based upon public policy and that, by the same analogy, if no public policy was involved, even in India, the person

affected by the infringement of the fundamental rights could waive the constitutional protection guaranteed to him. It was said that in the present case the appellant waived his fundamental right under Art. 14 of the Constitution as the right was only in respect of his liability to tax and he could legitimately waive it. To appreciate this argument it would be convenient at the outset to notice the American Law on the subject. Certain rights, which are sometimes described as the Bill of Rights, have been introduced by the Amendments to the Constitution of America. They declare the rights of the people of America in respect of the freedom of religion, speech, press, assemblage and from illegal seizures. They guarantee trial by jury in certain criminal and civil matters. They give protection against self-incrimination. The Fifth Amendment of the Constitution of the United States prescribes that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. The Fourteenth Amendment of the Constitution introduces the rule of due process as a protection against the State action. The said amendments are intended as a protection to citizens against the action of the Union and the States. Though the rights so declared are general and wide in their terms, the Supreme Court of America, by a long course of judicial interpretation, having regard to the social conditions in that country, has given content to those rights and imposed limitations thereon in an attempt to reconcile individual rights with social good, by evolving counterbalancing doctrines of police power, eminent domain, and such others. During the course of the evolution of the law, attempts were made to apply the doctrine of waiver to the provisions of the Constitution of America. American Courts applied the doctrine with great caution and in applying the same, laid down definite principles.

The said principles were culled out from the various decisions and clearly summarized in the authoritative text-books on the Constitution of America under different heads:

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WILLIS ON 'CONSTITUTIONAL LAW':

1. *Self-incrimination*:

The privilege against self-incrimination, like any other privilege, is one which may be waived.

2. *Double jeopardy*:

Double jeopardy is a privilege and may be waived expressly or impliedly.

3. *Immunity against unreasonable searches and seizures*:

The immunity is one which may be waived and by consent one can make a search and seizure reasonable.

4. *Jury Trial*:

The United States Supreme Court.....held that neither a jurisdictional question nor the interest of the State was involved, but only the privilege and right of the accused, and that these were subject to waiver in accordance with the usual rules.

5. *Due Process of Law as a matter of jurisdiction*:

In order to delimit personal liberty by exercising social control, the branch of the government undertaking to do so must have jurisdiction. If it does not have jurisdiction, it is taking personal liberty (life, liberty or property) without due process of law. To this rule there are no exceptions. It cannot be waived.

'COOLEY'S CONSTITUTIONAL LIMITATIONS':

Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.

In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offences are not within the provinces of individual consent or agreement.

CORPUS JURIS SECUNDUM:

It has been stated supra (p. 1050, note 32) that the doctrine of waiver extends to rights and privileges

of any character, and since the word 'waiver' covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringe on the rights of others, and further provided the waiver of the right or privilege is not forbidden by law, and does not contravene public policy, and the principle is recognized that everyone has a right to waive, and agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringing on any public right and without detriment to the community at large.....

As a general rule, rights relating to procedure and remedy are subject to waiver, but if a right is so fundamental in its nature as to be regarded by the state as vitally integrated in immemorially established processes of the administration of justice, it cannot be waived by anyone.

The cases cited at the Bar illustrate the aforesaid principles. The doctrine was applied to the obligations under a contract in *Pierce* v. *Somerset Railway* (1); to deprivation of property without due process of law in *Pierce Oil Corporation* v. *Phoenix Refining Company* (2) and *Shepard* v. *Barron* (3) to trial by jury in *Patton* v. *United States* (4) and *Adams* v. *United States* (5); and to self-incrimination in *United States* v. *Murdock* (6). It is true, as the learned counsel for the appellant contended, that in some of the aforesaid decisions, observations are in the nature of *obiter*, but they clearly indicate the trend of judicial opinion in America.

(1) (1898) 43 L. Ed. 316; 171 U.S. 641.
(2) (1922) 66 L. Ed. 855; 259 U.S. 125.
(3) (1904) 48 L. Ed. 1115; 194 U. S. 553.
(4) (1930) 74 L. Ed. 854; 281 U.S. 276.
(5) (1942) 87 L. Ed. 268.
(6) (1931) 76 L. Ed 210; 284 U.S. 141.

