

(1982) 09 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Original Order No. 114 of 1982

State of West Bengal and Others

APPELLANT

Vs

Bio-Drug Laboratories (P) Ltd.

RESPONDENT

Date of Decision : 24-09-1982

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10A, 11, 12, 9
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 12, 12(2)
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 124, 125, 127(1)

Citation : (1987) 27 ELT 394

Hon'ble Judges : Murari Mohan Dutt, J;Manoj Kumar Mukherjee, J

Bench : Division Bench

Advocate : Arun Prokash Chatterjee and Bagchi, for the Appellant;Subrata Roy Chowdhury, P.K. Roy and A.K. Roy, for the Respondent

Judgement

Murari Mohan Dutt J.

1. This appeal has been preferred by the State of West Bengal against the judgment dated 22nd September, 19 80, of Padma Khastgir, J., making absolute the rule nisi obtained by the respondent Bio-Drug Laboratories (P) Ltd., on its application under Article 226 of the Constitution. In the writ petition, the respondent challenged the order dated 27th December, 1972, of the Deputy Commissioner of Excise (Special), West Bengal, directing the appellant to pay a sum of, Rs, 1,75,667.97 on account of excise duty payable under the Medicinal and Toilet Preparation (Excise Duties) Act, 1955, as amended by the Medicinal and Toilet Preparations (Excise Duties) Amendment Act, 1961, for the period from 1st June, 1961 to. 31st March, 1971, as upheld on appeal by the Commissioner of Excise (Special), West Bengal, and thereafter, by the State Government. Further, the respondent claimed a refund of the sum of Rs. 1,64,500 paid by it from time to time towards assessment of excise duty under the Act as amended.

2. At the very outset, Mr. Subrata Kumar Roy Chowdhury the learned counsel appearing on behalf of the respondent, has taken a preliminary objection to the maintainability of the appeal. It is contended by him that the appeal is hopelessly barred by limitation. In order to appreciate the said contention, the relevant particulars relating to the question of limitation are set out below:

"September 22, 1980 : Order appealed from was passed. September 23, 1980 : Application for a certified copy of the order was filed by the appellants. September 27, 1980 : Requisition put in by the appellants for drawing up and completion of the order. April 5, 1982 : Information of the requisite number of folios and stamps is obtained by the appellants from the department and the appellants furnished the same April 8, 1982 : Memorandum of appeal filed by the appellants with the leave of court undertaking to file a certified copy of the order within the period of limitation. May 3, 1982 : Certified copy made ready for delivery to the appellants. May 4, 1982 : The appellants took delivery of the certified copy of the order appealed from."

3. It is contended on behalf of the respondents that the period between 24th November, 1981, when the order was completed and filed, and 5th May, 1982, when the folios were marked cannot be excluded in computing the period of limitation of the appeal, which is 30 days from the date of the impugned order, inasmuch as the said period not "time requisite" for obtaining the certified copy within the meaning of Section 12 of the Limitation Act, 1963. In support of the said contention, the learned counsel for the respondent, has referred to us certain practice stated to be a vogue over years on the original side of this Court in the matter of obtaining a certified copy of a decree or order. We" shall presently notice such practice, but before we do that we may refer to Rule 27 of Chapter XVI of the Original Side Rules of this Court. The relevant portion of Rule 27 provides as follows :

"Except as otherwise provided in the Rules, or unless otherwise ordered, application shall be made for the drawing up of every decree and order, other than an order directing a person to furnish security, by requisition to the Registrar in writing by the party in whose favour the decree or order was made within three days from the date of the decree or the order, or, in default of his applying within such time, by any party within seven days from the date of the decree or order."

4. In view of Rule 27, the initial responsibility was of the respondent to apply for the drawing up of the order by requisition to the Registrar in writing within three days of the date of the order. As the respondent did not take any steps in that regard, the appellants submitted a requisition for drawing up and completion of the order on 27th September, 1980, that is, within seven days of the date of the order. The order was completed on 24th November, 1981, and it was filed by the appellants in the Current Record Department of this Court. Therefore, up to that stage, that is to say, up to 24th November, 1981, the appellant had acted in accordance with Rule 27.

