

(1963) 08 KL CK 0041

In the High Court Of Kerala

Case No : C.M.P. No. 3134 of 1961

Bhanumathi Amma Rugmini Amma and Others

APPELLANT

Vs

Nani Amma Kamalamma and Others

RESPONDENT

Date of Decision : 30-08-1963

Acts Referred:

Limitation Act, 1908 — Section 12(2), 12(3)

Citation : AIR 1964 Ker 173

Hon'ble Judges : M.S. Menon, C.J;S. Velu Pillai, J;K.K. Mathew, J

Bench : Full Bench

Advocate : C.K. Sivasankara Panicker and P.G. Para, eswara Panicker, for the Appellant; T.S. Krishnamoorthy Iyer and P.C. Chacko, for the Respondent

Judgement

Mathew, J.—The question referred to this Bench for decision is whether, in computing the period of limitation for an application for leave to file an appeal in forma pauperis, the time requisite for obtaining copy of the judgment can be excluded. The relevant provisions of the Limitation Act are Sub-sections (2) and (3) of Section 12, and they read:

"Section 12(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 the judgment on which it is founded shall also be excluded."

There is a divergence of opinion among the various High Courts as to whether the provisions of Sub-section (3) apply in the case of an application for leave to appeal.

2. Sub-section (2) refers to three classes or categories of cases, an appeal, an application for leave to appeal, and an application for review of judgment and it

provides that not only shall the day on which the judgment complained of was pronounced be excluded in computing the period of limitation, but also the time required for obtaining a copy of the decree appealed from shall be excluded. Sub-section (3) provides that the time requisite for obtaining a copy of the judgment complained of shall be excluded where a decree is appealed from.

3. Although sub-section (2) speaks of three classes or categories of cases, it provides for exclusion of the time requisite for obtaining a copy of the decree only, in cases where the decree is appealed from or sought to be reviewed. Prima facie an application for leave to appeal in forma pauperis is not an appeal from the decree, but only a step anterior to an appeal. But it would be a strange omission on the part of the legislature if the words decreeappealed from in sub-section (2) are held not to include an application for leave to appeal. We are not aware of any case in which it has been held that a copy of the decree need not accompany an application for leave to appeal in forma pauperis, or that the time requisite for obtaining a copy of the decree should not be excluded in the case of an application for leave to appeal. On the other hand it has been held that, in computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the decree may be excluded. See *Ram Sarup v. Jaswant Rai* AIR 1915 All 335(2) and *Mahabir Prasad Tewari v. Jamuna Singh* AIR 1922 Pat 255 . In *In Re: The Secretary of State for India in Council*, , *Devadoss and Wallace JJ.* have held that:

"Under Sub-section (2) when an application for leave to appeal is put in, the time requisite for obtaining "a copy of the decree sought to be appealed from" may be deducted."

4. Order XLIV. Rule 1, Sub-rule (2) of the CPC reads:

Rule 1 (2). The appellate Court, after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

The sub-rule would indicate that the court is to peruse the application, the judgement and the decree appealed from, indicating thereby that the decree itself is being appealed from when an application for leave to file the appeal in forma pauperis is made. We think that the words "decree, sentence or order appealed from" in Sub-section (2) of Section 12 would include an application for leave to appeal. If that be so, then the only question is whether the words "the decree appealed from" in sub-section (3) would include an application for leave to appeal. We see no reason why these words should have a more restricted meaning in Sub-section (3) than they have in Sub-section (2).

5. This question came up for consideration in *Baldeo Pershad Vs. Dwarika Pd.*, where a Full Bench of that Court, after a review of the authorities, has come to

the conclusion that the time requisite for obtaining a copy of the judgment should be excluded in the case of an application for leave to appeal to the Supreme Court Mootham C. J., who spoke for the Full Bench observed as follows at page 335 ;

"In our opinion the answer to the question which has been referred turns on the meaning which must be given to the words "decree appealed from" in Sub-sections (2) and (3), and we think that these words must bear the same meaning in Sub-section (3) as they do in Sub-section (2) prima facie the words "decree appealed from" would not apply in the case of an application for leave to appeal, for such an application is a step anterior to an appeal proper; but there are considerations which have led us to the conclusion that these words are intended to cover the case of such an application."

The same view has been taken in *In Re: The Secretary of State for India in Council, and Hunter v. Ehsan Husain* AIR 1941 Oudh 247.

6. A different view has been taken in *Neki Kishen Sahai and Others Vs. Rup Chand and Another*, . The learned judges there, adopted the apparently plain construction of Sub-section (3) and held that it would apply only to the case of an appeal from the decree itself and not to the case of an application for leave to appeal.

7. In *The Dharwar Bank Ltd. Vs. Vasudeorao Madhavrao Deshpande*, it was held that Sub-section (3) does not warrant the exclusion of the time requisite for obtaining the copy of the judgement in computing the period of limitation for an application for leave to appeal. The same view was taken in *Punjab Co-operative Bank Ltd, Amritsar v. Punjab National Bank Ltd, Amritsar* AIR 1939 Lah 43. All these decisions proceeded upon the basis that the words "decree appealed from" in sub-section (3) should be restricted to the case of an appeal from the decree itself. We think that there is no justification in so limiting the meaning of these words in Sub-section (3). We think that the words "decree appealed from" occurring in Sub-section (3) have the same meaning as they have in Sub-section (2).

8. Some light on this question is thrown by articles 170 and 179 of the first schedule to the Limitation Act. These articles prescribe the periods of limitation within which application for leave to appeal to the Supreme Court and application for leave to appeal as a pauper respectively must be made, and in each case time begins to run from the date of the "decree appealed from, "indicating thereby that it is the decree itself that is being appealed from, when an application for leave to appeal is made.

9. This conclusion is fortified by the fact that an application for leave to appeal in forma pauperis must under Order 44, Rule 1 be accompanied by a memorandum of appeal, and it goes without saying that to prepare a memorandum of appeal it is necessary that one should look into the judgment In *Jijibhoy N. Surty v. T. S. Chettyar* firm AIR 1928 P. C. 103, at p. 105 the Judicial Committee of the Privy

Council held that the time spent in obtaining copies of the judgment and decree must be excluded in computing the period of limitation for an appeal even though such copies need not, according to the rules of the High Court of Rangoon, accompany the memorandum of appeal. In the course of the discussion it was observed :

"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 petitioner 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."

10. Order XLIV, Rule 1(2) would indicate that the court has to peruse judgment and the decree appealed from in order to be satisfied that the decree is contrary to law. How could the court peruse the judgment and decree appealed from unless the memorandum of appeal is accompanied by these documents?

11. It has been held in *Rajammal Vs. G.S. Parthasarathi Ayyengar*, at p. 602:

"It can hardly be intended that it is for the court to call for copies of the judgment and decree when it has to consider an application made to it for leave to appeal as a pauper. With regard to the absence from O. XLIV, Rule 1. Civil P. C., of any reference to the application being subject to the provisions of Order XLI, Rule 1, Civil P. C., such as was to be found in Section 592 of the old Code, it seems to me that such reference is redundant in the light of the proviso. In the view I take there was therefore no valid application for leave to appeal before the Court without the presentation of the copies of decree and judgment."

12. Therefore, both as a matter of construction of Sub-sections (2) and (3) of Section 12, and as a matter of principles, we hold that the time taken for obtaining the copy of the judgment should be excluded in computing the period of limitation for an application for leave to appeal in forma pauperis. We answer the question accordingly.