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The American Law on the subject may be summarized thus: The doctrine of waiver can be invoked when the Constitutional or Statutory guarantee of a right is not conceived in public interest or when it does not affect the jurisdiction of the authority infringing the said right. But if the privilege conferred or the right created by the statute is solely for the benefit of the individual, he can waive it. But even in those cases, the Courts invariably administered a caution that having regard to the nature of the right some precautionary and stringent conditions should be applied before the doctrine is invoked or applied.

This leads me to the question whether the fundamental rights enshrined in the Indian Constitution pertain to that category of rights which could be waived. To put it differently, whether the Constitutional guarantee in regard to the fundamental rights restricts or ousts the jurisdiction of the relevant authorities under the Constitution to make laws in derogation of the said rights or whether the said rights are for the benefit of the general public. At the outset I would like to sound a note of warning. While it is true that the judgments of the Supreme Court of the United States are of a 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. While the principles evolved by the Supreme Court of the United States of America may in certain circumstances be accepted, their application to similar facts in India may not always lead to the same results. It is therefore necessary to consider the nature of the fundamental rights incorporated in the Indian Constitution, the conditions of the people for whose benefit and the purpose for which they were created, and the effect of the laws made in violation of those rights. The Constitution of India in its preamble promises to secure to all citizens justice, social, economic and

political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity of the nation. One of the things the Constitution did to achieve the object is to incorporate the fundamental rights in the Constitution. They are divided into seven categories: (i) right to equality—Arts. 14 to 18; (ii) right to freedom—Arts. 19 to 22; (iii) right against exploitation—Arts. 23 and 24; (iv) right to freedom of religion —Arts. 25 to 28; (v) cultural and educational rights—Arts. 29 and 30; (vi) right to property—Arts. 31, 31A and 31B; and (vii) right to Constitutional remedies—Arts. 32 to 35. Patanjali Sastri, J., as he then was, pointed out, in *Gopalan* v. *The State of Madras*(1), that fundamental rights contained in Part III of the Constitution are really rights that are still reserved to the people after the delegation of rights by the people to the institutions of Government both at the Centre and in the States created by the Constitution. Article 13 reads :—

"(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of the contravention, be void."

This Article, in clear and unambiguous terms, not only declares that all laws in force before the commencement of the Constitution and made thereafter taking away or abridging the said rights would be void to the extent of the contravention but also prohibits the State from making any law taking away or abridging the said rights. Part III is therefore enacted for the benefit of all the citizens of India, in an attempt to preserve to them their fundamental rights against infringement by the institutions created by the Constitution; for, without that safeguard, the objects

(1) [1950] S. C. R. 88.

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adumbrated in the Constitution could not be achieved. For the same purpose, the said chapter imposes a limitation on the power of the State to make laws in violation of those rights. The entire part, in my view, has been introduced in public interest, and it is not proper that the fundamental rights created under the various Articles should be dissected to ascertain whether any or which part of them is conceived in public interest and which part of them is conceived for individual benefit. Part III reflects the attempt of the Constitution makers to reconcile individual freedom with State Control. While in America this process of reconciliation was allowed to be evolved by the course of judicial decisions, in India, the fundamental rights and their limitations are crystallized and embodied in the Constitution itself; while in America a free hand was given to the judiciary not only to evolve the content of the right but also its limitations, in the Indian Constitution there is not much scope for such a process. The Court cannot therefore import any further limitations on the fundamental rights other than those contained in Part III by any doctrine, such as "waiver" or otherwise. I would, therefore, hold that the fundamental rights incorporated in Part III of the Constitution cannot be waived.

