Similarly, Chuni Lal stated in cross-examination :

> "It is wrong to suggest that the damaged goods were also sold by our firm * * * * * *."

(13) Apparently, this part has been accepted by the learned Judge, Small Cause Court, and there appears to be no reason to interfere in that finding. Details were given with regard to each consignment and Inder Raj gave the prevailing rates of the tea on the date of taking the delivery of each one of the consignments. These rates are much higher than the rates at which the damages are claimed, apparently because the firm sold the tea at the retail rates. Consequently, I find no reason to interfere with the finding with regard to the quantum either.

(14) For the reasons given above, I accept this revision and grant a decree in favour of the plaintiff-firm, as prayed. The plaintiff-firm will have its costs in the Court below as well as in this Court.

N.K.S.

FULL BENCH

Before D. K. Mahajan, C.J., Pritam Singh Pattar and M. R. Sharma, JJ.

JAGJIT RAI VOHRA, ETC.—*Petitioners.*

versus

THE STATE OF HARYANA, ETC.,—*Respondents.*

Civil Writ No. 3314 of 1973.

April 24, 1974.

Punjab Civil Secretariat (State Service Class III) Rules (1952)—*Rules* 2(*d*), 2(*g*), 5 *and* 6—*Administrative instructions issued by the State Government requiring the Clerks to qualify in a departmental test for being eligible for promotion to the posts of Assistants—Whether violative of the Rules.*

Held, that from a combined reading of the rules 2(d), 2(g), 5 and 6 of the Punjab Civil Secretariat (State Service Class III) Rules, 1952, the only possible conclusion is that it is only at the time when a person is appointed directly to the service that rule 5 of the Rules will come into play. This rule does not deal with the case of persons who are in the service when they are promoted from one category to the other or when they are transferred from other Government departments to the Civil Secretariat to man the posts in one category or the other of Class III Service. The definition of 'service' in rule 2(d) along with the operative words of rule 5, namely, 'no person shall be appointed substantively to the service unless he possesses the educational and other qualifications', suggest that in the case of direct appointment, both the qualifications have to be fulfilled. This rule cannot be read in a disjunctive manner, that is, only the educational qualifications have to be fulfilled by a direct recruit and not the other qualifications. This view is supported by a reference to rule 6(1) (i) (iii) of the Rules, which lays down that in the case of promotion of Restorers to the posts of junior clerks, they have to qualify a departmental test. If the idea was that in every case of promotion or transfer, a qualifying test has to be undergone, rule 6 of these Rules would have made a provision for that as it did in the case of a Restorer when he is promoted as a Junior Clerk. Hence the executive instructions issued by the State Government *vide* their letter dated September 5, 1958, requiring the Clerks to qualify in a departmental test for being eligible for promotion to the posts of Assistants are violative of the 1952 Rules which have been framed under Article 309 of the Constitution. (Paras 7 and 11).

Case referred by Hon'ble Mr. Justice M. R. Sharma, vide *order dated 28th November*, 1973 *to a Full Bench for decision of an important question of law. Full Bench consisting of Hon'ble the Chief Justice Mr. D. K. Mahajan, Hon'ble Mr. Justice Pritam Singh Pattar and Hon'ble Mr. Justice M. R. Sharma, after deciding the question referred to the Full Bench sent back the case to the Single Bench for decision of the case.*

Petition under Article 226 of the Constitution of India praying that a writ in the nature of certiorari, mandamus, *Quo-Warranto or any other appropriate writ, order or direction be issued quashing the order passed by respondent No. 1,*—(vide *circular letter No. 5901-4GSII-73/23071, dated the 11th September*, 1973), *and directing the respondents to implement the decision of Their Lordships of the Supreme Court* qua *all the employees uniformally without any discrimination between those who went to the Courts and others who didn't, and also directing the respondents to determine the seniority on the basis of the date of appointment by ignoring the condition regarding test etc. and also direct the respondents to give the petitioners all the consequential reliefs to which they be found entitled as*

a result of the implementation of the decision of the Hon'ble Supreme Court of India, and also further praying that pending the disposal of the writ petition, further promotions be stayed.

