

Privy Council Appeal No. 56 of 1927.

Jijibhoy N. Surty - - - - - *Appellant*

v.

T. S. Chettyar (a firm) - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1928.

Present at the Hearing :

LORD PHILLIMORE.
LORD BLANESBURGH.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

The appellant is plaintiff in a suit brought on the original side of the High Court of Rangoon which was dismissed on the 8th January, 1925. On the 28th April he presented to the appellate side of the Court a memorandum of appeal against the decree.

The Judge before whom the appeal came for admission noted that the appeal appeared to be out of time and directed that this point should be argued as a preliminary question before a bench of the High Court. Thereupon the appellant filed affidavits explaining the delay, and also a petition praying for an extension of time. The Court decided that he was in delay, and that no sufficient reason had been shown for any indulgence and dismissed the appeal.

Thereupon the appellant applied for a review of the decree dismissing the appeal, and for the first time argued that under the provisions of the Indian Limitation Act, the time during which he was procuring a copy of the decree and a copy of what is called the judgment—that is, the Judge's reasons for the decree—was not to be reckoned as part of the period of 20 days which was prescribed by Article 151 for such appeals.

To this it was answered by the respondents that this section applied only to cases where the Code of Civil Procedure required that the memorandum of appeal should be accompanied by copies of the judgment and decree, and that by the rules of the High Court of Rangoon, which could modify that Code, where the appeal presented was not from a decree in the mofussil but from the original side of the same Court, the appeal could be presented without annexing the two documents, and that *cessante ratione cessat lex*, and, therefore, the period of 20 days was unqualified.

It may perhaps be questioned whether the appellant, who had not taken this point when the matter first came to be argued, was entitled to raise it by a proceeding in review ; but leave was given to him so to apply. The Court then heard his arguments, but decided in favour of the respondents affirming its previous decision that the appeal was out of time. It is from this decision that the present appeal is brought.

Section 12 of the Limitation Act provides (*inter alia*) as follows :—

“(2) In computing the period of limitation prescribed for an appeal an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

“(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded.”

Under the Code of Civil Procedure, Order 41, Rule 1 makes it necessary that the memorandum of appeal should be accompanied by copies of the decree and judgment, and this is the general rule. Section 122, however, gives power to the High Courts, established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, to annul, alter or add to the rules in the code, and by the Government of India Act, 1915, this power is extended to other High Courts. Several High and Chief Courts have exercised this power, and in particular this High Court has made rules in the following terms :—

“Memoranda of appeal and applications for revision shall be accompanied by certified copies of the following documents :—

“(1) The decree or order against which an appeal or an application is made.

“(2) The judgment on which such decree or order is founded unless the Court dispenses therewith, and

“(3) In appeals and applications from appellate decrees or orders the judgment of the Court of First Instance, unless the Court dispenses therewith.

“Provided that a memorandum of appeal against a decree or order of the High Court in the exercise of its Original Civil Jurisdiction may be presented without a certified copy of the decree or formal order accompanying it.”

It is therefore not necessary on an appeal to the appellate side that the memorandum of appeal should have both documents

annexed to it. And if the only reason for excluding the time for procuring these documents was that they were necessary to the presentation of the appeal, it might be said that the provisions of Section 12 could not have been meant to apply to such a case.

Even so, however, there would be a difficulty in dealing with the grammatical construction of the words ; but their Lordships, if they had found a consistent course of practice, would have been disposed to accept the construction put upon them by the High Court of Rangoon. When, however, the matter comes to be examined, it is found that there have been divergencies of opinion in the several High Courts, and that the more prevalent opinion is not that which has been taken by the High Court of Rangoon.

In *Haji Hassum Oomer v. Nur Mahomed* (I.L.R. 28 Bomb., p. (643), decided in 1904), Sir Lawrence Jenkins C.J. and Batchelor J. held that in reckoning the time for presenting an appeal, the time required for obtaining a copy of the judgment must be excluded, even though by the rules of the Court it was not necessary to obtain a copy of the judgment to file with the memorandum of appeal.

In *Kirka Ram v. Rakhy* (Punjab Records, 1907, p. 524), the Court held that Section 12 of the Limitation Act applied to appeals under Section 70 of the Punjab Courts Act under which the period for appealing was 90 days, and that the time required for obtaining copies of the judgment and decree must be excluded, though by the rules of the Court such copies were not required to be annexed to the memorandum in that particular class of appeal.

In *Kalipada v. Shekhar Basini* (24 Calcutta Law Journal, p. 235), Sir Lancelot Sanderson C.J., and Mookerjee J., held that in a case where the period of 90 days was prescribed for appealing, Section 12 of the Limitation Act excluded the period required for obtaining a copy of the decree, even though the rules did not prescribe that a copy of the decree should be attached to the application.