It is said that such an inflexible rule would, in certain cases, defeat the very object for which the fundamental rights are created. I have carefully scrutinized the Articles in Part III of the Constitution of India, and they do not, in my view, disclose any such anomaly or create unnecessary hardship to the people for whose benefit the rights are created. Article 14 embodies the famous principle of equality before the law and equal protection of the laws, and Arts. 15 to 18 and Art. 29(2) relate to particular applications of the rule. The principle underlying these Articles is the mainspring of our democratic form of government and it guarantees to its citizens equal protection in respect of both substantive and procedural laws. If the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree to be discriminated. When one realizes the unequal

positions occupied by the State and the private citizen, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of preferment, give up his right. It is said that in such a case coercion or influence can be established in a Court of law, but in practice it will be well nigh impossible to do so. The same reasoning will apply to Arts. 15 and 16. Art. 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That Article in express terms forbids untouchability; obviously, a person cannot ask the State to treat him as an untouchable. Article 19 reads:—

"(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practice any profession, or to carry on any occupation, trade or business."

The right to freedom is the essential attribute of a citizen under democratic form of government. The freedoms mentioned in Art. 19 are subject to certain restrictions mentioned in cls. (2) to (6) of that Article. So far as the freedoms narrated in sub-cls. (a) to (g) of Cl. (1) of Art. 19 are concerned, I cannot visualise any contingency where a citizen would be in a worse position than he was if he could not exercise the right of waiver. In regard to freedom to acquire, hold and dispose of property, a plausible argument may be advanced, namely, that a citizen should have a right to waive his right to acquire, hold and dispose of property; for, otherwise he might be compelled to acquire and hold his property, even if he intended to give it up! There is an underlying fallacy in this argument. The Article does not compel a citizen to acquire, hold and

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dispose of property just as it does not compel a person to do any of the acts covered by the other freedoms. If he does not want to reside in any part of the territory of India or to make a speech or to practise any profession, he is at liberty not to do any of these things. So too, a person may not acquire the property at all or practise any profession but if he seeks to acquire property or practise any profession, he cannot be told that he has waived his right at an earlier stage to acquire property or practise the profession. A freedom to do a particular act involves the freedom not to do that act. There is an essential distinction between the non-exercise of a right and the exercise of a right subject to the doctrine of waiver. So understood, even in the case of the right covered by sub-cl. (f) of cl. (1), there cannot be any occasion when a citizen would be worse off than when he had no fundamental rights under the Article. The preservation of the rights under Art. 19 without any further engrafting of any limitations than those already imposed under the Constitution, is certainly in the interest of the public; for, the rights are essential for the development of human personality in its diverse aspects. Some comment is made in regard to the right covered by cl. (3) of Art. 20, and it is asked that if a person has no liberty to waive the protection under that clause, he could not give evidence even if he wanted to give it in his own interest. This argument ignores the content of the right under cl. (3) of Art. 20. The fundamental right of a person is only that he should not be compelled to be a witness against himself. It would not prevent him from giving evidence voluntarily. Under Art. 21, no person shall be deprived of his life or personal liberty except according to procedure established by law and Art. 22 gives protection against arrest and detention in certain cases. I do not think that any situation can be conceived when a person could waive this right to his advantage. Article 23(1) prohibits traffic in human beings and forced labour. It is not suggested that a person can waive this Constitutional protection. So too, the right under Art. 24, which prohibits employment

of children in factories, cannot be waived. That apart, so far as this Article is concerned, no question of waiver can arise as a child cannot obviously waive his right under this Article. Article 25 gives guarantee for religious liberty subject to certain restrictions contained therein. It declares that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. This right is certainly conceived in the public interest and cannot be waived. So too, freedom to manage religious affairs, freedom as to payment of taxes for promotion of any particular religion and freedom as to attendance at religious instruction or religious worship in certain educational institutions are all conceived to enforce the religious neutrality of the State and it cannot be suggested that they are not in public interest. The cultural and educational rights of the minorities and their right to establish and administer educational institutions of their choice are given for the protection of the rights of the minorities and it cannot be said that they are not in public interest. Article 31, which prohibits the State from depriving a person of his property save by authority of law or to acquire any property without paying compensation, is intended to protect the properties of persons from arbitrary actions of the State. This Article is conceived in the interest of the public and a person cannot say that he can be deprived of his property without authority of law or that his land can be acquired without compensation.

