Addl. Collector of Customs, Calcutta & Anr.

Vs

M/s. Best & Co.

Civil Appeal No. 275 of 1966

(K. Subha Rao, V. Ramaswami-I, J.M. Shelat JJ)

25.03.1966

JUDGMENT

SHELAT, J.-

On March 31, 1959 the respondents obtained a licence to import certain machinery from West Germany. The import licence contained particulars of the machinery to be imported and inter alia stated that its value would be "C.I.F. value of Rs. 45,000". One of the conditions upon which the licence was issued was that :

> "the above application is accepted and import licence is granted having quantity and value as the limiting factor and is not valid for clearance if the actual value of any item exceeds the C.I.F. value indicated in the licence by more than five per cent."

The machinery arrived at the port of Calcutta sometime in July 1960 and was allowed to be cleared on the bill of entry submitted on behalf of the respondents. The bill of entry showed the C.I.F. value of the machinery at Rs. 44,843.61 nP. The customs authorities thereafter assessed the duty payable on the said machinery and the duty so assessed was paid by the respondents. On May 6, 1961, in consequence of certain information received by the authorities a search was made of the business premises of the respondents and also of Stahlumon & Co. Ltd., the agents of the exporters. As a result of the search certain documents and papers were seized by the customs authorities. On June 19/20, 1961 a notice was served upon the respondent calling upon them to show cause why action should not be taken against them under s. 167(8) of the Sea Customs Act, 1878. The notice alleged that the respondents were guilty of illegal import of goods worth Rs. 6,730.74 nP, that being the excess value of the goods permitted to be imported under the said licence. The respondents in due course gave their explanation. Thereafter an amended show cause notice dated September 21, 1961 was served upon the respondents charging them under s. 167(8) of the Sea Customs Act read with s. 3(2) of the Imports and Exports Control Act, 1947 for illegally importing the said consignment. The respondents were given a personal hearing and thereafter the first petitioner passed an order dated March 17, 1962 directing confiscation of the said machinery and imposing a fine of Rs. 20,000 in lieu of confiscation and further imposing a personal penalty of Rs. 25,000/-. Aggrieved by this order the respondents filed a petition in the High Court under Art. 226 of the Constitution praying for mandamus directing the petitioners to rescind the order dated March 17, 1962 and for certiorari quashing the said order. The learned single Judge who heard the petition passed an order dated September 2, 1963 dismissing the petition holding that the said import was illegal. Thereupon the respondents filed an appeal against the said order and the Appellate Bench of the High Court by its orders dated December 18, 1964 allowed the respondents' appeal directing the petitioners to forbear from giving effect to the said order of the first petitioner. The petitioners filed an application for a

certificate under Art. 133 but the Appellate Bench of the High Court by its order dated August 17, 1964 dismissed the said application on the ground that it was barred by limitation, though holding that

> (i) the valuation tests laid down in sub-cl. (a) and (b) of Art. 133(1) were satisfied, and
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> (ii) that the order being one of reversal the petitioners were otherwise entitled to a certificate.

The present appeal is against the said order dated December 18, 1964 by which the High Court issued the writ of mandamus against the petitioners.

As aforesaid, the High Court delivered its judgment and passed the abovementioned order allowing the respondent's appeal on December 18, 1964. On December 19, 1964 the petitioners applied for certified copies of the said judgment and the said order. The certified copy of the judgment was furnished to the petitioners on January 18, 1965. The petitioners however waited for the certified copy of the said order which was yet not furnished to them. As the certified copy of the said order was not finalised and was not ready the petitioners filed the said application for leave on May 10, 1965 annexing thereto the certified copy of the judgment only. On July 17, 1965, a certified copy of the said order was furnished to the petitioners but they did not annex it to their application for leave as it was already filed. As stated earlier the High Court dismissed the application by its order dated August 17, 1965, on the ground that it was barred by limitation. The High Court however observed that if the petitioners had annexed the certified copy of the said order furnished to them on July 17, 1965 they would have been entitled to exclude the time taken in obtaining it from the period of limitation under s. 12(2) of the Limitation Act. The result according to that view would be that :-

> (i) if the petitioners had waited till July 17, 1965 and filed their application annexing also the certified copy of the said order their application would have been within time as they would have been entitled to exclude the time for obtaining it;
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> (ii) if they had amended their application and annexed the certified copy of the order on receiving the same they would still have been entitled to exclude the aforesaid period and their application then would have been within time; and
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> (iii) if they had withdrawn the application and filed a fresh application annexing thereto the certified copy of the said order such fresh application would have been within time as they would have been entitled to exclude the time taken in obtaining the certified copy of the order. According to the High Court the petitioners however were not entitled to exclude the time for obtaining the certified copy of the order as they had filed the said application without annexing thereto the copy of the said order and their application filed on May 10, 1965 was already time barred.

According to the respondent, since under Art. 132 of the Limitation Act the application for leave had to be made within 60 days, the petitioner's application lodged on May 10, 1965 was clearly beyond 60 days even after the certified copy of the judgment was furnished to them on January 18, 1965. Consequently, the petitioners' application was time barred and was rightly rejected by the High Court.