5. According to the respondent, after getting the order drawn up, completed and filed, the appellants did not take any further steps for obtaining certified copy till 5th April, 1982, which they should have taken much earlier consistent with the age old practice prevailing in the original side of this Court. The practice referred to "by the respondent is that after a decree or order is filed, it is the duty of a party who has applied for a certified copy of a decree or order for preferring an appeal against the same to immediately inform the officer concerned of the Current Record Department, who marks the folios about the filing of the decree or order. It is said that unless such information is given, the officer concerned will not come to know of the filing of the decree or order, and consequently, the folios will not be marked and the certified copy will not be prepared and delivered within a reasonable time and there will be delay. Our attention has been drawn to the following observation of Chakravartti, C.J., in a Bench decision of this Court in *Smt. Prativa Bala Mitra v. Gourlal Mitra*-ILR (1968) Cal 554.

"It is stated by the office that no certified copy of any order or decree can be supplied till the decree or order has been filed and the copying department cannot possibly become aware whether a decree or order has or has not been filed, unless it is informed. There has, accordingly, grown up a practice of very long standing that immediately after a decree or order is filed, a party who has put in a requisition for a certified copy informs the copying department of the fact and then the copying department proceeds to mark the folios."

6. In an unreported decision of a Division Bench consisting of Ramendra Mohan Datta and S.K. Hazra, JJ., in Appeal No. 51 of 1963, disposed of on October 7/10, 1977, Datta J., who delivered the judgment of the Bench made the following observation in regard to the said practice as noticed by Chakravartti, C.J., in *Prativa Bala Mitra*'s case-ILR (1968) Cal 554.

"With utmost respect to the learned Chief Justice, I am constrained to hold that the practice laid down in the said judgment is not the correct practice which is followed in this Court. We have since been informed by the Registrar of this Court that the person who gave requisition for drawing up of the decree files it after obtaining the same and then informs the Current Record Department that the decree has been filed. Thereafter, the Current Record Department assesses the folios and the person asking for certified copy and who has already given requisition for getting the certified copy of the decree would then furnish the stamps on the folios and thereafter, the folios are assessed by the Current Record Department and the same would be transmitted to the copying department and then it would make available to the party who has applied for and paid for the stamps."

7. The learned Judge, therefore, recognises the practice of informing the Current Record Department as to the filing of the decree or order, and that without such information the folios cannot be assessed. Chakravartti, C.J., also referred to such a practice in the said observation, but it has been stated by him that the information about the filing of the decree or order has to be given to Copying

Department. Actually the information is to be given not to the Copying Department, but to the Current Record Department. Be that as it may, there is, therefore, a long standing practice on the original side of this Court of supplying the Current Record Department with the information about the filing of the decree or order so as to enable that department to mark the folios be supplied by the party applying for the certified copy of a decree or order. We had also called for a report from the Registrar of the original side of this Court. The Registrar has submitted a report which supports the contention of the respondent about such a practice prevailing in the original side.

8. Rule 3, Chapter 40 of the Original Side Rules, provides: "Where no other provision is made by the Code or by these rules the present procedure and practice shall remain in force." This rule has been relied on by the respondent in support of its contention that it was obligatory upon the appellants to follow the practice referred to above, and that the time which has elapsed due to the failure of the appellants is not informing the Current Record Department of the filing of the order cannot be excluded as time requisite or the time properly required to obtain the certified copy.

9. At this stage, it may be mentioned that we have allowed Mr. Salil Kumar Ganguly, on the prayer made by him, to intervene in this appeal on behalf of the Incorporated Law Society only insofar as it relates to the question of limitation. It has been pointed out by him that after the decree or order is drawn up and filed in the Current Record Department, such filing is entered in a ledger maintained in that department. The officer of that department who marks the folios sits in the room next to that where the said ledger is kept. It is submitted by him that the officer who is entrusted to mark the folios may, Without least effort, look into the ledger and ascertain whether in any" particular case the decree or order in respect of which a copy application has been made has been filed or not. Mr. Ganguly asserts that it is the duty of such officer to do the same but, as the litigants applying for certified copies of decrees or orders in their earnestness to obtain certified copies of the same earlier, inform the officer concerned about the filing of the decrees or orders and satisfy him about the same from the entries in the ledger, he does not generally move in the matter until he is so informed The counsel submits that there is no need or necessity to inform the officer concerned about the filing of the decree or order which he can easily ascertain from the entries in the ledger. After the folios are assessed, such assessment is entered in the Folio Assessment Book which is accessible to all.

