TILOKCHAND MOTICHAND & ORS.

v.

H. B. MUNSHI & ANR.

November 22, 1968

[M. HIDAYATULLAH, C.J., S. M. SIKRI, R. S. BACHAWAT, G. K. MITTER AND K. S. HEGDE, JJ.]

Constitution of India, 1950, *Art.* 32—*Laches—Fundamental right—Effect on.*

Petition under Art. 226—*Contention raised that provision of law is* ultra vires *as violating fundamental rights—Contention not considered but petition dismissed* in limine—*Order of High Court if* res judicata, *in relation to petition under Art.* 32.

The sales tax authorities directed that the sum realised as sales tax by the petitioners from their customers and paid over to the State should be refunded to the petitioners on condition that the petitioners passed on the amounts to their customers. Since the petitioners did not fulfil the condition, the sales tax officer forfeited the sum under s. 21(4) of the Bombay Sales Tax Act, 1953, by order dated March 17, 1958. On March 28, the petitioners filed a writ petition in the High Court and contended that s. 21(4) was *ultra vires* the powers of the State Legislature and was violative of Arts. 19(1)(f) and 265 of the Constitution and hence, they were not liable to repay the amount. The single Judge dismissed the petition on the ground that the petitioners defrauded their customers and so were not entitled to any relief even if there was a violation of fundamental rights. The appellate bench of the High Court dismissed the appeal on the ground that it would not interfere with the discretionary order of the single Judge. On December 24, 1958, the Collector attached the properties of the petitioners for recovering the amount as arrears of land revenue and the petitioners paid the amount in instalments between August 1959 and August 1960. On September 29, 1967 this Court in *Kantilal Babulal* v. *H. C. Patel,* 21 S.T.C. 174 (S.C.) struck down s. 12A(4) of Bombay Sales Tax Act, 1946, corresponding to s. 21(4) of the 1953-Act, on the ground that it was violative of Art. 19(1)(f) inasmuch as the power conferred by the section was unguided, uncanalised and uncontrolled and so was not a reasonable restriction on the fundamental right guaranteed under the Article. On the assumption that s. 21(4) of the 1953-Act is also liable to be struck down on the same ground, on February 9, 1968, the petitioners filed a writ petition under Art. 32 claiming a refund of the amount. The petitioners contended that they did not know that the section was *ultra vires* on the particular ground on which this Court struck it down, that they paid the amounts under coercion or mistake, that the mistake was discovered on September 29, 1967 (the date of the judgment of this Court) and that they were entitled to the refund under s. 72 of the Indian Contract Act, 1872.

On the questions : (1) Whether the petition is liable to be dismissed on the ground of *laches;* and (2) Whether the petition is barred by *res judicata* in view of the decision of the High Court.

HELD : (*Per* Hidayatullah, C.J., Bachawat and Mitter, JJ.) : (1) The petition must be dismissed on the ground of *laches.*

A *Per* Hidayatullah C.J. : Article 32 gives the right to move this Court by appropriate proceedings for enforcement of fundamental rights and the State cannot place any hindrance in the way of an aggrieved person. But once the matter has reached this Court, the extent or manner of interference is for this Court to decide. This Court has put itself in restraint in the matter of petitions under Art. 32. For example, this Court refrains from acting under the Article if the party had already moved the High Court under Art. 226 and if the High Court had exercised its parallel B jurisdiction. In such a case, this Court would not allow fresh proceedings to be started under Art. 32 but would insist on the decision of the High Court being brought before it on appeal. Similarly, in inquiring into belated and stale claims, this Court should take note of evidence of neglect of the petitioner's own rights for a long time or of the rights of innocent parties which might have emerged by reason of the delay. The party aggrieved must therefore move this Court at the earliest possible time and explain satisfactorily all semblance of delay. It is not possible C for this Court to lay down any specific period as the ultimate limit of action and each case will have to be considered on its own facts. A petition under Art. 32 is neither a suit nor an application to which the Limitation Act applies. Further, putting curbs in the way of enforcement of fundamental rights through such legislative action might be questioned under Art. 13(2), for, if a short period of limitation is prescribed the fundamental right might be frustrated. Therefore, this Court has to D exercise its discretion from case to case, and where there is appearance of an avoidable delay and this delay affects the merits of the claim, this Court will consider it, and in a proper case, hold the party disentitled to invoke its extraordinary jurisdiction. [830C, D—E, G—H; 831 A—B, C—E; 832 A—E]

In the present case, the petitioners moved unsuccessfully the High Court for relief on the ground that the recovery from them was unconstitutional, but did not come up in appeal to this Court. There is thus E no question of any mistake of law. Having set the machinery of law in motion they cannot abandon it to resume it after a number of years because another person got the statute declared unconstitutional. They should have known the exact ground of unconstitutionality since every one is presumed to know the law; and pursued the ground in this Court. Not having done so, and having abandoned his own litigation years ago, this Court will not apply the analogy of the Article in the Limitation F Act in cases of mistake of law and give him relief. [832 F—H; 833 A—B, C—E]

Per Bachawat, J. : The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. The right to move this Court for enforcement of fundamental rights is guaranteed by Art. 32, and no period of limitation is prescribed for such a petition. The writ issues as a matter of course if a breach of a fundamental right is established, but this does not mean that in giving relief under the G Article this Court may ignore all laws of procedure. The extraordinary remedies under Arts. 32 and 226 of the Constitution are not intended to enable a claimant to recover monies the recovery of which by suit is barred by limitation. In the absence any rules of procedure under Art. 145(1)(c) this Court may adopt any reasonable rule. For example, this Court will not allow a petitioner to move this Court under Art. 32 on a petition containing misleading and inaccurate statements. Similarly, the general principles of *res judicata* are applied where applicable on H grounds of public policy. Therefore, where the remedy in a writ application under Art. 32 or Art. 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court imposes on analogy the same limitation on the summary

remedy in the writ jurisdiction even though there is no express statutory bar of limitation, on grounds of public policy and on the principle that the laws aid the vigilant and not those who slumber. [842 A—F; 843 A—F]

In the present case, the petitioners were not labouring under any mistake of law when they made the payments, because, in their writ petition in the High Court, they contended that the order was invalid and that s. 21(4) of the Bombay Sales Tax Act, 1953, was *ultra vires* and unconstitutional although they did not know the precise ground upon which this Court subsequently struck down s. 12A(4) of the 1946-Act. Therefore, when they made the payments in 1959 and 1960 they were made under coercion and not under a mistake of law in thinking that the money was due. Hence the petitioners could not claim any relief on the ground of mistake. They could rely on the ground of coercion but a suit for the recovery of money on the ground of coercion instituted in February 1968, would have been barred by limitation. A suit for recovery of money on the ground of coercion instituted after January 1, 1964 would be governed by Art. 24 of the Limitation Act, 1963, and the period of limitation would be 3 years from the dates in 1959 and 1960 when the amounts were paid. The petitioners could not obtain an extension of the period under s. 30(a) of the Limitation Act, 1963, as Art. 62 of the Limitation Act, 1908, which governs a suit for recovery of tax or other levy illegally collected, prescribed the same period of limitation. [840 F—H; 841 A—C]

Shiva Prasad Singh v. *Srish Chandra Nandi,* (1949) L.R. 76 I.A. 244, 254, *Sales Tax Officer* v. *Mukundlal Saraf* [1959] S.C.R. 1350, 1361, 1362, *A. Venkata Subba Rao* v. *State of Andhra Pradesh* [1965] 2 S.C.R. 577, 612—620, *State of Madhya Pradesh* v. *Bhailal Bhai & Ors.* [1964] 6 S.C.R. 261 274, *Daryao* v. *State of U.P.* [1962] 1 S.C.R. 574, *Sobhraj Odharmal* v. *State of Rajasthan,* [1963] Supp. 1 S.C.R. 99, 111 and *Her Highness Ruckmaboye* v. *Lulloobhoy Mottickchund,* (1851-52) 5 M.I.A. 234, 251, referred to.

Per Mitter, J. : The Limitation Act does not in terms apply to proceedings against the State under Art. 32 in respect of violation of fundamental rights. A person complaining of such infraction has one of three courses open to him. He can file a suit, invoke Art. 226 or Art. 32. Suits are governed by the Limitation Act. In the matter of the issue of a writ under Art. 226 also, courts have refused to give relief in cases of long or unreasonable delay, although the Limitation Act does not apply, and the maximum period fixed by the Legislature for filing a suit is ordinarily taken to be a reasonable standard by which delay in seeking the remedy under Art. 226 can be measured. There is no reason for applying a different test when a party comes to this Court under Art. 32. There is public policy behind all statutes of limitation and a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation Act for the enforcement of the right by way of suit, that is, although the Limitation Act does not apply, the period fixed by it should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully under Art. 32. [853 C—H; 854 A—B]

The petitioners in this case had not made a mistake in thinking that the money paid was due when in fact it was not due. They not only opposed the claim of the sales tax authorities but filed a writ petition contending that there was a violation of Art. 19(1)(f). They did not accept the decision of the single Judge but filed an appeal raising the same contention. They complained about the violation of their fundamental rights, the illegality of the order of forfeiture and the unreason-

A able restriction on their fundamental rights under Art. 19(1)(f). They protested against the order of forefeiture not only out of court but in court and only paid the amounts after the issue of legal process. They were never influenced by a mistake of law and never failed to appreciate the correct position in law. But the payments were made under coercion. The period of limitation for a suit against Government to recover money paid under protest is governed either by Art. 16 or Art. 62 of the Limitation Act, 1908 that is one year or three years. But taking the B most favourable view that the period of six years fixed by Art. 120 of Limitation Act, 1908, would apply, that period would have expired in 1966. The position is not different even if the Limitation Act, 1963 is applied. A claim for money paid under coercion would be covered by Art. 113 of the Limitation Act, 1963, giving a period of 3 years from January 1, 1964 the date of commencement of the 1963-Act. Under s. 30(a) of the Limitation Act, 1963, the period of limitation for a suit which was formerly covered by Art. 120 of the Act of 1908, would be C covered by Art. 113 of the 1963-Act. Therefore, the suit in the present case would have to be filed by January 1, 1967. As the petitioners came to this Court in February 1968 long after the date when they could have properly filed a suit, the application under Art. 32 must be rejected. [851 H; 852 A—D, G—H; 853 A—B; 854 B—H; 855 A—B]

Kantilal Babulal & Bros. v. *H. C. Patel* 21 S.T.C. 174, *Sri Sri Shiba Prasad Singh, deceased, now represented by Kali Prasad Singha* v. *Maharaja Srish Chandra Nandi* 76 I.A. 244, *Sales Tax Officer* v. *Kanhaiya Lal Mukundlal Saraf*, [1959] S.C.R. 1350 at 1363, *Sales Tax Officer, Pilibhit* v. *Budh Prakash Jai Prakash*, [1955] 1 S.C.R. 243, *State of Madhya Pradesh* v. *Bhailal Bhai*, [1964] 6 S.C.R. 261, *State of Kerala* v. *Aluminium Industries Ltd.* 16 S.T.C. 689, and *A. V. Subbarao* v. *The State of Andhra Pradesh* [1965] 2 S.C.R. 577, referred to.