It is suggested that if a person, after waiving his fundamental right to property and allowing the State to incur heavy expenditure in improving the same, turns round and claims to recover the said property, the State would be put to irreparable injury. Firstly, no such occasion should arise, as the State is not expected to take its citizens' property or deprive them of their property otherwise than by authority of law. Secondly, if the owner of a property intends to give it to the State, the State can always insist upon conveying to it the said property in the manner known to law. Thirdly, other remedies may be open to the

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State—on that I am not expressing any opinion—to recover compensation or damages for the improvements *bona fide* made or the loss incurred, having regard to the circumstances of a particular case. These considerations, in my view, are of no relevance in considering the question of waiver in the context of fundamental rights. By express provisions of the Constitution, the State is prohibited from making any law which takes away or abridges the rights conferred by Part III of the Constitution. The State is not, therefore, expected to enforce any right contrary to the Constitutional prohibition on the ground that the party waived his fundamental right. If this prohibition is borne in mind, no occasion can arise when the State would be prejudiced. The prejudice, if any, to the State would be caused not by the non-application of the doctrine of waiver but by its own action contrary to the Constitutional prohibition imposed on it.

It is then said that if the doctrine of waiver is to be excluded, a person can apply to the Supreme Court under Art. 32 of the Constitution for the relief provided therein, withdraw the petition, get the order of the Supreme Court dismissing it and then apply over again for issue of a writ in respect of the same right. The apprehension so expressed is more imaginary than real; for, it has no foundation either in fact or in law. When an application is dismissed, for whatever reason it may be—whether on merits or on admission—, the order of the Court becomes final and it can be reopened only in the manner prescribed by law. There is no scope for the application of the doctrine of waiver in such a case.

Articles 33 and 34 contain some of the Constitutional limitations on the application and the enforcement of the fundamental rights. The former Article confers power on Parliament to modify the rights conferred by Part III of the Constitution in their application to facts and the latter enables it to impose restrictions on the rights conferred by that Part, while martial law is in force in any area.

These two Articles, therefore, do not create fundamental rights, but impose limitations thereon and I

cannot appreciate the argument that their presence in Part III either derogates from the content of the fundamental rights declared therein or sustains the doctrine of waiver in its application to the said rights. Article 35 confers on the Parliament, the power to legislate for giving effect to the provisions of Part III to the exclusion of the Legislatures of the States. This Article also does not create a fundamental right, but provides a machinery for enforcing that right.

A startling result, it is suggested, would flow from the rejection of the doctrine of waiver and the suggestion is sought to be illustrated by the following example: A person takes a permit for several years from the State for running a motor vehicle or an excise shop. Having enjoyed the benefit for several years and when action is proposed to be taken against him to terminate the licence, he contends that the law under which the permit was granted to him offended his fundamental rights and therefore constitutionally not valid. It is asked whether it would be open to him to say that the very Act under which the permit was granted to him was not valid in law. To my mind, this illustration does not give rise to any anomaly. Either a person can run a motor vehicle or an excise shop with licence or without licence. On the basis the law is valid, a licence is taken and the motor vehicle is run under that licence and if that law offends his fundamental right and therefore void, he continues to run the business without licence, as no licence is required under a valid law. The aforesaid illustration does not, therefore, give rise to any anomaly and even if it does, it does not affect the legal position.

I have considered the various provisions relating to the fundamental rights with a view to discover if there is any justification for the comment that without the aid of the doctrine of waiver a citizen, in certain circumstances, would be in a worse position than that he would be if he exercised his right. I have shown that there is none. Nor is there any basis for the suggestion that the State would irreparably suffer under certain contingencies; for, any resulting hardship would be its

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own making and could be avoided if it acted in accordance with law.

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. I have, therefore, no hesitation in holding that the fundamental rights created by the Constitution are transcendental in nature, conceived and enacted in national and public interest, and therefore cannot be waived.