J. L. Gupta, S. C. Sibal, and Karminder Singh, Advocates, *for the petitioners.*

J. N. Kaushal, Advocate-General, Haryana with Naubat Singh, District Attorney, Haryana.

Kuldip Singh and I. S. Sidhu, Advocates, *for respondents* 3, 5 to 11, 16 to 19 & 21 to 24.

ORDER

MAHAJAN, C.J.—The petitioners are members of the Haryana Civil Secretariat Service. They are working as Assistants. Originally, they were recruited as Clerks on different dates between November 20, 1944 and August 13, 1959, in the State of Punjab, out of which the State of Haryana was carved out. The conditions of service of these employees were originally laid down in the Punjab Civil Secretariat Service Rules, 1943 (hereinafter referred to as the 1943 Rules). These rules were framed under section 241 of the Government of India Act, 1935. After the coming into force of the Constitution, these rules were repealed. A new set of rules, namely, the Punjab Civil Secretariat (State Service Class III) Rules, 1952 (hereinafter called the 1952 Rules) were promulgated and notified on January 7, 1952. The relevant 1943 rules and the 1952 rules are reproduced side by side: (His Lordship read 1943 Rules and 1952 Rules and then proceeded).

(2) However, *vide* its letter dated September 5, 1958, the Chief Secretary to Government, Punjab, Chandigarh, issued instructions to the effect that the Clerks will have to pass a test before being promoted to the posts of Assistants. The relevant part of the said instructions is as follows:

> "For the purpose of appointment of officials from the offices of Heads of Departments as Assistants in the Punjab Civil Secretariat as also for promotion of Assistants in the cadre, a test separately prescribed will be held by the Punjab Public Service Commission. For officials belonging to the offices of the Heads of Departments, this test will be competitive one and for the Secretariat Clerks, it will be a

qualifying test. As at present, this test will be conducted simultaneously in Accounts as also in Noting and Drafting. The question as to what standard of Accounts test, it would be fair to expect of the examinees, is being considered separately."

These instructions were challenged by Shamsher Jang Shukla by a suit and it was held that these instructions were invalid and could not override the rules governing the service. This decision was affirmed by this Court and later on by the Supreme Court and is reported as *The State of Haryana* v. *Shamsher Jang Shukla* (1). To the same effect is the law laid down by their Lordships of the Supreme Court in *The State of Punjab* v. *Madan Singh and others* (2). After the decisions of the Supreme Court, the Clerks who had failed to qualify the test and consequently had not been promoted as Assistants, filed a joint writ petition in this Court claiming benefit of the Supreme Court decisions, mentioned above. It may be mentioned that during the pendency of the appeal to the Supreme Court, a large number of writ petitions were filed in this Court and in the returns filed by the States of Punjab and Haryana, a representation was made that the States were awaiting the decision of the Supreme Court. In the meantime, the composite State of Punjab approached the Central Government for the grant of retrospective approval to the rules regarding qualifying the test by Clerks before being eligible for promotion to the posts of Assistants. Obviously, this approach was made in view of the provisions of section 115 of the States Reorganisation Act, 1956. But this request of the State Government was declined.

(3) In the present petition, which is directed against the State of Haryana, it is alleged that the instructions issued *vide* Chief Secretary's letter dated September 5, 1958, are contrary to the statutory rules, because they change the conditions of service governing the members of the Service. It is also averred that as these instructions have been issued without obtaining the prior approval of the Central Government, they cannot operate and govern the petitioners. The petitioners approached the Government to settle their case under the 1952 rules without regard to the instructions issued by them *vide* letter dated September 5, 1958. This request was not acceded to by the State Government. Instead,

(1) A.I.R. 1972 S.C. 1546.
(2) A.I.R. 1972 S.C. 1429.

the State Government issued the following directions *vide* letter dated September 11, 1973:

> "The matter has been under the consideration of the State Government as how best to implement the judgments of the Supreme Court. It has now been decided that the benefit should be given only to those officials who went to the Courts and got decrees in their favour. Accordingly they should be given due seniority as if there was no requirement of passing the test in their cases, in pursuance of the instructions issued by the Government in the year 1958 or the service rules which were framed without getting the prior approval of the Government of India as required under section 115 of the State Reorganisation Act, 1956."