Per Sikri and Hegde, JJ. (*dissenting*) : The petition has to be allowed and the petitioners must be granted the relief prayed for.

Per Sikri, J. : Article 32(2) of the Constitution confers a judicial power on this Court, and like all judicial powers, unless there is an express provision to the contrary, it must be exercised in accordance with fundamental principles of administration of justice, and one such fundamental principle is that stale claims should not be given effect to. [833 F—G]

The Limitation Act does not directly apply to a petition under Art. 32 and and to invoke the analogy of the Limitation Act is not appropriate when dealing with petitions under Art. 32. If a claim is barred under the Limitation Act, *prima facie* it is a stale claim but even if it is not so barred, it may not be entertained by this Court if on the facts of the case there is unreasonable delay. To issue a writ, direction or order in the nature of *mandamus, certiorari* or prohibition after a delay of 12 years or 6 years would, except when there are exceptional circumstances, G be strange. It is difficult to lay down a precise period, but a period of one year may be taken as the period beyond which the claim would be a stale claim unless the delay is explained. The time spent in making representations to higher authorities may be taken as a good explanation for any delay. Such a practice would not destroy the guarantee under Art. 32, because, the article nowhere lays down that a petition, however late, should be entertained. [833 G; 835 C—H]

H In the present case, the petitioners were mistaken in thinking that the money was liable to be paid under a valid law and hence under s. 72 of the Contract Act, the petitioners would be entitled to the relief claimed. The grounds urged before the High Court show that it never struck the petitioners that the provision could be challenged on the ground ulti-

mately accepted by this Court. If the petitioners had not moved the High Court but had paid on demand they would have been entitled to maintain the petition in this Court. The position could not be worse because they exercised their right under Art. 226. When a petitioner approaches a High Court and fails, it could not be said that payments made by him thereafter were not under a mistake of law, even if the point on which this Court ultimately strikes down the provision under which the payments were made was never raised in the High Court. The petitioners discovered, like all assessees, their mistake when this Court struck down s. 12A(4) of the 1946-Act and they came to this Court within 6 months of that date and hence there was no delay. [837 G—H; 839 B—E]

Daryao v. *State of U.P.* [1962] 1 S.C.R. 574, *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chindwara,* A.I.R. 1964 S.C. 1013, 1018, *Sales Tax Officer* v. *Kanhaiyalal,* [1959] S.C.R. 1350 and *Kantilal Babulal* v. *H. C. Patel, Sales Tax Officer,* 21 S.T.C. 174, referred to.

Per Hegde, J. : In view of the decision of this Court in *Kantilal Babulal* v. *H. C. Patel,* 21 S.T.C. 174 which struck down s. 12A(4) of the 1946-Act, the impugned collection under s. 21(4) of the 1953-Act was without the authority of law and consequently the exaction infringed the fundamental right of the petitioners under Art. 19(1)(f). Hence the petitioners have a fundamental right to approach this Court under Art. 32 for relief and this Court has a duty to afford them the appropriate relief. Since the right given to the petitioners under Art. 32 is itself a fundamental right and does not depend on the discretionary powers of this Court, as in the case of Art. 226, it is inappropriate to equate the duty imposed on this Court to the powers of Chancery Court in England or the equitable jurisdiction of Courts in the United States. The fact that the petitioners have no equity in their favour is an irrelevant circumstance in deciding the nature of the right available to an aggrieved party under Art. 32. This Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights, and hence *laches* on the part of an aggrieved party cannot deprive him of his right to get relief under Art. 32. In fact, law reports do not show a single instance of this Court refusing to grant relief on the ground of delay. If this Court could refuse relief on the ground of delay, the power of the Court under Art. 32 would be a discretionary power and the right would cease to be a fundamental right. The provisions contained in the Limitation Act do not apply to proceedings under Arts. 226 and 32 and if these provisions of the Limitation Act are brought in indirectly to control the remedies conferred by the Constitution, it would be a case of Parliament indirectly abridging the fundamental rights which this Court, in *Golaknath's case,* [1967] 2 S.C.R. 762, held that Parliament cannot do. The fear that forgotten claims and discarded rights against Government may be sought to be enforced after the lapse of a number of years if fundamental rights are held to be enforceable without any time limit, is an exaggerated one, for, after all, a petitioner can only enforce an existing right. [856 D, F—H; 857 A, B, D, G—H; 858 A, D—E, F—H; 859 H]

In this case the petitioners have an existing right even if their remedy under the ordinary law is barred. This Court struck down s. 12A(4) of the 1946-Act on a ground not put forward by the petitioners in the High Court but on a wholly different ground. A mere impression of a party that a provision of law may be *ultra vires* cannot be equated to knowledge that the provision is invalid, and the fact, that, after a futile attempt to get the provision in question declared invalid the petitioners gave up their fight and submitted to the law which was apparently valid is no proof of the fact that they knew that the provision in question was

A invalid. There is no reason for rejecting the plea of the petitioners that they became aware of the invalidity of the provision only after the decision of this Court in *Kantilal's* case, and since the petition was filed very soon thereafter, the petitioners were entitled to relief. [860 C—G]

State of M.P. v. *Bhailal Bhai*, [1964] 6 S.C.R. 261, referred to.

(2) (By Full Court) : The petition is not barred by *res judicata.*

B *Per* Hidayatullah, C.J. : Where the order of the High Court under Art. 226 is not a speaking order or the matter has been disposed of on some ground other than on merits, at the threshold, this Court may entertain the application under Art. 32. [831 B]

Daryao v. *State of U.P.* [1962] 1 S.C.R. 574, explained.

Per Sikri, Bachawat and Mitter, JJ. : When a petition under Art. 226 is dismissed not on the merits but because of the *laches* on the party C applying for the writ or because an alternative remedy was available to him, such dismissal is not a bar to a subsequent petition under Art. 32, except in cases when the facts found by the High Court might themselves be relevant under Art. 32. [833 E—F; 839 F—G; 855 C—D, F—G]

Daryao's case, [1962] 1 S.C.R. 574 and *Joseph* v. *State of Kerala*, A.I.R. 1965 S.C. 1514, referred to.

D *Per* Hegde. J. : It is only when the right claimed by the petitioner in his petition under Art. 32 had been claimed in the High Court under Art. 226 and negatived by the High Court and that decision had become final as it was not appealed against, that the petitioner would not be able to agitate the right over again in this Court under Art. 32. [856 B—C]

Daryao's case, [1962] 1 S.C.R. 574, explained.

E ORIGINAL JURISDICTION : Writ Petition No. 53 of 1968.

Petition under Art. 32 of the Constitution of India for enforcement of the fundamental rights.

H. K. Shah, B. Datta and *J. B. Dadachanji* for the petitioners.

C. K. Daphtary, Attorney-General, R. Gopalakrishnan, R. H. F *Dhebar* and *S. P. Nayar*, for the respondents.

HIDAYATULLAH, C.J., BACHAWAT and MITTER, JJ., delivered separate judgments dismissing the petition. SIKRI and HEGDE, JJ. delivered separate dissenting opinions allowing the petition.

Hidayatullah, C.J. This petition has led to a sharp division G of opinion among my brethren : Sikri and Hegde, JJ. would allow the petition and Bachawat and Mitter, JJ. would dismiss it. They have differed on the question whether the petition deserves to be dismissed on the ground of delay. I agree in the result reached by Bachawat and Mitter, JJ. and would also dismiss it. I wish briefly to state my reasons.

H At the threshold it appears to me that as there is no law which prescribes a period of limitation for such petitions, each of my brethren has really given expression to the practice he follows or intends to follow. I can do no more than state the views I

hold on this subject and then give my decision on the merits of the petition in the light of those views. A

The problem divides itself into two. The first part is a general question to be considered in two aspects : (a) whether any limit of time at all can be imposed on petitions under Art. 32, and (b) whether this Court would apply by analogy an article of the Indian Limitation Act appropriate to the facts of the case or any other limit ? The second is what is to be done in this case ? I shall begin by stating my views on the first question. B

There appears to be some confusion about the scope of Article 32. That Article gives the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. The provision merely keeps open the doors of this Court, in much the same way, as it used to be said, the doors of the Chancery Court were always open. The State cannot place any hindrance in the way of an aggrieved person seeking to approach this Court. This is logical enough for it is against State action that Fundamental Rights are claimed. But the guarantee goes no further at least on the terms of Art. 32. Having reached this Court, the extent or manner of interference is for the Court to decide. It is clear that every case does not merit interference. That must always depend upon the facts of the case. In dealing with cases which have come before it, this Court has already settled many principles on which it acts. A few of them may be mentioned here. C D E

This Court does not take action in cases covered by the ordinary jurisdiction of the civil courts, that is to say, it does not convert civil and criminal actions into proceedings for the obtainment of writs. Although there is no rule or provision of law to prohibit the exercise of its extraordinary jurisdiction this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies. F G

Then again this Court refrains from acting under Art. 32 if the party has already moved the High Court under Art. 226. This constitutes a comity between the Supreme Court and the High Court. Similarly, when a party had already moved the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings to be started. In this connection the principle of *res judicata* has been applied, although the expression is somewhat inapt and unfortunate. The reason of the rule no H

A doubt is public policy which Coke summarised as *"interest reipublicae res judicates non rescindi"* but the motivating factor is the existence of another parallel jurisdiction in another Court and that Court having been moved, this Court insists on bringing its decision before this Court for review. Again this Court distinguishes between cases in which a speaking order on merits has
B been passed. Where the order is not speaking or the matter has been disposed of on some other ground at the threshhold, this Court in a suitable case entertains the application before itself. Another restraint which this Court puts on itself is that it does not allow a new ground to be taken in appeal. In the same way, this Court has refrained from taking action when a better remedy is to move the High Court under Art. 226 which can go into the
C controversy more comprehensively than this Court can under Art. 32.