The point also arose, though indirectly, as a matter for consideration, on *Wajid Ali Shah v. Nawal Kishore* (I.L.R. 17 All., p. 213). In that case the argument began from the other end. It was contended for the respondent that it must be the rule that a copy of the decree should be annexed to the memorandum of appeal, because the Limitation Act excluded the time for procuring that copy. But the reply made by Sir John Edge C.J., presiding over a full Bench, was that there might be other reasons for giving to the appellant this time. The Chief Justice pointed out that the legislature might intend to give possible appellants time to consider the terms of the decree before hurrying into an appeal from it.

To these authorities it should perhaps be added that in the case of *Pramatha Nath Roy v. Lee* (49 I.A., p. 307, decided in 1922), it seems to have been assumed that the time properly required for obtaining copies of the two documents was to be excluded, the discussion turning upon the question whether the steps taken by the

appellant were sufficiently prompt to entitle him to the benefit of this provision.

It appeared at one time during the course of the argument that an earlier decision of a full bench of the High Court of Allahabad when Sir Robert Stewart was Chief Justice (*Fazal Muhammed v. Phul Kuar* (I.L.R. 2 All., p. 192), decided in 1879), was to the contrary effect; but after closer examination it was discovered by their Lordships that the case was not a decision on the Limitation Act, but upon what is known as a letters-patent appeal, that is an appeal under the clause in the charter constituting the Court, which clause fixes its own period for appeal and has no provision like that in the Limitation Act for excluding the period of time required for getting copies of the judgment and decree.

The learned counsel for the respondents who, at first, relied upon this case, upon consideration, saw that this was so, and withdrew the case from his argument. It seems however, that other tribunals have not been equally fortunate in discovery. The three other decisions on which the respondents relied take their origin from a misapprehension of this case in 2 All.

In *Jadhoji Raghoji v. Rajoo Babaji* (1 Bomb. L.R., p. 112, decided in 1899), the Court expressed the opinion that inasmuch as the annexation of the two documents to the memorandum of appeal was not necessary, the exclusion provided by Section 12 of the Limitation Act did not apply. However, in the circumstances the Court held that the delay might be excused, and allowed the appeal to proceed. This may explain why the apparently opposite case in I.L.R. 28 Bombay came to be decided without referring the matter to a full bench.

There is, at any rate, this to be said, the earlier case in 1 Bomb. professes to be founded on the case in 2 All. which, as already observed, when closely investigated, affords no such foundation.

Then there are two cases in the High Court of Madras. The earlier one, *Kumara Akkappa Nayanim Bahadur v. Sithala Naidu* (I.L.R. 20 Mad., p. 476, decided in 1897 by Sir Arthur Collins C.J., and Shephard J.), in which it was held definitely that the period was not to be deducted, the Chief Justice saying "that the provision can only be held to apply where it is necessary to file with such appeal a copy of the decree or judgment," and Shephard J. quoting the case in 2 Allahabad as supporting his view.

It so happens, however, that there was another ground upon which it could be held, and was held, that the section of the Limitation Act did not apply, as the proceedings were under an Act which is complete in itself, though this was not the prominent ground put forward by the Court.

Lastly comes the other case (*Abu Backer Sahib v. Secretary of State*, I.L.R. 34 Mad., p. 505, decided in 1909), the point arising under the same Act, and the case being decided like the previous one, on both grounds, though on this occasion greater prominence was given to the special Act.

Besides these authorities there are, in the arguments in the cases cited, references made from time to time to unreported cases, and their Lordships have also investigated some authorities laid before them which, however, have no real bearing. The result, as has been already stated, is that the preponderance of practice is in favour of the appellant.

Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation. Section 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.

If, indeed, it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt when the case does not come from up country, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the legislature may not wish him to hurry to make a decision till he has well considered it.

There is force no doubt in the observation made in the High Court that the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioners; and their Lordships would be unwilling to discourage any such effort. All, however, that can be done as the law stands, is for the High Courts to be strict in applying the provision of exclusion.

The word "requisite" is a strong word; it may be regarded as meaning something more than the word required. It means "properly required," and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default.

But for that time which is taken up by his opponent in drawing up the decree, or by the officials of the Court in preparing and issuing the two documents, he is not responsible.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the case remitted to the High Court to be heard upon its merits. The appellant must have the costs of the appeal to His Majesty in Council and the costs of the first hearing when the admissibility of his appeal was discussed in the High Court.

Inasmuch, however, as he did not take the right point on that occasion and thereby brought about the application in review, he must pay the costs of that application by way of deduction from those awarded to him.

In the Privy Council.

JIJIBHOY N. SURTY

vs.

T. S. CHETTYAR (A FIRM).

DELIVERED BY LORD PHILLIMORE.

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