Thus, the stand taken by the State of Haryana is that the benefit of the decision of the Supreme Court should be given only to those officials who went to Court and got decrees in their favour. Besides the fact that the latest instructions issued by the State of Haryana are contrary to the decision of the Supreme Court, it is claimed that they are violative of Article 16 of the Constitution being discriminatory. It is also maintained that the effect of non-implementation of the Supreme Court decision is that persons far junior to the petitioners had gained undue seniority on the basis of the test declared illegal by the Supreme Court.

(4) In the return filed on behalf of the State of Haryana, a number of preliminary objections have been raised, *inter alia*:

(a) that a joint writ petition by a number of persons is not competent,

(b) that all the petitioners who took the test, but failed to qualify, are estopped from challenging the resultant supersession, and

(c) that the claim of the petitioners was grossly belated and if they had filed civil suits, the same would have failed on account of bar of limitation.

This petition was placed before my learned brother M. R. Sharma, J., and by his order dated November 28, 1973, the learned Judge referred

the case to a larger Bench. The learned Judge, in the order of reference, observed:

> "The controversy as it crystalised itself from the pleadings of the parties relates to the following two matters:
>
> (a) Whether the provision of the departmental examination introduced *vide* letter dated September 5, 1958, by the Chief Secretary to the Government, Punjab, Chandigarh, runs counter to the statutory rules on the subject; and
>
> (b) Whether the seniority list of the petitioners and the respondents which was published on November 27, 1964, in the official Gazette, could be revised as a consequence of the later decisions."

(5) It is not necessary for me to deal with the merits of each petitioner's case, because that is a matter which will have to be settled by the learned Single Judge when the case goes back to him after we have pronounced upon the main controversies to settle which the matter was referred to a larger Bench; the main controversies being:

(1) whether the instructions issued by the State Government *vide* letters dated September 5, 1958 and September 11, 1973, are illegal and this has been so held by the Supreme Court in *Madan Singh's case* (2), *and Shamsher Jang Shukla's case* (1) (supra),

(2) Whether irrespective of the fact that this Court was moved after considerable delay, the laches on the part of any one or more of the petitioners would not stand in their way in getting redress from this Court in the exercise of its extraordinary jursidiction.

However, towards the end of the reference order, the learned Judge observed that the petition could be thrown out on some technical grounds; the technical grounds being:

(1) that a joint petition has been filed by a large number of persons to whom the causes of action arose on different dates,

(2) that the causes of action arose years ago and their enforcement is being sought after undue delay, and

(3) that the *inter se* seniority approved by the Central Government is not open to challenge in a Court of law.

However, the learned Judge observed that he was not prepared to adopt the easier course of dismissing the petition on grounds of laches or other considerations as the learned Judge wanted the controversy to be authoritatively settled once for all, and that is how the matter has been placed before us.

(6) After hearing the learned counsel for the parties, I am of the view that so far as the first matter is concerned, it is authoritatively settled by the Supreme Court decisions, referred to above. In *Madan Singh's case* (2) (supra), their Lordships of the Supreme Court followed the decision in *Shamsher Jang Shukla's case* (1) (supra). *Shamsher Jang Shukla was* an employee of the Pepsu Government and became the employee of the Punjab Government after the merger of Punjab and Pepsu with effect from November 1, 1956. Since then, the 1952 rules became applicable to him. This fact was conceded before the Supreme Court. After examining the 1952 rules, and in particular rule 6 of the rules, it was observed as follows:

"It may be noted that herein we are dealing only with those who were promoted from the cadre of Clerks in the Secretariat. The first question arising for decision is whether the Government was competent to add by means of administrative instructions to the qualifications prescribed under the Rules framed under Article 309. The High Court and the Courts below have come to the conclusion that the Government was incompetent to do so. This Court has ruled in *Sant Ram Sharma* v. *State of Rajasthan* (3), that while the Government cannot amend or supersede the statutory rules by administrative instructions, if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Hence we have to see whether the instructions with which we are concerned, so far as relate

(3) (1968)1 S.C.R. 111=A.I.R. 1967 S.C. 1910.

to the Clerks in the Secretariat amend or alter the conditions of service prescribed by the rules framed under Article 309. Undoubtedly, the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affect the promotion of concerned officials and, therefore, they relate to their conditions of service. The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question, the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules."