It follows, therefore, that this Court puts itself in restraint in the matter of petition under Art. 32 and this practice has now become inveterate. The question is whether this Court will in-
D quire into belated and stale claims or take note of evidence of neglect of one's own rights for a long time? I am of opinion that not only it would but also that it should. The party claiming Fundamental Rights must move the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. This principle is well-recognised and has been
E applied by Courts in England and America.

The English and American practice has been outlined in Halsbury's Laws of England and *Corpus Juris Secundum*. It has been mentioned by my brethren in their opinions and I need not traverse the same ground again except to say this that Courts of
F Common Law in England were bound by the Law of Limitation but not the Courts of Chancery. Even so the Chancery Courts insisted on expedition. It is trite learning to refer to the maxim "delay defeats equity" or the latin of it that the Courts help those who are vigilant and do not slumber over their rights. The Courts of Chancery, therefore, frequently applied to suits in equity
G the analogy of the law of Limitation applicable to actions at law and equally frequently put a special limitation of their own if they thought that the suit was unduly delayed. This was independently of the analogy of law relating to limitation. The same practice has been followed in the United States.

In India we have the Limitation Act which prescribes different
H periods of limitation for suits, petitions or applications. There are also residuary articles which prescribes limitation in those cases where no express period is provided. If it were a matter of a suit or application, either an appropriate article or the residuary article

would have applied. But a petition under Art. 32 is not a suit and it is also not a petition or an application to which the Limitation Act applies. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Art. 13(2). The reason is also quite clear. If a short period of limitation were prescribed the Fundamental Right might well be frustrated. Prescribing too long a period might enable stale claims to be made to the detriment of other rights which might emerge.

If then there is no period prescribed what is the standard for this Court to follow ? I should say that utmost expedition is the *sine qua non* for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction.

Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some Article but this Court need not necessarily give the total time to the litigant to move this Court under Art. 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

Applying these principles to the present case what do I find ? The petitioner moved the High Court for relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is : can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court ? He moved the High Court but did not come up in appeal to this Court. His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconsti-

A tutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. If I were
B to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced it may be questioned in a fresh litigation revived only with the argument, that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of my brethren Bachawat and Mitter, JJ. that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the
C Article in the Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might have also have decided the question of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High
D Court decided against it. Not having done so and having abandoned his own litigation years ago, I do not think that this Court should apply the analogy of the Article in the Limitation Act and give him the relief now. The petition, therefore, fails and is dismissed with costs.

E **Sikri, J.** I have had the advantage of reading the drafts of the judgments prepared by Mitter, J., and Bachawat, J. I agree with Mitter, J., in his conclusion that the rule laid down in *Daryao* v. *State of U.P.*(1) is inapplicable to the facts of the case, but for the reasons I will presently give, in my opinion the petition should be allowed.

F Art. 32(2) of the Constitution confers a judicial power on the Court. Like all judicial powers, unless there is an express provision to the contrary, it must be exercised in accordance with fundamental principles of administration of justice. General principles of *res judicata* were accordingly applied by this Court in *Daryao* v. *State of U.P.*(1), and *Amalgamated Coalfields Ltd.* v.
G *Janapada Sabha, Chindwara*(2). I understand that one of the fundamental principles of administration of justice is that, apart from express provisions to the contrary, stale claims should not be given effect to. But what is a stale claim? It is not denied that the Indian Limitation Act does not directly apply to a petition under Art. 32. Both the English Courts and the American Courts were confronted with a similar problem. In the United States the
H Federal Courts of Equity solved the problem thus :

(1) [1962] 1 S.C.R. 574. (2) A.I.R. 1964 S.C. 1013, 1018.

"Except, perhaps, where the statute by its express terms applies to suits in equity as well as to actions at law, or where the jurisdiction of law and equity is concurrent, the rule appears to be that Federal courts sitting in equity are not bound by state statutes of limitation. Nevertheless, except where unusual conditions or extraordinary circumstances render it equitable to do so, the Federal courts usually act in analogy to the state statutes of limitation applicable to cases of like character." (Vol. 34, American Jurisprudence, Limitation of Actions, § 54.")

In Courts of Admiralty, where the statutes of limitation do not control proceedings, the analogy of such statutes is ordinarily followed unless there is something exceptional in the case. (*ibid*)

Story on Equity Jurisprudence states the legal position thus :

"It was, too, a most material ground, in all bills for an account, to ascertain whether they were brought to open and correct errors in the account *recenti facto;* or whether the application was made after a great lapse of time. In cases of this sort, where the demand was strictly of a legal nature, or might be cognizable at law, courts of equity governed themselves by the same limitations as to entertain such suits as were prescribed by the Statute of Limitations in regard to suits in courts of common law in matters of account. If, therefore, the ordinary limitation of such suits at law was six years, courts of equity would follow the same period of limitation. In so doing, they did not act, in cases of this sort (that is, in matter of concurrent jurisdiction) so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute. But where the demand was not of a legal nature, but was purely equitable; or where the bar of the statute was inapplicable; courts of equity had another rule, founded sometimes upon the analogies of the law, where such analogy existed, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. Hence, in matters of account, although not barred by the Statute of Limitations, courts of equity refused to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions had become obscure by time, and the evidence might have been lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full en-

A forcement of the maxim, *Vigilantibus, non dormientibus jura subveniunt.* Under peculiar circumstances, however, excusing or justifying the delay, courts of equity would not refuse their aid in furtherance of the rights of the party; since in such cases there was no pretence to insist upon laches or negligence, as a ground for dismissal of the suit; and in one case carried back the account over a period of fifty years." (Third Edition, page 224, §529)

In England, as pointed out by Bachawat, J., the Court of Chancery acted on the analogy of Statute of Limitation (*vide* Halsbury, Vol. 14, p. 647, Art. 1190).

It seems to me, however, that the above solution is not quite appropriate for petitions under Art. 32. A delay of 12 years or 6 years would make a strange bed-fellow with a direction or order or writ in the nature of *mandamus, certiorari* and prohibition. Bearing in mind the history of these writs I cannot believe that the Constituent Assembly had the intention that five Judges of this Court should sit together to enforce a fundamental right at the instance of a person, who had without any reasonable explanation slept over his rights for 6 or 12 years. The history of these writs both in England and the U.S.A. convinces me that the underlying idea of the Constitution was to provide an expeditious and authoritative remedy against the inroads of the State. If a claim is barred under the Limitation Act, unless there are exceptional circumstances, *prima facie* it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act, it may not be entertained by this Court if on the facts of the case there is unreasonable delay. For instance, if the State had taken possession of property under a law alleged to be void, and if a petitioner comes to this Court 11 years after the possession was taken by the State, I would dismiss the petition on the ground of delay, unless there is some reasonable explanation. The fact that a suit for possession of land would still be in time would not be relevant at all. It is difficult to lay down a precise period beyond which delay should be explained. I favour one year because this Court should not be approached lightly, and competent legal advice should be taken and pros and cons carefully weighed before coming to this Court. It is common knowledge that appeals and representations to the higher authorities take time; time spent in pursuing these remedies may not be excluded under the Limitation Act, but it may ordinarily be taken as a good explanation for the delay.

It is said that if this was the practice the guarantee of Art. 32 would be destroyed. But the article no where says that a petition, howsoever late, should be entertained and a writ or order or

direction granted, howsoever remote the date of infringement of the fundamental right. In practice this Court has not been entertaining stale claims by persons who have slept over their rights. There is no need to depart from this practice and tie our hands completely with the shackles imposed by the Indian Limitation Act. In the case of applications under Art. 226 this Court observed in *State of Madhya Pradesh* v. *Bhailal Bhai*(1) :

> "It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

In *State of Kerala* v. *Aluminium Industries*(2) Wanchoo, J., speaking on behalf of a large Bench of this Court, observed :

> "There is no doubt in view of the decision of this Court in *Sales Tax Officer v. Kanhaiyalal*(3) that money paid under a mistake of law comes within the word 'mistake' in section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the parties, which was the case here inasmuch as the respondent did not raise the question relating to Article 286 of the Constitution and the Sales Tax Officer had no occasion to consider it. In such a case where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice) to refund the tax. If refund is not made, remedy through court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake [see *State of Madhya Pradesh* v. *Bhailal*(1)]. In this view of the matter it was the duty of the State to

(1) [1964] 6 S.C.R. 261, 271-72. (2) 16 S.T.C. 689, 692.
(3) [1959] S.C.R. 1350.

A investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation."

But these cases cannot directly apply to petitions under Art. 32 because they proceed from the premise that the remedy is discre-
B tionary under Art. 226.

Coming to the facts of this case, which have been stated in detail by Mitter, J., it seems to me that the delay in coming to this Court has been adequately explained. In brief, the facts are these : The Sales Tax Officer, by his order dated March 17, 1958, forfeited a sum of Rs. 26,563.50 under s. 21(4) of the Bombay
C Sales Tax Act (Bombay Act III of 1953), which provision is similar to s. 12A(4) of the Bombay Sales Tax Act, 1946. The petitioner promptly filed a writ petition in the Bombay High Court challenging this order. His petition was dismissed on November 28, 1958. He also failed in appeal before the Division Bench on July 7, 1959. An order of attachment followed. The peti-
D tioner paid the sum of Rs. 26,563.50 in various instalments from October 3, 1959, to August 8, 1960. By letter dated January 9, 1962, the petitioner was called upon to pay a penalty amounting to Rs. 12,517/68 on account of late payment of sales tax dues but this order of penalty was ultimately cancelled.