That apart, I would go further and hold that as section 5(1) of the Act XXX of 1947 was declared to be void by this Court in *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras* (1), the appellant cannot, by the application of the doctrine of waiver, validate the enquiry made under the said Act. It is suggested that there is a distinction between a case where the enactment is beyond the legislative competence of the Legislature which made it and the case where the law is unconstitutional on the ground of existence of a constitutional limitation, that while in the former case the law is null and void, in the latter case the law is unenforceable and may be revived by the removal of the limitation by an amendment of the Constitution. On this distinction an argument is sought to be built to the effect that as in the present case s. 5(1) of the Act XXX of 1947 was declared to be invalid only on the ground that it was hit by Art. 14 of the Constitution, the law must be deemed to be on the statute book and therefore the appellant was within his right to waive his constitutional guarantee. I am unable to appreciate this argument.

The scope of Art. 13(1) of the Constitution was considered by this Court in *Keshavan Madhava Menon* v. *The State of Bombay* (2). This Court, by a majority, held that Art. 13(1) of the Constitution does not make

(1) [1955] 2 S.C.R. 1247. (2) [1951] S.C.R. 228.

existing laws which are inconsistent with the fundamental rights, void *ab initio*, but only renders such laws unenforceable and void with respect to the exercise of the fundamental rights on and after the date of commencement of the Constitution. Mahajan, C. J., who was a party to that decision, explained the word 'void' in Art. 13(1) of the Constitution in *Behram Khurshed Pesikaka* v. *State of Bombay* (1). He observed at page 652 thus:—

"It is axiomatic that when the law-making power of a State is restricted by written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures as conferred by Arts. 245 and 246 of the Constitution stands curtailed by the fundamental rights Chapter of the Constitution."

This decision in clear and unambiguous terms lays down that there cannot be any distinction on principle between Constitutional incompetency and Constitutional limitation. In either case, the Act is void, though in the latter case, the pre-constitutional rights and liabilities arising under the statute are saved. This Court again dealt with the meaning of the word 'void' in *Bhikaji Narain Dhakras* v. *State of Madhya Pradesh* (2). There the question was whether an Act which was declared void on the ground of inconsistency with the Constitution, can be revived by any subsequent amendment to the Constitution removing the inconsistency. This Court answered the question in the affirmative. Das, acting C. J., observed at page 598 thus:—

"As explained in *Keshavan Madhava Menon's case*, the law became void not *in toto* or for all purposes or for all times or for all persons but only 'to the extent of such inconsistency', that is to say, to the extent it became inconsistent with the provisions of Part

(1) [1955] 1 S. C. R. 613. (2) [1955] 2 S. C. R. 589.

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III which conferred the fundamental rights on the citizens. It did not become void independently of the existence of the rights guaranteed by Part III.....In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Art. 19(1)(g) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with the exercise of the fundamental right on and after the date of the commencement of the Constitution..... . It is only as against the citizens that they remained in a dormant or moribund condition. In our judgment, after the amendment of clause (6) of Art. 19 on the 18th June, 1951, the impugned Act ceased to be unconstitutional and became revivified and enforceable against citizens as well as against non-citizens."

This judgment does not say anything different from that expressed in *Keshavan Madhava Menon's case* (1) nor does it dissent from the view expressed by Mahajan, C. J., in *Behram Khurshed's case* (2). The problem that confronted the learned Judges was a different one and they resolved it by applying the doctrine of 'eclipse'. The legal position, vis-a-vis, the law declared to be void either on the ground of legislative incompetence or for the reason of constitutional limitation, as stated in the earlier decisions, remains unshaken by this decision. So long as the inconsistency remains the law continues to be void, at any rate vis-a-vis the fundamental rights of a person. We are not concerned in this case with the doctrine of revival; for the inconsistency of s. 5(1) of the Act with the fundamental right under Art. 14 of the Constitution has not been removed by any amendment of the Constitution. So long as it is not done, the said section is void and cannot affect the fundamental rights of the citizens. In *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras* (3), it was declared that s. 5(1) of Act XXX of 1947 was unconstitutional on the ground that it infringed the fundamental rights of the citizens under Art. 14 of the Constitution.

(1) [1951] S.C.R. 228. (2) [1955] 1 S.C.R. 613.