After having so pronounced, their Lordships proceeded further and ruled that there was an additional ground on which also the Government appeal would fail. It was observed that:—

"There is a further difficulty in the way of the Government. The additional qualification prescribed under the administrative instructions referred to earlier undoubtedly relates to the conditions of service of the Government servants. As laid down by this Court in *Mohammad Bhakar* v. Y. *Krishna Reddy* (4), any rule which affects the promotion of a person relates to his conditions of service and, therefore, unless the same is approved by the Central Government in terms of proviso to sub-section (7) of section 115 of the States Reorganisation Act, 1956, it is invalid as it violates sub-section (7) of section 115 of the States Reorganisation Act. Admittedly the approval of the Central Government had not been obtained for issuing those instructions. But reliance was sought to be placed on the letter of the Central Government dated March 27, 1957, wherein the Central Government accorded advance approval to the State Government regarding the change in the conditions of service obtaining immediately before November 1, 1956, in the matter of travelling allowance, discipline, control, classification appeal, conduct, probation

(4) 1970 S.L.R. 768 (S.C.).

> and departmental promotion. The scope of that letter has been considered by this Court in *Mohammad Bhakar's case* (4) (supra). Therein this Court held that the letter in question cannot be considered as permitting the State Government to alter any conditions of service relating to promotion of the affected Government servants."

It is, thus, clear that their Lordships definitely ruled that the 1952 rules could not be amended by executive instructions issued *vide* Government letter dated September 5, 1958. Threfore, this decision concludes the matter.

(7) Learned counsel for the State, however, sought to distinguish *Shamsher Jang Shukla's case* (1) (supra) on the ground that their Lordships of the Supreme Court did not notice rule 5 of the 1952 rules, and that this rule provides for a departmental test. If rule 5 of the 1952 rules is read cursorily, it will appear to be so. But from a combined reading of the rules, particularly rules 2(d), 2(g), 5 and 6 the only possible conclusion is that it is only at the time when a person is appointed directly to the service that rule 5 of the 1952 rules will govern the case. Rule 5 of the 1952 rules does not deal with the case of persons who are in the service when they are promoted from one category to the other, or when they are transferred from other Government departments to the Civil Secretariat to man the posts in one category or the other of Class III Service. The definition of "service" in rule 2(d) along with the operative words of rule 5, namely, "no person shall be appointed substantively to the service unless he possesses the educational and other qualifications....." suggests that in case of direct appointment, both the qualifications have to be fulfilled. Mr. Kaushal would like the rule to be read in a disjunctive manner, that is, only the educational qualifications have to be fulfilled by a direct recruit and not the other qualifications. I am unable to agree with this interpretation. In fact, the interpretation I have placed is fully borne out if a reference is made to rule 6(I)(i)(iii) of the 1952 rules where, in the case of promotion of Restorers to the posts of Junior Clerks, they have to qualify a departmental test. If the idea was that in every case of promotion or transfer, a qualifying test has to be undergone, rule 6 of the 1952 rules would have made a provision for that as it did in the case of a Restorer when he is promoted as a Junior Clerk. Therefore, the contention of the learned counsel that rule 5 would cover the case of the persons who are promoted from one category

of service to the other or who are appointed by transfer to one category or the other in the Service cannot be accepted. As already observed, it cannot be assumed that their Lordships of the Supreme Court while settling the matter in *Shamsher Jang Shukla's case* (1) (supra) were oblivious to rule 5 of the 1952 rules. These rules were before their Lordships and what their Lordships have observed must have been after due consideration of the entire set of rules. To take a contrary view would be to do violence to the rule laid down by their Lordships in the aforesaid cases. I, therefore, repel the contention of the learned counsel that the Supreme Court decision in Shamsher Jang Shukla's case (1) does not clinch the matter. It is, therefore, clear that the administrative instructions issued by Government *vide* their letter dated September 5, 1958, are violative of the 1952 rules, framed under Article 309 of the Constitution of India.