The Gujarat High Court (Shelat, C.J., and Bhagwati, J.) in
E *Kantilal Babulal* v. *H. C. Patel, Sales Tax Officer*(1) held on December 2, 1963, that s. 12A(4) of the Bombay Sales Tax Act, 1946, was valid and did not violate Art. 19(1)(f) as it was saved by Art. 19(5). On September 29, 1967, this Court, on appeal, in *Kantilal Babulal* v. *H. C. Patel Sales Tax Officer*(2) struck down this provision as it infringed Art. 19(1)(f). On February 9,
F 1968, four petitioners—hereinafter compendiously referred to as the petitioner—filed this petition praying that the order dated March 17, 1958, and the notice and order dated December 18, 1958, and December 24, 1958, be quashed.

There is no doubt that under s. 72 of the Contract Act the petitioner would be entitled to the relief claimed and the refund
G of the amount if he paid the money under mistake of law. I find it difficult to appreciate why the payment was not made under a mistake of law. In my opinion the petitioner was mistaken in thinking that the money was liable to be refunded under a valid law. Nobody has urged before us that the grounds which he had raised before the High Court were sound.

H The petitioner had attempted to raise before the Bombay High Court the following grounds :

(1) 16 S.T.C. 973. (2) 21 S.T.C. 174.

1. Inasmuch as the sum of Rs. 26,563.50 was paid by way of refund under the Bombay Sales Tax Act 1946, the taxing authorities had exceeded their power under s. 21(4) of the Act of 1953, in forfeiting the said sum of money.

2. Assuming that the respondent had power to forfeit the sum under the Act of 1953, it was strictly limited to taxes payable under the provisions of the Act and as no tax was payable on outside sale the authorities had no power to forfeit the sum of Rs. 26,563.50.

3. . . . . .

4. Even assuming while denying that the respondent had power to forfeit the sum of Rs. 26,563.50, the power to forfeit an amount as a tax presupposes a power to impose a tax and inasmuch as on a proper construction of the relevant provisions of the Constitution no State Legislature had at any time a power to impose tax on the aforesaid transactions, the power to forfeit tax in respect of those transactions is *ultra vires* the State Legislature."

The learned Single Judge held :

"This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have, therefore, decided to dismiss this petition on that single ground."

The Division Bench, on appeal, decided on the limited ground that "Mr. Justice K. K. Desai having exercised his discretion no case is made out for interference with the exercise of that discretion." The petitioner rightly did not file an appeal to this Court for he would have had little chance of succeeding.

Suppose a petitioner challenges a provision of the Sales Tax Act before the High Court on the ground that it does not fall within List II or List III of the Seventh Schedule. He fails and pays the tax and does not appeal to the Supreme Court. Ultimately, in another petition, the provision is struck down under Art. 14 or Art. 19, a point which he and his lawyers never thought of. All assessees who had paid tax without challenging the provision would be entitled to approach this Court under Art. 32 and claim a refund (see *Sales Tax Officer, Benaras* v. *Kanhaiya Lal Mukundlal Saraf*)(1). But why not the assessee who applied to

(1) [1959] S.C.R. 1350.

A the High Court ? The answer given is that he had thought at one time that the law was bad, though on wrong grounds. If a law were framed sanctioning the above discrimination, I believe, it would be difficult to sustain it under Art. 14, but yet this is the discrimination which the respondent wants me to sanction.

The grounds extracted above show that it never struck the B petitioner that the provision could be challenged on the ground ultimately accepted by this Court. If the petitioner had not thought of going to the Bombay High Court on the points he did, and had paid on demand, as most of the assessees do, he would, I imagine, have been entitled to maintain this petition. But it is now said that the petitioner's position is worse because he exer- C cised his right to approach the High Court under Art. 226. The contention seems to be that when a petitioner approaches a High Court and fails, he can no longer suffer from any mistake of law even if the point on which this Court ultimately strikes down the provision, never struck him or his lawyer or the Court. I cannot uphold this contention.

D In my opinion the petitioner was under a mistake of law, when he paid up, the mistake being that he thought that s. 12A(4) was a valid provision in spite of its imposing unreasonable restrictions. This mistake he discovered like all assessees when this Court struck down s. 12A(4) of the Bombay Sales Tax Act. He has come to this Court within six months of that day and there is no delay.

E The petition is accordingly allowed and the impugned order dated March 17, 1958, quashed and the respondent directed to refund the amount. Under the circumstances there will be no order as to costs.

Bachawat, J. I have had the advantage of reading the judgment prepared by G. K. Mitter, J. For the reasons given in this F judgment, I agree with the order proposed by him. As the earlier petition filed in the High Court was not dismissed on the merits, the present petition is not barred by *res judicata* or principle analogous thereto.

The petitioners realised Rs. 26,563.50 P from their customers outside Bombay on account of sales tax. The Sales Tax Officer G by his order dated March 17, 1958 forfeited this sum under s. 21(4) of the Bombay Sales Tax Act 3 of 1953. On March 28, 1958 the petitioners filed a writ petition in the Bombay High Court seeking to restrain the Sales Tax Officer from recovering the amount. They pleaded that they were not liable to pay the amount, that s. 21(4) was *ultra vires* the powers of the State H legislature and that the order of forfeiture was violative of Arts. 19(1) (f) and 265 of the Constitution and was invalid. On November 28, 1958, K. K. Desai, J. dismissed the petition. He held that the petitioners having defrauded other persons were not

entitled to any relief. The petitioners filed an appeal against the order. In the memorandum of appeal, they pleaded that the threatened levy was in violation of Arts. 19(1)(f) and 31 of the Constitution. The appeal was dismissed on July 13, 1959. In the meantime on December 24, 1958 the Collector of Bombay attached the petitioners' properties. Between August 3, 1959 and August 8, 1960 the petitioners paid the sum of Rs. 26,563.50 P to the Collector of Bombay. In Civil Appeal No. 126 of 1966, *Kantilal Bapulal & Bros.* v. *H. C. Patel* decided on September 29, 1967 this Court struck down s. 12(A)(4) of the Bombay Sales Tax Act, 1946 as unconstitutional and violative of Art. 19(1)(f). The arguments in the present appeal proceeded on the assumption that s. 21(4) of the Bombay Sales Tax Act, 1953 is liable to be struck down on the same ground. On February 9, 1968 the petitioners filed the present writ petition under Art. 32 of the Constitution claiming refund of Rs. 26,563.50 P under s. 72 of the Indian Contract Act 1872. They alleged that they paid this sum to the Collector under coercion and/or mistake of law, and that they discovered the mistake on September 29, 1967.

Two points arise for decision in this writ petition : (1) Would the claim be barred by limitation if it were the subject-matter of a suit in February 1968 and (2) if so, are the petitioners entitled to any relief in this petition under Art. 32 of the Constitution.

Subject to questions of limitation, waiver and estoppel, money paid under mistake or coercion may be recovered under s. 72 of the Indian Contract Act. The right to relief under s. 72 extends to money paid under mistake of law, *i.e.*, "mistake in thinking that the money paid was due when, in fact, it was not due." *Shiva Prasad Singh* v. *Srish Chandra Nandi*(1), *Sales Tax Officer* v. *Mukundlal Saraf*(2).

In my opinion, the petitioners were not labouring under any mistake of law when they made the payments. As early as March 1958 they filed a writ petition for restraining the levy under the order dated March 17, 1958 claiming that the order was invalid and that s. 21(4) of the Bombay Sales Tax Act, 1953 was *ultra vires* and unconstitutional. They might not have then known the precise ground upon which the Court subsequently struck down a similar provision of law, but they had discovered presumably under legal advice that they were not legally bound to make any payment. After the writ petition was dismissed their properties were attached and they made the payments under coercion in 1959 and 1960. The payments were not made under a mistake of law or as pointed out in *Shiva Prasad Singh's* Case(1) under a mistake in thinking that the money was due. They cannot claim any relief on the ground of mistake.

(1) [1949] L.R. 76 I.A. 244, 254. (2) [1959] S.C.R. 1350, 1361, 1362.

A As we are assuming in favour of the petitioners that s. 21(4) of the Bombay Sales Tax Act 1953 as invalid, we must hold that they made the payments under coercion. A suit for the recovery of the money on this ground instituted on January 1, 1964 would be governed by Article 24 of the Limitation Act, 1963 and the period of limitation would be three years from the dates in 1959 B and 1960 when the money was received by the respondents. The petitioners cannot obtain an extension of the period under s. 30(a) of the Limitation Act, 1963 as Art. 62 of the Indian Limitation Act, 1908 prescribed the same period of limitation. A suit for recovery of tax or other levy illegally collected was governed by Art. 62 and not by Art. 120, see *A. Venkata Subba Rao* v. *State of Andhra Pradesh*(1). Accordingly a suit for the recovery of C money instituted in February 1968 would be barred by limitation.

If the petitioners could claim relief on the ground of mistake the suit would be governed by Art. 96 of the Indian Limitation Act, 1908 and time would begin to run from the date when the mistake becomes known to the plaintiff. In *State of Madhya* D *pradesh* v. *Bhailal Bhai & Ors.*(2), *and State of Kerala* v. *Aluminium Industries Ltd.*(3) it was held that Art. 96 applied to a suit for recovery of money paid under a mistake of law. Section 17(1)(c) of the Limitation Act 1963 now provides that in the case of a suit for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has E discovered the mistake or could with reasonable diligence have discovered it. Section 17(1)(c) corresponds to s. 26(c) of the Limitation Act, 1939 (2 & 3 Geo. 6, c. 21). It was held in *Re Diplock*(4) that sec. 26(c) applied by analogy to a suit for recovery of money paid under mistake of law. On appeal, the House of Lords said that the section presented many problems F and refrained from saying more about it, see *Ministry of Health* v. *Simpson*(5). In some American States, it has been held that a mistake of law cannot be regarded as a mistake within a similar statute and time ran from the date of the accrual of the cause of action, see *Corpus Juris Secundum*, vol. 54, Limitation of Actions, Article 198, page 202, *Morgan* v. *Jasper County*(6), and the cases referred to therein. It is not necessary G to pursue the matter any further as the petitioners cannot claim relief on the ground of mistake. Accordingly, I express no opinion on the scope of s. 17(c) of the Limitation Act, 1963. For the reasons already stated a suit for the recovery of the money instituted in February 1968 would be barred by limitation.