The question for determination is whether the application for leave to appeal was barred by

limitation and the petitioners were not entitled under s. 12(2) of the Limitation Act to exclude the time taken in obtaining the certified copy of the said order. Section 12(2) provides that in computing the period of limitation for an appeal or application for leave to appeal, the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised shall be excluded. Similarly, under sub-section 3 where an application is made for leave to appeal, from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or an order is founded shall also be excluded. On a plain reading of these sub-sections, it is clear that the time for obtaining the certified copy of both the judgment and the decree or order as the case may be must be excluded while computing the period of limitation. The object of the exclusion is to enable the person desiring to appeal to consider the terms of the decree, judgment and order before he decides to launch a further proceeding in respect of it.

Two views were, however, canvassed before us on the construction of s. 12. One was that the right of exclusion of time is qualified by the words "time requisite for obtaining a copy of the decree, sentence or order" in sub-section 2. Therefore, if an application for leave to appeal does not require a certified copy of the order in question to be annexed to the application, it is not possible to say that the time required for obtaining such a copy was requisite. In such cases the time in obtaining the copy would not be requisite time and consequently the applicant would not be entitled to exclude the time taken in obtaining the certified copy of the order. Certain decisions of some of the High Courts have also taken the view that such an applicant would not be entitled to the benefit of the sub-section where a copy of the decree, judgment or order is not actually annexed to the application or the memorandum of appeal. The other view is that sub-ss. 2 and 3 of s. 12 enact the rule of exclusion as a positive direction. The object of the sub-section being to afford a party opportunity to consider his position even where a certified copy of the judgment gives all the necessary information enabling the party to decide the proceed further or not, he would nevertheless be entitled to exclude the time for obtaining the certified copy of the decree or order. It has been held in some decisions that even in cases where it is not necessary to prepare a formal order, if such an order is prepared, the party would be entitled to the benefit of exclusion of time taken in preparing and furnishing a copy thereof where it is applied for.

Counsel for the respondents relied on the first view and argued that though the petitioners applied for certified copies of both the judgment and the order, they were at best entitled to exclude the time for obtaining the copy of the judgment as they had annexed such a copy but not to the exclusion of time in obtaining the latter. He contended that though the petitioners applied also for the copy of the said order it was not necessary for them to annex it to their application and in fact though it was applied for and obtained it was not actually annexed. That being the position and the application for leave to appeal being competent without annexing either the certified copy of the judgment or of the order under the rules of the High Court of Calcutta it would not be possible to say that the time for obtaining the copy was time for something that was requisite and therefore that time could not be excluded. He also argued that the rules of the High Court of Calcutta not only did not require such a party to annex a copy of the order but the prescribed form for such an application was mandatory in language and was a provision to the contrary. He therefore argued that there was a double reason for the petitioners not being entitled to the benefit of the exclusion.

We shall deal with the second contention first as it is capable of an easy disposal. Rule 4, in Chapter XXXIIIA of the Rules of the High Court requires that an application for leave to appeal shall be made by a notice of motion before the appellate court and shall be presented in the prescribed form, viz., Form No. 3, That form does not require that a certified copy of the judgment and/or decree or order need be annexed to such an application. The rule and the form thus enable a party to file an

application for a certificate without annexing either a copy of a judgment or a copy of an order. But that does not mean that the rule and the form lay down any mandatory direction that a copy either of the order or of the judgment shall not be annexed. The rule and the form thus do not assist or further the argument urged by counsel for the respondents.

In regard to his first contention the learned counsel for the respondents urged that sub-ss. 2 and 3 of s. 12 would not apply where it is not necessary to annex a copy of the judgment or order. For, in such a case it is not possible to say that the time taken in obtaining such a copy is time "requisite" within the meaning of that expression in sub-s. 2 of s. 12. Exclusion of the time required in obtaining a copy of the order therefore can only be allowed if and only if, such a copy is either required to be annexed or in any event is in fact annexed to the petition for leave to appeal. The question is : is the provision for exclusion of time in s. 12(2) dependent upon whether the rules of a court permit a petitioner to file an application for leave with on without a copy of the judgment or order or decree and also where the rules so permit whether he has annexed such a copy to his application ? In Surty v. Chettyar [55 I.A. 161] the Privy Council after considering various decisions of different High Courts held that (1) the preponderance of practice in India was that time for obtaining a copy of the judgment or decree or order should be excluded even though under the rules of the Court it was not necessary to obtain a copy of the judgment or decree to be filed with the memorandum of appeal, and (2) that on a grammatical construction of s. 12(2), the sub-section plainly lays down a positive direction for exclusion of time without any reference to the Code of Civil Procedure or any other Act. In that case the appellant had brought a suit on the original side of the High Court of Rangoon. That suit was dismissed on January 8, 1925. On April 28, he filed his memorandum of appeal before the appellate side of the High Court. A question arose whether the appeal was filed in time. The appellant tried to explain the delay and prayed for extension of time but the court refused to condone the delay and dismissed the appeal. The appellant then filed an application for review and it was then that he for the first time invoked sub-ss. 2 and 3 of s. 12 contending that the time taken in obtaining the copy of the order and of the judgment should be excluded. The Court upheld the contention of the respondents that such time could not be excluded as under the rules of that High Court the memorandum of appeal could be filed without annexing thereto the copy of the judgment or the order. This view was challenged in appeal before the Privy Council. The rule on which the respondents in that case relied provided that a memorandum of appeal and an application for revision should be accompanied by certified copies of the judgment and decree unless they were dispensed with by the court. That rule however had a proviso which was in the terms following :-