(8) This brings us to the question as to whether the petitioners are entitled to the benefit of the Supreme Court judgment irrespective of the fact that they have approached the Court after undue delay, and after the respondents had superseded them and worked in the higher posts for a considerable length of time. One view could have been that the moment the Supreme Court gave its decision, effect should have been given to it without considering the benefit gained under the invalid executive instructions by the respondents. The other way of looking at the matter is that when the respondents superseded them and the petitioners took no action to challenge their supersession, and only woke up when the Supreme Court finally settled the matter in *Shamsher Jang Shukla's case* (1), would this Court be justified to exercise its discretion in their favour? There is a lot of literature on this aspect of the matter. The correct view seems to be that laches cannot be overlooked and each case will have to be examined to see whether a particular petitioner is or is not entitled to the relief available to him in view of the Supreme Court decision in *Shamsher Jang Shukla's case* (1) (supra). It would be proper at this stage to refer to almost a score of settled decisions of the Supreme Court on this matter. In *State of Madhya Pradesh and another* v. *Bhailal Bhai and others* (5), it was observed:

> "The provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. However, the maximum period fixed by the Legislature as the time

(5) A.I.R. 1964 S.C. 1006.

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 Article 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy, but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable."

In *M/s Tilokchand and Motichand and others,* v. *H. B. Munshi and another* (6), it was held:—

"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 Article 226 of the Constitution to a High Court or he can make an application to this Court under Article 32 of the Constitution, or he 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 Article 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 refused to give relief in cases of long or unreasonable delay. As noted above in *Bhailal Bhai's case* (5) (supra), 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 Article 226 can be measured". On the question of delay, we see no reason to hold that a different test ought to be applied when a party comes to this Court under Article 32 from one applicable to applications under Article 226. There is a public policy behind all statutes of Limitation and according to Halsbury's Laws of England (Third Edition, Volume 24), Article 330 at page 181:

"The Courts have expressed at least three different reasons supporting the existence of statutes of limitation,

(6) (1969)1 S.C.C. 110=(1969)2 S.C.R. 824.

namely (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale demand and (3) that persons with good causes of action should persue them with reasonable diligence."

In *Rabindranath Bose and others* v. *The Union of India and others* (7), their Lordships observed as follows:

"But in so far as the attack is based on the 1952 Seniority Rules, it must fail on another ground. The ground being that this petition under Article 32 of the Constitution has been brought about fifteen years after the 1952 Rules were promulgated and effect given to them in the Seniority List prepared on August 1, 1953. Learned counsel for the petitioner says that this Court has no discretion and cannot dismiss the petition under Article 32 on the ground that it has been brought after inordinate delay. We are unable to accept this contention. This Court by majority in *M/s Tilokchand Moti Chand and others* v. *H. B. Munshi and others* (6), held that delay can be fatal in certain circumstances. We may mention that in *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India and another* (8), Mahajan, C.J., observed as follows:

"From the facts stated above it is plain that the proceedings taken under the impugned Act XXX of 1947 concluded so far as the Investigation Commission is concerned in September, 1952, more than two years before this petition was presented in this Court. The assessment orders under the Income-tax Act itself were made against the petitioner in November, 1963.

In these circumstances, we are of the opinion that he is entitled to no relief under the provisions of Article 32 of the Constitution. It was held by this Court in *Ramjilal* v. *Income-tax Officer, Mohindergarh* (9),

(7) 1970 S.L.R. 339=(1970)2 S.C.R. 697.
(8) 1955 S.C.R. 769.
(9) (1951) S.C.R. 127.

that as there is a special provision in Article 265 of the Constitution that no tax shall be levied or collected except by authority of law, clause (1) of Article 31 must, therefore, be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32. In view of this decision it has to be held that the petition under Article 32 is not maintainable in the situation that has arisen and that even otherwise in the peculiar circumstances that have arisen, it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with the Court."

The learned counsel for the petitioners strongly urges that the decision of this Court in *M/s Tilokchand Motichand's case* (6) (supra) needs review. But after carefully considering the matter, we are of the view that no relief should be given to petitioners who, without any reasonable explanation, approach this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given original jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. It was on this ground that this Court in *S. G. Jaisinghani* v. *Union of India and others* (10) observed that the order in that case

(10) (1967)2 S.L.R. 482.

would not effect Class II officers who have been appointed permanently as Assistant Commissioners. In that case, the Court was only considering the challenge to appointments made during the periods of 1945 to 1950. If there was adequate reason in that case to leave out Class II Officers, who had been appointed permanently Assistant Commissioners, there is much more reason in this case that the officers who are now permanent Assistant Commissioners of Income-tax and who were appointed and promoted to their original posts during 1945 to 1950 should be left alone.