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(1) [1965] 2 S.C.R. 577, 612-620.
(2) [1964] 6 S.C.R. 261, 274.
(3) [1965] 16 S.T.C. 689, 692.
(4) [1948] Ch. 465, 515-516.
(5) [1951] A.C. 251, 277.
(6) 11 A.L.R. 634: 274 N.W. 310.

The next and the more fundamental question is whether in the circumstances the Court should give relief in a writ petition under Art. 32 of the Constitution. No period of limitation is prescribed for such a petition. The right to move this Court for enforcement of fundamental rights is guaranteed by Art. 32. The writ under Art. 32 issues as a matter of course if a breach of a fundamental right is established. Technical rules applicable to suits like the provisions of s. 80 of the Code of Civil Procedure are not applicable to a proceeding, under Art. 32. But this does not mean that in giving relief under Art. 32 the Court must ignore and trample under foot all laws of procedure, evidence, limitation, *res-judicata* and the like. Under Art. 145(1)(c) rules may be framed for regulating the practice and procedure in proceedings under Art. 32. In the absence of such rules the Court may adopt any reasonable rule of procedure. Thus a petitioner has no right to move this Court under Art. 32 for enforcement of his fundamental right on a petition containing misleading and inaccurate statements and if he files such a petition the Court will dismiss it, see W.P. No. 183 of 1966, *Indian Sugar and Refineries Ltd.* v. *Union of India* decided on March 12, 1968. On grounds of public policy it would be intolerable if the Court were to entertain such a petition. Likewise the Court held in *Daryao* v. *The State of U.P.*[1] that the general principles of *res judicata* applied to a writ petition under Art. 32. Similarly, this Court has summarily dismissed innumerable writ petitions on the ground that it was presented after unreasonable delay.

The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Articles 32 and 226 of the Constitution provide concurrent remedy in respect of the same claim. The extraordinary remedies under the Constitution are not intended to enable the claimant to recover monies, the recovery of which by suit is barred by limitation. Where the remedy in a writ application under Art. 32 or Art. 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court in its writ jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in the writ jurisdiction. On similar grounds the Court of Chancery acted on the analogy of the statutes of limitation in disposing of stale claims though the proceeding in a Chancery was not subject to any express statutory bar, see Halsbury's Laws of England, vol. 14, page 647, Art. 1190, *Knox* v. *Gye*[2]. Likewise the High Court acts on the analogy of the statute of limitation in a proceeding under Art. 226 though the statute does not expressly apply to the proceeding. The Court will almost always refuse to give relief under Art. 226 if the

(1) [1962] 1 S.C.R. 574. (2) L.R. 5 H.L. 656, 674.

A delay is more than the statutory period of limitation, see *State of Madhya Pradesh* v. *Bhailal Bhai*(1).

Similarly this Court acts on the analogy of the statute of limitation in respect of a claim under Art. 32 of the Constitution though such claim is not the subject of any express statutory bar of limitation. If the right to a property is extinguished by prescription B under s. 27 of the Limitation Act, 1963 the petitioner has no subsisting right which can be enforced under Art. 32 (see *Sobhraj Odharmal* v. *State of Rajasthan*(2). In other cases where the remedy only and not the right is extinguished by limitation, it is on grounds of public policy that the Court refuses to entertain stale claims under Art. 32. The statutes of limitation are founded on C sound principles of public policy. As observed in Whitley Stoke's Anglo-Indian Codes, Vol. II p. 940 : "The law is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence, and to prevent oppression." In *Her Highness Ruckmaboye* v. *Lulloobhoy Mottickchund*(3) the Privy Council observed that the object of the D statutes of limitation was to give effect to the maxim, *"interest reipublicae ut sit finis litium"* (Co Litt 303)—the interest of the State requires that there should be a limit to litigation. The rule of *res judicata* is founded upon the same rule of public policy, see *Daryao* v. *State of U.P.*(4) at page 584. The other ground of public policy upon which the statutes of limitation are founded is expressed in the maxim *"vigilantibus non dormientibus jura* E *subveniunt"* (2 Co. Inst. 690)—the laws aid the vigilant and not those who slumber. On grounds of public policy the Court applies the principles of *res judicata* to writ petitions under Art. 32. On like grounds the Court acts on the analogy of the statutes of limitation in the exercise of its jurisdiction under Art. 32. It follows that the present petition must be dismissed.

F **Mitter, J.** The facts leading up to the filing of the petition under Art. 32 of the Constitution are as follows.

The first petitioner before us is a registered partnership firm (hereinafter referred to as 'the firm') carrying on business in Bombay and the other petitioners are partners of the said firm. The G firm has been carrying on business as a dealer in and a trader of textiles and art silk etc. It was registered as a dealer and has held registration certificates under the various sales tax laws prevailing in the State of Bombay from 1946 onwards including the Bombay Sales Tax Act 5 of 1946, the Bombay Sales Tax Act 3 of 1953 and the Bombay Sales Tax Act 51 of 1959.

H In the course of assessment for the assessment period commencing on April 1, 1949 and ending on 31st October 1952 the

(1) [1964] 6 S.C.R. 261, 273-74. (2) [1963] Supp. 1 S.C.R. 99, 111.
(3) [1851-52] 5 M.I.A., 234, 251. (4) [1962] 1 S.C.R. 574.

firm contended that its sales of the value of Rs. 13,42,165-15-6 were not liable to be taxed under the provisions of the Bombay Sales Tax Act then in force as the goods were delivered as a direct result of such sales for purposes of consumption outside the State of Bombay. The firm claimed that it was entitled to a refund of the amount which it had collected from its customers and paid on account of the aforesaid sales at the time of submitting the returns of its turnover. The Sales Tax Officer did not accept this contention but on appeal the Assistant Collector of Sales Tax upheld the firm's contention after examining the details submitted by it and found that sales involving the sum of Rs. 26,563-8-0 realised by way of tax were protected under Art. 286 of the Constitution. He therefore directed that the said sum be refunded to the firm on a proper application. This appellate order was passed on November 7, 1956. The firm preferred an application for refund of Rs. 26,563.50 on November 13, 1956 whereupon the Assistant Collector (the appellate authority) simultaneously with the issue of a cheque for the above amount by way of refund wrote a letter dated May 11, 1957 to the effect that the petitioner should produce before him within one month of the date of the cheque receipts totalling Rs. 26,563.50 from its customers outside Bombay State to show that the refund had been passed on to them. It appears that the petitioner did not fulfil this condition and a notice dated 28th January 1958 was issued calling upon the firm to show cause why the said sum of Rs. 26,563.50 should not be forfeited under s. 21(4) of the Bombay Sales Tax Act, 1953. In reply thereto, the firm stated by letter dated February 7, 1958 that it had collected from its customers outside the State of Bombay the said sum of money and "under an honest mistake of law had paid the same to the sales tax authorities." The firm went on to add that the order for refund had been made only when the authorities were satisfied that it was not liable to pay the said sum but the latter had insisted upon a condition that the firm should in its turn refund the said amount to its customers from whom the collection had been made. The letter records that the firm "had agreed to that condition under coercion even though in law the authorities were bound to refund the said amount without any such condition." Further the firm's case in that letter was that the authorities had "no right to forfeit any amount collected by a dealer under a mistake of law in respect of these transactions" and the threat to forfeit the amount on the ground that it had not been refunded to the firm's customers was without the authority of law.

A B C D E F G

The order on the show cause notice passed on March 17, 1958 records that though given sufficient opportunity to produce stamped receipts from its customers the firm had failed to do so and had thereby contravened the provisions of s. 21(2) of the Bombay Sales Tax Act. The firm was directed to refund the said sum to

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A the Reserve Bank of India on or before April 1, 1958 failing which it would be recoverable as arrears of land revenue from the firm together with penalty. The order was purported to be passed under s. 21(4) of the Bombay Sales Tax Act, 1953.

Within a few days thereafter *i.e.* on March 28, 1958 the firm presented an application to the High Court of Bombay under B Art. 226 of the Constitution for the issue of a writ in the nature of *certiorari* quashing the above mentioned order of forfeiture and for incidental reliefs. In paragraph 4 of the petition it was stated that the order of forfeiture was "without the authority of law and therefore in violation of Art. 19(1)(g) and Art. 265 of the Constitution."

C It appears that a similar application had been presented on behalf of Pasha Bhaj Patel and Co. (P) Ltd. to the Bombay High Court and the application of the firm along with the first mentioned application were disposed of by a learned single Judge of the Bombay High Court on November 28, 1958. The main judgment was delivered in Pasha Bhai Patel and Company's case. The learned Judge observed in the course of his judgment that there was no D merit whatsoever in it and "justice did not lie in his (the petitioner's) side and this was a matter in which the court should not interfere by way of a writ and give relief to the petitioner company." The Judge further observed that the petitioner has not referred to fundamental rights of any kind in the petition and said :

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> "This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights, I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have therefore decided to dismiss this peti-
> F tion on that single ground."

No copy of the petition in Pasha Bhai Patel and Company's case is before us but the present petitioner, as shown already, did complain of violation of Art. 19(1)(g) and Art. 265 of the Constitution besides contending that the order was *"ultra vires,* bad and inoperative in law." Dealing with the petition of the firm the G learned Judge said that "there was no merit in the case and justice did not lie on the side of the petitioner" and for reasons given in Pasha Bhai Patel and Co.'s case the petition was dismissed.