10. We may now consider whether, in view of Rule 3 of Chapter 40 of the Original Side Rules quoted above, the long stand practice of informing the officer of the Current Record Department of the filing of the decree or order in that department has the force of law to be observed by the parties applying for certified copies of decrees or orders. In other words, whether the time that would pass by for non-compliance with such practice can be said to be "time requisite" within the meaning of Section 12 of the Limitation Act. The Original Side Rules

were framed in 1914. It is not known since when such practice had come into vogue or whether it was in existence in 1914. Rule 3 refers to "present procedure and practice". So in order to invoke Rule 3, it has to be shown that the practice with which we are concerned was in existence at the time the rules were framed. There is, however, no evidence in that regard.

11. On the assumption that such practice was there in 1914, we may consider the scope and effect of Rule 3 with respect to such practice. Rule 3 will apply only if there is no provision in the Code or in the Rules. There are, however, provisions in the rules for grant of certified copies and the assessment of folios, and these rules are Rules 9, 10 and 12 of Chapter 4; Rule 72 of Chapter 36, item Nos. 52 to 54; and Rule 4(4) of Chapter 40. As the rules contain provisions relating to certified copies of decrees, orders and other documents, it is doubtful if rule of 3 of Chapter 40 will have any application to the practice relied on by the respondent.

12. The rules lay down the procedures relating to various matters. The procedure for obtaining a certified copy of a decree or order is to apply for the same and to get the decree or order drawn up, completed and filed in the Current Record Department. This procedure has to be followed by the party who intends to get a certified copy of a decree or order, and in case it is not followed, it is impossible for him to get the certified copy. In our opinion the practice that is referred to in rule 3 must be of such a nature as that without taking recourse to the same, it will not be possible to get a certified copy of a decree or order. In other words, the practice must be a step in the procedure, not provided for in the rules, without which it is not possible to obtain a certified copy. The practice should be considered an indispensable part of the procedure. Unless the practice is of the above nature, it will not come within the purview of Rule 3.

13. In this connection, we may refer to a decision of the Bombay High Court in *Charity Commissioner Vs. Padmavati and Others*, . In that case, the practice of the Bombay High Court to the effect that the attorneys were to draw the orders and place the same for the settlement thereof before the Prothonotary has been noted, and it has been held that any delay in having the said order drawn up by an attorney cannot be excused. It thus appears that unless the order is drawn up the certified copy cannot be granted. So the practice of drawing up of the order to be appealed against is a vital step in the procedure without which the appellant cannot get the certified copy to be annexed to the memorandum of appeal. In our opinion, therefore, the Bombay High Court was justified in taking note of such practice not provided in the rules and in considering the question of limitation with reference to such practice.

14. The practice, which has grown up over years as referred to above and relied on by the respondent, of informing the officer of the Current Record Department, entrusted with the duty to mark folios, of the filing of the decree or order, is not such as to say that if it is not followed, the certified copy would not be available. It may be that there will be some delay, but such delay is quite immaterial. The

delay may be for various reasons. There may be shortage of officers in the copying department, the record may not be available at the proper time, the typist concerned may be over-burdened with work, etc. The framers of the Rules seem to have considered the delay that might occasion for the reasons mentioned above which is evident from the procedure of filing a memorandum of appeal on the original side without the certified copy of the decree or order with the leave of court. In order to expedite the delivery of the certified copy a party may contact the officer concerned responsible for preparing and delivering the certified copy, as it is done for informing the officer of the Central Record Department of the filing of the decree or order. If any practice has grown up in this regard, it cannot, in our opinion, have the force of a rule by virtue of Rule 3.