Learned counsel for the petitioners, however, says that there has been no undue delay. He says that the representations were being received by the Government all the time. But there is limit to the time which can be considered reasonable for making representations. If the Government has turned down one representation, the making of another representation on similar lines would not enable the petitioners to explain the delay. Learned counsel for the petitioners says that the petitioners were under the impression that the Departmental Promotion Committee had held a meeting in 1948 and not on April 29, 1949 and the real true facts came to be known in 1961 when the Government mentioned these facts in their letter, dated December 28, 1961.

We are unable to accept this explanation. This fact has been mentioned in the minutes of the meeting of the Committee which met in February, 1952, and we are unable to believe that the petitioners did not come to know all these facts till 1961. But even assuming that the petitioners came to know all these facts only in December, 1961, even then there has been inordinate delay in presenting the present petition. The fact that *Jaisinghani's case* (10) was pending before the High Court and later in this Court is also no excuse for the delay in presenting the present petition."

To the same effect are the observations in three decisions of this Court in *Bikermajit Bhandari* v. *The State of Punjab and others* (11), *Tej Bhan Shukla* v. *The State of Punjab and others* (12), *and Bakhshish*

(11) C.W. No. 3268 of 1970 decided on 14th January, 1971.

(12) C.W. No. 772 of 1971 decided on 10th August, 1972.

Singh v. *The State of Punjab and others* (13). The last two decisions were affirmed in appeal under clause X of the Letters Patent.

(9) Mr. J. L. Gupta, learned counsel for the petitioners when faced with this situation relied on *Ramchandra Shankar Deodhar and others* v. *The State of Maharashtra and others* (14). In this case, the rules in question were in operation with effect from April 7, 1961, but the Commissioner of Aurangabad Division by his letter dated October 18, 1960, and also the then Secretary of the Revenue Department in January, 1961, had informed the petitioners that the rules of recruitment to the post of Deputy Collector in the reorganised State of Bombay had not yet been unified and that the petitioners continued to be governed by the rules of Ex-Hyderabad State and the rules of July 30, 1959, had no application to them. On these facts, it was observed by the Supreme Court:

> "The petitioners were, therefore, justified in proceeding on the assumption that there were no unified rules of recruitment to the posts of Deputy Collectors and the promotions that were being made by the State Government were only provisional, to be regularised when unified rules of recruitment were made. It was only when the petition in *Kapoor's case* was decided by the Bombay High Court—that the petitioners came to know that it was the case of the State Government in that petition—and that case was accepted by the Bombay High Court—that the Rules of 30th July, 1959, were the unified rules of recruitment to the posts of Deputy Collectors applicable throughout the reorganised State of Bombay. The petitioners thereafter did not lose any time in filing the present petition. Moreover, what is challenged in the petition is the validity of the procedure for making promotions to the posts of Deputy Collectors—whether it is violative of the equal opportunity clause—and since this procedure is not a thing of the past, but is still being followed by the State Government, it is but desirable that its constitutionality should be adjudged when the question has come before the Court at the instance of the parties properly aggrieved by it. It may also be noted that the principle on which the Court proceeds in refusing relief to the petitioner on ground

(13) C.W. No. 3423 of 1970 decided on 30th April, 1973.
(14) 1974 S.L.R. 470 (S.C.);

of laches or delay is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for the delay. This principle was stated in the following terms by Hidayatullah, C.J., in *Tilokchand* v. *H. B. Munshi* (6):

"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."