The firm went up in appeal to the same High Court. A note may be taken of some of the grounds in the memorandum of appeal filed by the firm. They were *inter alia* :—

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"(13) The learned Judge erred in not deciding the petition on merits even when there was a question of violation of fundamental rights.

(16) The learned Judge erred in holding that this was a gross case where even if he had been of the opinion that the order was invalid or that it involved violation of fundamental rights, he would not in his discretion interfere by way of issuing a writ.

(30) The learned Judge failed to appreciate that the order of forfeiture was nothing but the deprivation of property without the authority of law and the action of the respondent was an unreasonable restriction on the fundamental rights of the petitioner under Art. 19(1)(f) and Art. 31 of the Constitution of India."

In dismissing the appeal the learned Judges of the Division Bench observed :

> "The appellant claims to retain with himself amounts to which he has no claim and the appellant is seeking to come before this Court to retain with himself amounts which he has obtained from the sales tax authorities on a representation that he is going to refund the same and which he has not refunded. Mr. Justice K. K. Desai was of the view that the claim made by the appellant was a gross claim and even if it involved violation of fundamental rights, in exercise of his discretion, he will not interfere by issuing a writ. The learned Judge having exercised his discretion which he undoubtedly was entitled to exercise, we do not think sitting in appeal we would be justified in exercising our powers as an appellate court in interfering with the order under appeal. We may observe that we are not dealing with this case on the merits at all. We have not considered the question whether the appellant is entitled in law to retain the moneys which he has obtained from the sales tax department. We have decided this appeal on the limited ground that Mr. Justice K. K. Desai having exercised his discretion, no case is made out for our interference with the exercise of that discretion."

It is therefore amply clear from the above that the learned Judges of the Bombay High Court did not examine the merits of the firm's contention that the order of refund was without the authority of law or *ultra vires* or in violation of any fundamental rights of the partners of the firm. They merely exercised their discretion on the question of issue of a writ under Art. 226 of the Constitution in view of the firm's conduct in obtaining an order for refund of the amount mentioned and later on refusing to fulfil the condition imposed.

It does not appear that the firm took any further steps in the court of law for vindicating its position before filing the present

A writ petition. It received a notice dated December 18, 1958 under the Bombay City Land Revenue Act 2 of 1876 calling upon it to pay the said sum of Rs. 26,563.50 to the State of Bombay failing which proceedings were threatened to be taken by attachment and sale of its property and by other remedies provided by s. 13 of the Land Revenue Act. It appears that the Collector of B Bombay actually issued an order of attachment on the right, title and interest of two of the partners of the firm including the goodwill and tenancy right in the premises where the business was carried on. The firm paid the sum of Rs. 26,563.50 in various instalments beginning on October 3, 1959 and ending on August 8, 1960.

C In paragraph 8 of the present petition to this Court it is submitted that the petitioners "paid the sum to the State of Bombay under coercion and/or mistake of law." The petitioners also state they "did not know that the sections of the Sales Tax Acts under which the said sum was sought to be forfeited and/or recovered and/or retained were *ultra vires*." In paragraph 10 of the peti- D tion it is stated that the petitioners discovered their mistake in law when they came to know of the decision of this Court dated September 29, 1967 that s. 12A(4) of the Bombay Sales Tax Act 5 of 1946 was *ultra vires*. In paragraph 14 of the petition the firm also states :

> "that the said sum had been forfeited and/or recov- E ered and/or retained by the respondents from the petitioners in violation of Art. 265, Art. 31 and Art. 19(1)(f) of the Constitution. The fundamental rights of the petitioners have thus been violated. The petitioners submit that they have been deprived of their property, to wit, the said sum, by the respondents without any authority in law and contrary to the fundamental F rights guaranteed to the petitioners by Arts. 19(1)(f) and 31 of the Constitution."

The grounds of law under which the firm claimed that the action of the State of Bombay and the respondents in recovering, retaining, forfeiting and not returning the said sum were void and in- G valid in law are set forth in paragraph 15 of the petition. In the view which we take of the firm's claim and in view of the decision of this Court in *Kantilal Babulal and Bros.* v. *H. C. Patel*[1] dated September 29, 1967, it is not necessary to examine the validity or otherwise of the provisions of s. 12A(4) of the Act of 1946 or the corresponding section of the Act of 1953 *i.e.* s. 21(4). The appeal of *Kantilal Babulal and Bros.* v. *H. C.* H *Patel*[1] decided by this Court on September 29, 1967 was from a decision of the High Court of Gujarat reported in 16 Sales Tax

(1) 21 S.T.C. 174.

Cases 973. The Gujarat High Court had held that s. 12A(4) was saved by Art. 19(5) of the Constitution. The appeal by the assessee was allowed by this Court on the short ground that assuming that s. 12A(4) was a penal provision within the legislative competence of the legislature, it was violative of Art. 19(1)(f) inasmuch as it did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from his purchasers outside the State and if so what that amount was. It was further observed that the section did not contemplate any adjudication nor did it provide for making any order and on a reasonable interpretation of the impugned provision it was observed "that the power conferred under s. 12A(4) was unguided, uncanalised and uncontrolled." On the above reasoning the Court held that the provisions in s. 12A(4) were not a reasonable restriction on the fundamental right guaranteed under Art. 19(1) within the meaning of Art. 19(5).

To establish that the payments totalling Rs. 26,563.50 made in the years 1959 and 1960 were under a mistake of law, the petitioners must satisfy the court that they paid the money under a genuine belief that the law allowed it but that they later discovered that they were under no legal obligation to pay. Repayment of money paid under a mistake is provided for by s. 72 of the Indian Contract Act occurring in Chapter V of the said Act which deals with certain relations resembling those created by a contract. It reads :

> "A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

It was laid down by the Judicial Committee of the Privy Council in *Sri Sri Shiba Prasad Singh, deceased, now represented by Kali Prasad Singha* v. *Maharaja Srish Chandra Nandi*(1) that :

> "Payment 'by mistake' in s. 72 must refer to a payment which was not legally due and which could not be enforced : the mistake is thinking that the money paid was due when in fact it was not due."

The above decision of the Judicial Committee was relied on by this Court in *Sales Tax Officer* v. *Kanhaiya Lal Mukundlal Saraf*(2) where it was said :

> "The Privy Council decision has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the

(1) 76 I.A. 244, 254. (2) [1959] S.C.R. 1350, 1363.

A same is bound to repay or return it. No distinction can therefore be made in respect of a tax liability and any other liability on a plain reading of sec. 72 of the Contract Act. ....."

In *Mukundlal's* case(1) the respondent firm had paid sales tax in respect of its forward transactions in pursuance of the assessment B orders passed by the Sales Tax Officer for the years 1949 to 1951. The levy of sales tax on forward transactions being held to be *ultra vires* by the High Court of Allahabad by its judgment delivered on February 27, 1952 in the case of *Budh Prakash Jai Prakash v. S.T.O. Kanpur,* the respondent by its letter dated 8th July 1952 asked for a refund of the amount of sales tax paid by it C under assessment orders passed on May 31, 1949, October 30, 1950 and August 22, 1951. The Commissioner of Sales Tax U.P. refused to refund the amount claimed by letter dated July 19, 1952. The above judgment of the Allahabad High Court was confirmed by this Court on May 3, 1954 see *Sales Tax Officer, Pilibhit* v. *Budh Prakash Jai Prakash*(2). In the meanwhile the respondent had filed a writ petition No. 355 of 1952 in the D High Court for quashing the assessment orders which was allowed by an order of a single Judge on November 30, 1954. The appellant's Special Appeal from the said order contending that money paid under a mistake of law was irrecoverable being dismissed, a further appeal was taken to this Court under a certificate. On the facts of that case the Court held that both the parties were E labouring under a mistake of law the legal position as established later as by the decision of the Allahabad High Court in *Budh Prakash Jai Prakash* v. *The S.T.O. Kanpur* subsequently confirmed by this Court in *S.T.O. Pilibhit v. Budh Prakash Jai Prakash*(2) not having been known to the parties at the relevant time. This mistake of law had become apparent only on May 3, 1954 when F this Court confirmed the decision of the Allahabad High Court in *Sales Tax Officer, Pilibhit* v. *Budh Prakash Jai Prakash*(2) observing :

"on that position being established the respondent became entitled to recover back the said amounts which had been paid by mistake of law. The state of mind of G the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law....it was entitled to recover back the said amounts and the State of U.P. was bound to repay or return the same to the respondent irrespective of any other consideration.....On a true interpretation of s. 72 of the H Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money

(1) [1959] S.C.R. 1350. (2) [1955] 1 S.C.R. 243.

back are that the moneys must have been paid by mistake or under coercion."

In *State of Madhya Pradesh* v. *Bhailal Bhai*(1) this Court had to deal with 31 appeals arising out of an equal number of applications filed before the Madhya Pradesh High Court contending that the taxing provisions under which the tax was assessed and collected from the petitioners (the Madhya Pradesh Sales Tax Act) infringed Art. 301 of the Constitution and did not come within the special provision of Art. 304(a). In all the petitions a prayer was made for refund of the taxes collected. The High Court allowed the prayer for refund in 24 applications but rejected the same in the other applications. This Court agreed with the decision of the High Court that the imposition of the tax contravened the provisions of Art. 301 of the Constitution and was not within the saving provisions of Art. 304(a) and on that view observed that the payment was made under a mistake within s. 72 of the Indian Contract Act and so the Government to whom the payment had been made must repay it. The tax provisions under which these taxes had been assessed and paid were declared void by the High Court of Madhya Pradesh in their decision in *Mohammad Siddique* v. *The State of M.P.* on 17th January, 1956. The respondents claimed to have discovered their mistake in making the payments after they came to know of these decisions. Sixteen of the applications out of 31 were made to the High Court within three years from 17th January 1956 and the High Court took the view that this was not an unreasonable delay and in that view ordered refund. The High Court also ordered refund in seven other applications made more than three years eight months after the said 17th January 1956.

This Court although of opinion that the High Court had power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law, observed :

"At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of *mandamus*. Among the several matters which the Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party

(1) [1964] 6 S.C.R 261.

