

Statute - Waiver of mandatory requirement of a statute - Waiver.

Question of waiver of mandatory requirement of a statute was considered in depth in *Commissioner of Customs, Mumbai v. Virgo Steels, Bombay and Another*, (2002) 4 SCC 316 by referring to a catena of judgments beginning from the judgment of the Privy Council in *AL.AR. Vellayan Chettiar (Decd.) v. Government of the Province of Madras, Through the Collector of Ramnad at Madura, and Another*, AIR 1947 PC 197 wherein it was held that though notice under Section 80 of the Code of Civil Procedure, 1908 is mandatory, the suit would not be bad if the non-issuance of notice is waived by the party for whose benefit the provision has been enacted.

In *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Others*, (1980) Supp SCC 53 the argument that the requirement of Section 94 of the Representation of Peoples Act, 1951 cannot be waived was rejected observing that a privilege conferred or a right created by a statute, if it is solely for the benefit of a party, the said party can waive it. However, where a provision enacted is founded on public policy, the courts would be slow to apply the doctrine of waiver. The doctrine applies in the first situation as the right to waive inheres in the concept of personal privilege and right. Reference in this regard be also made to the ratio in *Krishan Lal v. State of J&K*, (1994) 4 SCC 422 and *Martin & Harris Ltd. v. VIth Additional Distt. Judge and Others.*, (1998) 1 SCC 732.

Bank of India and Others v. O.P. Swarnakar and Others, (2003) 2 SCC 721 and in *Shri Lachoo Mal v. Shri Radhey Shyam*, (1971) 1 SCC 619, Court elucidated the general principle that everyone has a right to waive and to agree to renounce an advantage of law or rule made solely for the benefit and protection of the person in private capacity. If a party gives up the advantage that could be taken of a particular position in law, it cannot later be permitted to change and turn around so as to avail of that advantage. However, this rule will not apply when there is a prohibition against contracting out of the statute, which prohibition would have its consequences or in case the waiver would be contrary to public policy. Further, a person cannot waive a right of a third person. In *Pravesh Kumar Sachdeva v. State of Uttar Pradesh and Others*, (2018) 10 SCC 628 it was held that waiver is abandonment of a right which normally everybody is at liberty to waive. Waiver is nothing unless it amounts to release, albeit it can be adduced from acquiescence or may be implied. The essence of waiver is an estoppel and they are questions of conduct and, therefore, necessarily determined on the facts of each case. As a rule and judicial policy, the courts of law do not allow a litigant to take inconsistent position to gain advantage through the aid of judicial proceedings.

Waiver - Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration. It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action. [**2022 SCeJ 0200**](#)