(3) [1955] 2 S.C.R. 1247.

Under Art. 141 of the Constitution, the law declared by the Suprere Court is binding on all the Courts in India. It follows that the Income-tax Commissioner had no jurisdiction to continue the proceedings against the appellant under Act XXX of 1947. If the Commissioner had no jurisdiction, the appellant could not by waiving his right confer jurisdiction on him.

The scope of the doctrine of waiver was considered by this Court in *Behram Khurshed's case* (1). There a person was prosecuted for an offence under s. 66(b) of the Bombay Prohibition Act and he was sentenced to one month's rigorous imprisonment. One of the questions raised there was whether s. 13(b) of the Bombay Prohibition Act, having been declared to be void under Art. 13(1) of the Constitution in so far as it affected the consumption or use of liquid medicinal or toilet preparation containing alcohol, the prosecution was maintainable for infringement of that section. The Court held that in India once the law has been struck down as unconstitutional by the Supreme Court, no notice can be taken of it by any Court, because, after it is declared as unconstitutional, it is no longer law and is null and void. Even so, it was contended that the accused had waived his fundamental right and therefore he could not sustain his defence. Mahajan, C. J., delivering the judgment of the majority, repelled this contention with the following observations at page 653 :—

"The learned Attorney General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship;

(1) [1955] 1 S.C.R. 613.

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equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for the individual benefit though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of Constitutional policy. Reference to some of the articles, *inter alia*, Articles 15(1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State 'You can discriminate', or get convicted by waiving the protection given under Articles 20 and 21."

On the question of waiver, Venkatarama Aiyar, J., in his judgment before review, considered the American decisions and was inclined to take the view that under our Constitution when a law contravenes the provisions intended for the benefit of the individual, it can be waived. But the learned Judge made it clear in his judgment that the question of waiver had no bearing to any issue of fact arising for determination in that case but only for showing the nature of the right declared under Art. 19(1)(f) and the effect in law of a statute contravening it. Das, J., as he then was, in his dissenting judgment, did not state his view on this question but expressly reserved it in the following words:—

"In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on the legislative power or the effect of the declaration under Art. 13(1) being 'relatively void'. On those topics I prefer to express no opinion on this occasion."

I respectfully agree with the observations of Mahajan, C. J. For the aforesaid reasons, I hold that the doctrine of waiver has no application in the case of fundamental rights under our Constitution.

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ORDER

The appeal is allowed. The order of the Income Tax Commissioner, Delhi, dated January 29, 1958, is set aside and all proceedings now pending for implementation of the order of Union Government dated July 5, 1954, are quashed. The appellant shall get costs of this appeal.

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November 24.

N. T. VELUSWAMI THEVAR

v.

G. RAJA NAINAR AND OTHERS

(T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR and A. K. SARKAR, JJ.)

Election Dispute—Rejection of Nomination paper by Returning Officer—Validity of rejection raised before Election petition—Jurisdiction of Tribunal to entertain grounds of disqualification not raised before Returning Officer—"Improperly rejected", meaning of—Representation of the People Act, 1951 (43 of 1951), ss. 7, 36(2), 100(1)(c), 100(1)(d)(i).

The nomination paper of the fourth respondent who was one of the candidates for election to the Legislative Assembly of the State, was rejected by the returning officer on the ground that as he was the Headmaster of a Government-aided school he was disqualified under s. 7(d) and (e) of the Representation of the People Act, 1951, to be chosen for election. One of the voters of the constituency filed a petition praying that the election of the appellant be declared void under s. 100(1)(c) of the Act on the ground that the rejection of the nomination paper of the fourth respondent was improper because the latter had ceased to be a Headmaster at the time of his nomination and that, further, the institution was a private one. The appellant, who was the second respondent in the petition, contended that the nomination paper of the fourth respondent was rightly rejected not only on the ground put forward before the returning officer but also for the reasons that he was interested in Government contracts and that he had agreed to serve as a teacher under the District Board. The question was whether in an election petition challenging the validity of the rejection of a nomination paper under s. 100(1)(c) of the Act, it was open to the parties to raise grounds