A in seeking this special remedy and what excuse there is for it. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, B being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay C down any rule of universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* D triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to E refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

In *State of Kerala* v. *Aluminium Industries Ltd.*(1) the respondents after submitting returns under the Sales Tax Act for the period May 30, 1950 to March 31, 1951 showing a net turnover exceeding Rs. 23 lakhs and depositing necessary sales tax claimed F a refund on the ground of having discovered their mistake soon after March 7, 1951. The petition to the Kerala High Court under Art. 226 of the Constitution was opposed on behalf of the State on various grounds. Holding that money paid under a mistake of law was recoverable, this Court called for a finding from the Sales Tax Officer on the question whether the writ petition was within G three years of the date on which the mistake first became known to the respondent so that a suit for refund on that date would not be barred under Art. 96 of the Indian Limitation Act of 1908.

Speaking for myself I am not satisfied that the petitioners in this case had made a mistake in thinking that the money paid was due when in fact it was not due. As already noted, in their reply H to the show cause notice dated February 7, 1958 the petitioners' case was that the threat of the sales tax authorities to forfeit the amount was without the authority of law and that the firm had

(1) 16 S.T.C. 689.

agreed to the condition of refunding the amount received to its own customers under coercion even though in law the authorities were bound to refund without any such condition. The petitioners did not content themselves merely by opposing the claim of the sales tax authorities to forfeit the amount but suited their action to their belief by presenting a writ petition to the Bombay High Court describing the order of forfeiture as without the authority of law and in violation of Art. 19(1)(g) and Art. 265 of the Constitution and praying for the necessary reliefs. They did not accept the decision of the learned single Judge of the Bombay High Court under Art. 226 of the Constitution but filed their appeal raising practically the same contentions as they have done in the present petition except that they did not state having discovered any mistake on a perusal of the decision of any court of law. The grounds of appeal to the Divisional Bench of the Bombay High Court are illustrative of the frame of mind and viewpoint of the petitioners then. They complained about the violation of their fundamental rights, the illegality of the order of forfeiture and in particular mentioned the unreasonable restriction on their fundamental rights enshrined in Art. 19(1)(f) of the Constitution. Further, they had the benefit of the judgment of the appeal Bench of the Bombay High Court that the case was not being decided on the merits at all and even if there was any violation of the fundamental rights of the petitioners the exercise of discretion by the learned single Judge would not be interfered with in appeal.

It was therefore clear to the petitioners that there was no adjudication as to their fundamental rights or the merits of their claim and there was nothing to prevent the petitioners then from coming up to this Court by preferring an appeal from the judgment of the Bombay High Court or by instituting a suit for declaration of the order of forfeiture illegal and *ultra vires* and for an injunction restraining the State from giving effect thereto. Before the Bombay High Court the petitioners questioned the legality of the order of forfeiture and prayed for quashing it on the ground of the threatened invasion of their fundamental rights. On these facts it is idle to suggest that the petitioners ever entertained any belief or thought that the money was legally due from them. The way they asserted their position under the law precludes any inference that they were ever influenced by a mistake of law or that they ever failed to appreciate the correct position under the law. Even after the decision of the Bombay High Court they did not willingly pay up the amount forfeited but only made disbursements after an attachment had been levied on the business including the tenancy of the premises and its good will. They protested against the order of forfeiture not only out of court but in court and only paid after the issue of a legal process.

A It is therefore not possible to hold that the payments complained of following the order of forfeiture were made in mistake of law. They were payments under compulsion or coercion. A payment under coercion has to be treated in the same way for the purposes of a claim to refund as a payment under mistake of law, but there is an important distinction between the two. A payment B under mistake of law may be questioned only when the mistake is discovered but a person who is under no misapprehension as to his legal rights and complains about the illegality or the *ultra vires* nature of the order passed against him can immediately after payment formulate his cause of action as one of payment under coercion.

C The Limitation Acts do not in terms apply to claims against the State in respect of violation of fundamental rights. A person complaining of infraction of any such rights has one of three courses open to him. He can either make an application under Art. 226 of the Constitution to a High Court or he can make an application to this Court under Art. 32 of the Constitution, or he D can file a suit asking for appropriate reliefs. The decisions of various High Courts in India have firmly laid down that in the matter of the issue of a writ under Art. 226 the courts have a discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial complaint as regards violation of fundamental rights. Although the Limitation Act does not apply, the courts have refus- E ed to give relief in cases of long or unreasonable delay. As noted above in *Bhailal Bhai's case*(1), it was observed that the "maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured." On the question of F delay, we see no reason to hold that a different test ought to be applied when a party comes to this Court under Art. 32 from one applicable to applications under Art. 226. There is a public policy behind all statutes of limitation and according to Halsbury's Laws of England (Third Edition, Vol. 24), Art. 330 at p. 181 :

> G "The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dorment claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim and (3) that persons with good causes of action should pursue them with reasonable diligence."

H In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed

(1) [1964] 6 S.C.R. 261.

by the Limitation Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms, I am of the view that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully under Art. 32 of the Constitution. Art. 16 of the Limitation Act of 1908 fixed a period of one year for a suit against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears, from the date when the payment was made. As an attachment was levied under s. 13 of the Bombay City Land Revenue Act II of 1876 it is a moot question as to whether the payments made in 1959 and 1960 in this case would not attract the said article of the Limitation Act of 1908. It was held by this Court in *A. V. Subbarao* v. *The State*(1) that the period of limitation for a suit to recover taxes illegally collected was governed by Article 62 of the Limitation Act of 1908 providing a space of three years from the date of payment. But taking the most favourable view of the petitioners' case, Art. 120 of the Limitation Act of 1908 giving a period of six years for the filing of a suit would apply to the petitioners' claim. The period of six years would have expired some time in 1966 but the Limitation Act of 1908 was repealed by the Limitation Act of 1963 and by s. 30(a) of the Act of 1963 it was provided that :

> "Notwithstanding anything contained in this Act—
>
> (a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of five years next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier :
>
> (b) . . . . ."

A claim for money paid under coercion would be covered by Art. 113 of the Limitation Act, 1963 giving a period of three years from the first of January 1964 on which date the Act came into force. The period of limitation for a suit which was formerly covered by Art. 120 of the Act of 1908 would in a case like this be covered by Art. 113 of the new Act and the suit in this case would have to be filed by the 1st January, 1967. As the petition to this Court was presented in February 1968 a suit, if filed, would have been barred and in my view the petitioners' claim in this case cannot be entertained having been preferred after the 1st of

(1) [1965] 2 S.C.R. 577.

A January, 1967. The facts negative any claim of payment under a mistake of law and are only consistent with a claim for money paid under coercion. As the petitioners have come to this Court long after the date when they could have properly filed a suit, the application must be rejected.

B I may also note in brief another contention urged on behalf of the respondents that the present petition is barred by principles analogous to *res judicata*. It was contended by learned counsel for the respondents that the decisions of the Bombay High Court were speaking orders and even if the petition to the Bombay High Court had been dismissed *in limine* there would be a decision on C the merits. I am unable to uphold this contention. It was held in *Daryao and others* v. *The State of U.P.*(1) that when a petition under Art. 226 is dismissed not on the merits but because of laches on the party applying for the writ or because an alternative remedy is available to him, such dismissal is no bar to the subsequent petition under Art. 32 except in cases where the facts found D by the High Court might themselves be relevant under under Art. 32. It was pointed out in *Joseph* v. *State of Kerala*(2) that:

> "Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been nega- E tived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of *res judicata* may be invoked. But where there is no such decision at all, there is no scope to call in its aid."

F The judgment of the Bombay High Court in 1958 clearly shows that the merits of the petitioners' claim were not being examined. I cannot however find no merit in the contention that because there is an invasion of a fundamenal right of a citizen he can be allowed to come to this Court, no matter how long after the infraction of his right he applies for relief. The Constitution is silent on this point; nor is there any statute of limitation expressly G applicable, but nevertheless, on grounds of public policy I would hold that this Court should not lend its aid to a litigent even under Art. 32 of the Constitution in case of an inordinate delay in asking for relief and the question of delay ought normally to be measured by the periods fixed for the institution of suits under the Limitation Acts.

H The petition therefore fails and is dismissed with costs.

(1) [1962] 1 S.C.R. 574. (2) A.I.R. 1965 S.C. 1514.

Hegde, J. I had the advantage of studying the judgments just delivered by my brothers Sikri, Bachawat and Mitter, JJ. The facts of the case are fully set out in those judgments. I shall not restate them.

I agree with the decision of Mitter J. that to the facts of this case the rule laid down by this Court in *Daryao and Ors.* v. *The State of U.P. and Ors.*(1) is inapplicable. The principle underlying that decision as I understand, is that the right claimed by the petitioner therein had been negatived by a competent court and that decision having become final, as it was not appealed against, he could not agitate the same over again. It is in that context the principle of *res judicata* was relied on. A fundamental right can be sought to be enforced by a person who possesses that right. If a competent court holds that he has no such right, that decision is binding on him. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which administration of justice depends.

In view of the decision of this Court in *Kantilal Babulal and Bros.* v. *H. C. Patel*(2) that s. 12A(4) of the Bombay Sales Tax Act, 1946 is violative of Art. 19(1)(f) of the Constitution on the grounds that that section did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from its purchasers outside the State and if so what that amount was; neither the section nor any rule framed under the Act contemplated any enquiry much less a reasonable enquiry in which the dealer complained of could plead and prove his case or satisfy the authorities that their assumptions were wholly or partly wrong and further the section also did not provide for any enquiry on disputed questions of fact or law or for making an order, it follows that the impugned collection was without the authority of law and consequently the same is an exaction resulting in the infringement of one of the proprietory rights of the petitioners guaranteed to them under Art. 19(1)(f) of the Constitution. Hence the petitioners have a fundamental right to approach this Court under Art. 32 of our Constitution for appropriate relief and this Court has a duty to afford them appropriate relief. In *Kharak Singh* v *The State of UP and Ors.*(3) Rajagopala Ayyangar J. speaking for the majority observed that once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner has been infringed it is not only the right but the duty of this Court under Art. 32 to afford relief to him by passing appropriate orders in that behalf. The right given to the citizens to move this Court under Art. 32 is itself a fundamental right and the same cannot be circumscribed or curtailed except as provided by the Constitution. It is in-

(1) [1962] S.C.R. 574.
(2) 21 S.T.C. 174.
(3) [1964] 1 S.C.R. 332.