> "Provided that a memorandum of appeal against a decree or order of the High Court in the exercise of the original jurisdiction may be presented without a certified copy of the decree or formal order accompanying it."

Relying on this rule, it was contended that inasmuch as the proviso enables the appellant to file his appeal without a copy of the order or judgment the appellant would not be entitled to exclusion of time as such time would not be "requisite" time within the meaning of s. 12(2) and the High Court was therefore right in dismissing the appeal as being beyond time. The Privy Council disagreed with this contention holding that s. 12 contained a positive direction for exclusion of time and that such direction applied irrespective of whether the rules permitted the filing of an appeal or an application without annexing the copy of the order or judgment. The Privy Council emphasised that the positive direction contained in s. 12 was unconditional inasmuch as there was no reference therein to the Code of Civil Procedure and the section did not say why the time was to be excluded. At page 170 of the report the Privy Council observed :

> "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."

These observations were an answer to the contention that no time could be requisite for obtaining something not requisite. The legislature allowed the exclusion even though the rules of a court might not require a copy to be annexed to the memorandum of appeal for a party who intends to file an appeal may desire to examine the decree or the judgment before he launches a further proceeding. Therefore, the exclusion was allowed irrespective of the rules of a court which permit a party to file an appeal without annexing a certified copy of the judgment or decree or order.

In Imperial Bucket Co. v. Smt. Bhagwati Basak [A.I.R. 1954 Cal. 520] there are however observations to the effect that an appellant will have the benefit of s. 12 in a case where he has annexed to the memorandum of appeal a certified copy of the judgment appealed from even though by the statute under which the appeal is filed, no certified copy of the order appealed from is required. This decision does not necessarily mean that where a copy is applied for and obtained but not annexed the time in obtaining it was for a thing not requisite. As the Privy Council observed, a party might like to examine the judgment or the decree or the order before he challenged it in a higher forum. Though the judgment states that such time would be excluded where the copy is annexed, it does not lay down that there can be no exclusion of time where it is not annexed. But in Gangaram v. Beharilal [A.I.R. 1952 Bhopal 39] a view has been taken that sub-ss. 2 and 3 of s. 12 would only be attracted when a copy of the judgment or decree or order appealed from accompanies the application for review. This view is not in consonance with and in fact is contrary to the interpretation of s. 12 by the Privy Council in Surty's Case [54 I.A. 161] and is therefore unwarranted. The same must also be said of Abdul Aziz v. Jai Ram [A.I.R. 1951 H.P. 67]. As observed by the Privy Council in Surty's Case [54 I.A. 161] the view of the High Courts of Bombay, Calcutta and Allahabad as expressed in Haji Hassum v. Noor Mohammad [I.L.R. Bom. 643], Kalipada v. Shakhar [24 Cal. 235], and Waji-Ali Shah v. Nawal Kishore [I.L.R. 17 All. 213] was that an appellant was entitled to exclusion of time in obtaining a copy of a judgment and decree even though the rules permit him to file the appeal without annexing such a copy. The view contended for on behalf of the respondents is thus not only contrary to the decision of the Privy Council but if accepted would lead to a somewhat surprising result, viz., that if the petitioners had waited till the copy of the order was furnished to them, their application would have been in time or if they had withdrawn their application and filed a fresh one or amended their application and annexed the copy of the order such a fresh application, or such amended application, which in its unamended form was in their view time barred, would have been well within the period of limitation. In our view such a result is not to be contemplated. As the Privy Council has laid down the provisions of s. 12(2) and (3) are a positive direction excluding the time taken in obtaining a copy of the judgment and decree or order as the case may be and those provisions are irrespective of the Code of Civil Procedure or the rules made by a court under s. 122 of the Code. Such rules if they permit a memorandum of appeal to be filed without annexing thereto a copy of the judgment or decree or order confer a privilege on a would be appellant but do not govern the positive direction

contained in s. 12. The High Court in this view, therefore, was not right in dismissing the petitioners' application for leave to appeal on the ground that it was barred by limitation.

In the result, we allow the appeal and set aside the High Court's order of dismissal and remand the case directing the High Court to decide that application in the light of this judgment and consider whether the petitioners were entitled to leave under Art. 133 of the Constitution. As we are allowing the appeal, no order need be passed on the petition for condonation of delay. The Special Leave Petition 1110 of 1965 is allowed to be withdrawn. There will be no order as to costs.

Appeal allowed.

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