Sikri, J., (as he then was), also re-stated the same principle in equally felicitous language when he said in *R. N. Bose* v. *Union of India* (7): "It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion affected a long time ago would not be set aside after the lapse of a number of years." Here, as admitted by the State Government in paragraph 55 of the affidavit in reply, all promotions that have been made by the State Government are provisional and the position has not been crystalised to the prejudice of the petitioners. No rights have, therefore, accrued in favour of others by reason of the delay in filing the petition. The promotions being provisional, they have not conferred any rights on those promoted and they are by their very nature liable to be set at naught, if the correct legal position, as finally determined, so requires. We are also told by the learned counsel for the petitioners, and that was not controverted by the learned counsel appearing on behalf of the State Government, that even if the petitions were allowed and the reliefs claimed by the petitioners granted to them, that would not result in the reversion of any Deputy Collector or officiating Deputy Collector to the posts of Mamlatdars/Tehsildars; the only effect would be merely to disturb their *inter se* seniority as officiating Deputy Collectors or as Deputy Collectors. Moreover, it may be noticed that the claim for enforcement of the fundamental rights of equal opportunity under Article 16 is itself a fundamental right guaranteed under

> Article 32 and this Court which has been assigned the role of a sentinal on the *qui vive* for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like."

Mr. Gupta, learned counsel for the petitioners, then relied on *Makhan Lal Waza and others* v. *State of Jammu & Kashmir and others* (15). That case stands on a totally different basis. In that case, the Supreme Court quashed the communal policy of the State Government in the matter of recruitment being violative of Article 16 of the Constitution of India. In spite of that, the State Government ignored the decision of the Supreme Court and went on pursuing its Communal Policy. The recruitments made after the Supreme Court decision were struck down by the Supreme Court, as bad. This case has, therefore, no parallel so far as the present case is concerned. There is no question of any right accruing to a third party so far as the instant case is concerned. In my opinion, the correct procedure to deal with the petitioners' case is that each individual case will have to be examined by the learned Single Judge to find out whether the delay in approaching this Court is or is not fatal. If in a particular case there are facts and circumstances like the case in *Ramchandra Shankar Deodhar's case* (14) (supra), the learned Single Judge will give relief to the petitioner. But where there are no extenuating circumstances and the laches stare him in the face, there will be no option left but to reject the claim of a particular petitioner on the ground of laches.

(10) With regard to the question of seniority list—one of the points highlighted by my learned brother Sharma, J., in the reference order—no arguments were addressed. I, therefore, leave this matter for decision to the learned Single Judge.

(11) For the reasons recorded above, I hold that the executive instructions issued by the State Government *vide* their letter dated September 5, 1958, requiring the Clerks to qualify in a departmental test for being eligible for promotion to the posts of Assistants, are violative of the 1952 rules which have been framed under Article 309 of the Constitution, and that in giving relief to each of the petitioners, laches will stand in their way unless they

(15) A.I.R. 1971 S.C. 2206.

satisfactorily explain the delay in moving this Court. The other matters will be determined by the learned Single Judge.

(12) The petition will now be set down for hearing before the learned Single Judge who will, if necessary, give each petitioner, an opportunity of making out his case on affidavits as to the matter of laches. The State Government as well as the private respondents will be given an opportunity to controvert those affidavits before each individual case is settled.

PATTAR, J.,—I agree and have nothing to add.

M. R. SHARMA, J.,—I agree.

B.S.G.

FULL BENCH

Before D. K. Mahajan, C. J., and R. S. Narula and Pritam Singh Pattar, JJ,

AMRIK SINGH, ETC.,—*Appellants.*

versus

KARNAIL SINGH, ETC.,—*Respondents.*

Regular Second Appeal No. 471 of 1972

May 2, 1974.

Code of Civil Procedure (Act No. V of 1908)—Order 32, rule 3—Suit filed against major and minor defendants—Provisions of order 32 rule 3 not complied with in appointing the guardian ad-litem of the minors—Interest of major defendants identical with the minors—Decree passed in such suit—Whether a nullity.

Held, that too much insistence on technical provisions of a procedural law can at time lead to absurd results and cause injustice to parties. Each case has to be decided on its own facts and it is not appropriate to lay down any general rule. The crux of the matter is that where a minor is a defendant in a suit it has to be seen if he is effectively represented. The non-compliance with the provisions of Order 32, rule 3 of Code of Civil Procedure, which no doubt are mandatory, will not render the decree passed in the suit as void in every case. It is only where a Court comes to the conclusion that the minor was not effectively represented and thus he was in fact not a party to the proceedings that the decree passed will be nullity and the minor can either ignore it or avoid it. Where a suit is filed against