A appropriate to equate the duty imposed on this Court to the powers of the Chancery Court in England or the equitable jurisdiction of the American Courts. A duty imposed by the Constitution cannot be compared with discretionary powers. Under Art. 32 the mandate of the Constitution is clear and unambiguous and that mandate has to be obeyed. It must be remembered, as em-
B phasized by several decisions of this Court that this Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights under Part III of the Constitution. If I may with respect, borrow the felicitous language employed by Chief Justice Patanjali Sastri in *State of Madras* v. *V. G. Rao*(1) that as regards fundamental rights this Court
C has been assigned the role of a Sentinel on the *qui vive*. The anxiety of this Court not to whittle down the amplitude of the fundamental rights guaranteed has found expression in several of its judgments. It has not allowed its vision to be blurred by the fact that some of the persons who invoked its powers had no equity in their favour. It always took care to see that a bad case did not end in laying down a bad law. I am not unaware of the
D fact that the petitioners before us have no equity in their favour but that circumstance is irrelevant in deciding the nature of the right available to an aggrieved party under Art. 32 of the Constitution.

All of us are unanimous on the question that the impugned
E collection amounts to an invasion of one of the fundamental rights guaranteed to the petitioners. Our difference primarily centres round the question whether their right to get relief under Art. 32 is subject to any limitation or to be more accurate whether this Court has any discretion while exercising its jurisdiction under that Article ? As mentioned earlier a right to approach this Court under Art. 32 is itself a fundamental right. In that respect our
F Constitution makes a welcome departure from many other similar Constitutions. As seen earlier a party aggrieved by the infringement of any of its fundamental rights has a right to get relief at the hands of this Court, and this Court has a duty to grant appropriate relief—see *Joseph Pothen* v. *The State of Kerala*(2). The power conferred on this Court by that Article is not a discre-
G tionary power. This power is not similar to the power conferred on the High Courts under Art. 226 of the Constitution. Hence laches on the part of an aggrieved party cannot deprive him of the right to get relief from this Court under Art. 32. A Division Bench of the Bombay High Court in *Kamalabai Harjivandas Parekh* v. *T. B. Desai*(3) held that where a constitutional objec-
H tion to the validity of a legislation is taken in a petition under Art. 226, the question of mere delay will not affect the

(1) [1952] S.C.R. 597. (2) A.I.R. 1965 S.C. 1514.
(3) [1965] Vol. 67 B.L.R. p. 85.

maintainability of that petition. Law reports do not show a single instance, where this Court had refused to grant relief to a petitioner in a petition under Art. 32 on the ground of delay.

There has been some controversy whether an aggrieved party can waive his fundamental right. That question was elaborately considered in *Basheshar Nath* v. *The Commissioner of Income Tax Delhi, Rajasthan and anr.*(1) by a Constitution Bench consisting of S. R. Das, C. J. and Bhagwati, S. K. Das, J. L. Kapur and Subba Rao, JJ. The learned Chief Justice and Kapur J. held that there could be no waiver of a fundamental right founded on Art. 14. Bhagwati and Subba Rao JJ. held that no fundamental right can be waived and S. K. Das J. held that only such fundamental rights which are intended to the benefit of a party can be waived. I am mentioning all these aspects to show how jealously this Court has been resisting every attempt to narrow down the scope of the rights guaranteed under Part III of our Constitution.

Admittedly the provisions contained in the Limitation Act do not apply to proceedings under Art. 226 or Art. 32. The Constitution makers wisely, if I may say with respect, excluded the application of those provisions to proceedings under Art. 226, 227 and 32 lest the efficacy of the constitutional remedies should be left to the tender mercies of the legislatures. This Court has laid down in *I.C. Golaknath and ors.* v. *State of Punjab and anr.*(2) that the Parliament cannot by amending the Constitution abridge the fundamental rights conferred under Part III of the Constitution. If we are to bring in the provisions of Limitation Act by an indirect process to control the remedies conferred by the Constitution it would mean that what the Parliament cannot do directly it can do indirectly by curtailing the period of limitation for suits against the Government. We may console ourselves by saying that the provisions of the Limitation Act will have only persuasive value but they do not limit the power of this Court but the reality is bound to be otherwise. Very soon the line that demarcates the rule of prudence and binding rule is bound to vanish as has happened in the past. The fear that forgotten claims and discarded rights may be sought to be enforced against the Government after lapse of years, if the fundamental rights are held to be enforceable without any time limit appears to be an exaggerated one. It is for the party who complains the infringement of any right to establish his right. As years roll on his task is bound to become more and more difficult. He can enforce only an existing right. A right may be lost due to an earlier decision of a competent court or due to various other reasons. If a right is lost for one reason or the other there is no right to be enforced. In this case we are dealing with an existing right even if it can be said that the petitioners'

(1) [1959] Supp. 1 S.C.R. 528. (2) [1967] 2 S.C.R. 762.

A remedy under the ordinary law is barred. If the decision of Bachawat and Mitter, JJ. is correct, startling results are likely to follow. Let us take for example a case of a person who is convicted and sentenced to a long period of imprisonment on the basis of a statute which had been repealed long before the alleged offence was committed. He comes to know of the repeal of the B statute long after the period prescribed for filing appeal expires. Under such a circumstance according to the decision of Bachawat and Mitter, JJ. he will have no right—the discretion of the Court apart—to move this Court for a writ of *habeas corpus*.

Our Constitution makers in their wisdom thought that no fetters should be placed on the right of an aggrieved party to seek C relief from this Court under Art. 32. A comparison of the language of Art. 226 with that of Art. 32 will show that while under Art. 226 a discretionary power is conferred on the High Courts the mandate of the Constitution is absolute so far as the exercise of this Court's power under Art. 32 is concerned. Should this Court, an institution primarily created for the purpose of safeguarding the fundamental rights guaranteed under Part III of the D Constitution, narrow down those rights ? The implications of this decision are bound to be far reaching. It is likely to pull down from the high pedestal now occupied by the fundamental rights to the level of other civil rights. I am apprehensive that this decision may mark an important turning point in down grading the fundamental rights guaranteed under the Constitution. I am E firmly of the view that a relief asked for under Art. 32 cannot be refused on the ground of laches. The provisions of the Limitation Act have no relevance either directly or indirectly to proceedings under Art. 32. Considerations which are relevant in proceedings under Art. 226 are wholly out of place in a proceeding like the one before us. The decision of this Court referred to in the judgment F of Bachawat and Mitter, JJ. where this Court has taken into consideration the laches on the part of the petitioners are not apposite for our present purpose. None of those cases deal with proceedings under Art. 32 of the Constitution. The rule enunciated by this Court in the *State of M.P. v. Bhailal Bhai*(1) is only applicable to proceedings under Art. 226. At page 271 of the report Das Gupta, J. who spoke for the Court specifically referred to this G aspect when he says :

> "that it has been made clear more than once that power to relief under Art. 226 is a discretionary power".

Therefore those decisions are of no assistance to us in deciding the present case. Once it is held that the power of this Court under Art. 32 is a discretionary power—that in my opinion is the H result of the decision of Bachawat and Mitter, JJ.—then it follows that this Court can refuse relief under Art. 32 on any one of the

(1) [1964] 6 S.C.R. 261.

grounds on which relief under Art. 226 can be refused. Such a conclusion militates not only against the plain words of Art. 32 but also the lofty principle underlying that provision. The resulting position is that the right guaranteed under that Article would cease to be a fundamental right.

Assuming that the rule enunciated by this Court in *Sales Tax Officer* v. *Kanhaiya Lal Mukundlal Saraf*(1) and further refined by this Court in *State of M.P.* v. *Bhailal Bhai*(2) can apply to the facts of this case even then I am of opinion that the petitioners are entitled to the relief that they have asked for. As could be gathered from the decision of Bachawat and Mitter, JJ., the Bombay High Court did not decide the merits of the case in the writ petition filed by the petitioners. In that petition the Court refused to exercise its discretion in favour of the petitioners. The grounds on which the petitioners challenged the validity of s. 12A(4) of the Bombay Sales Tax Act, 1946 before the High Court of Bombay have now been found to be unsustainable by the Gujarat High Court in *Kantilal Babulal and Bros.* v. *H. C. Patel*(3). In the appeal against that decision this Court did not examine those grounds. It struck down s. 12A(4) on a wholly different ground, a ground not put forward by the petitioners in their writ petition before the Bombay High Court. A mere impression of a party that a provision of law may be *ultra vires* the Constitution cannot be equated to knowledge that the provision is invalid. Hope and desire are not the same things as knowledge. A law passed by a competent legislature is bound to be presumed to be valid until it is struck down by a competent court. The fact that after a futile attempt to get the provision in question declared invalid the petitioners gave up their right and submitted to the law which was apparently valid is no proof of the fact that they knew that the provision in question is invalid. As seen earlier that none of the grounds urged by the petitioners in support of their contention that the provision in question is invalid has been accepted by any court till now. Under these circumstances I see no justification to reject the plea of the petitioners that they became aware of the invalidity of the provision only after the decision of this Court in *Kantilal Babulal's* case(4) which decision was rendered on September 29, 1967. This petition was filed very soon thereafter. Hence this case under any circumstance falls within the rule laid down by this Court in *Bhailal Bhai's case*(2).

For the reasons mentioned above I allow this petition and grant the relief prayed for by the petitioners.

ORDER

In accordance with the opinion of the majority, the petition fails and is dismissed with costs.

V.P.S.

(1) [1959] S.C.R. 1350.
(2) [1964] 6 S.C.R. 261.
(3) 16 S.T.C. 973.
(4) 21 S.T.C. 174.