15. The most important question is whether any such rule of practice can be exalted to a rule of limitation. The question was dealt with by the Supreme Court in *Chandra Bhushan and Another Vs. Deputy Director of Consolidation (Regional), U.P. and Others*, . The facts in the case before the Supreme Court are that the Allahabad High Court had consistently laid down the practice that the period of 90 days which is the period fixed for appeal to the High Court from the judgment of the lower court should be taken as the period for application for the issue of a writ of certiorari and the time can be extended only when circumstances of a special nature which are sufficient in the opinion of the court are shown to exist. The Supreme Court observed :

"But in the absence of a statutory rule, the period prescribed for preferring an appeal to the High Court is a rough measure; in each case the primary question is whether the applicant has been guilty of laches or undue delay. A rule of practice cannot prescribe a binding rule of limitation; it may only indicate how discretion will be exercised by the court in determining whether having regard to the circumstances of the case, the applicant has been guilty of laches or undue delay."

Thus it appears that although it was the practice of the Allahabad High Court that an application for the issue of a writ of certiorari should be made within the period of 90 days, the Supreme Court could not regard this rule of practice as a rule of limitation.

16. In this connection, we may refer to a later decision of the Supreme Court in *State of Uttar Pradesh Vs. Maharaj Narain and Others*, . The Allahabad High Court dismissed the appeal preferred by the State of Uttar Pradesh as barred by limitation. The order appealed from was passed on 10th November, 1962, and the appeal was filed on 29th March, 1963. The certified copy of the order annexed to the memorandum of appeal showed that the copy was applied for on 15th November, 1962, and the same was ready for delivery on 3rd January, 1963. It appears that in addition to the copy referred to above, the appellant had applied for another copy of the order appealed from on 3rd December, 1962, and the copy was ready for delivery on 20th December, 1962. The appellant also applied for yet another copy of the same order on 21st December, 1962, and that

copy was made ready on the same date. There was no dispute that if the period of limitation was computed on the basis of those copies the appeal was barred by limitation. Indeed, it was contended on behalf of the respondents before the Supreme Court that the appeal was out of time in view of fact that the appellant had applied for and obtained two other copies of the order appealed from and if time was calculated on the basis of those copies the appeal was beyond time. The Supreme Court, in overruling the decision of the Allahabad High Court, holding "the appeal as barred by limitation, distinguished two decisions of the Privy Council relied on by the Allahabad High Court in *Pramatha Nath Roy v. Lee* (1922) LR 49 1A 307 (PC) and *Jijibhoy N. Surty v. T.S. Chettyar Firm*-(1928) LR 55 1A 161 (PC). The Supreme Court observed, inter alia that there could be no question of any default as the steps taken by the appellant were in accordance with law. Further it was observed as follows:

"If the appellate courts are required to find out in every appeal filed before them the minimum time required for obtaining a copy of the order appealed from, it would be unworkable. In that event every time an appeal is filed, the court not only will have to see whether the appeal is in time on the basis of the information available from the copy of the order filed along with the memorandum of appeal but it must go further and hold an enquiry whether any other copy had been made available to the appellant and if so, what was the time taken by the court to make available that copy. This would lead to a great deal of confusion and enquiries into the alleged laches or dilatoriness in respect not of copies produced with the memorandum of appeal but about other copies which he might have got and used for other purposes with which the court has nothing to do."

17. The observation quoted above is of much importance so far as the instant case is concerned. If the rule of practice is considered to be a rule of limitation, in that case, every time an appeal is filed, apart from the information available from the certified copy, the court will have to make an enquiry whether after the filing of the decree or order in the Current Record Department, the appellant had duly intimated the officer entrusted with the work of assessing the folios. This would require an affidavit to be filed by the party filing the appeal which may be controverted by the respondent by an affidavit-in-opposition. If such dispute arises, it will be difficult for the court to come to a decision without taking the evidence of the said officer. Again, it will not be possible for the officer concerned to remember whether he was informed of the filing of the decree or order in the Current Record Department by the party applying for the certified copy of the same even, and if he remembers that fact, it may not be possible for him to remember the date on which such information was furnished to him. So, if such practice is upheld as a rule of limitation, there would be much complication and confusion too. As has been observed by the Madras High Court in *Panjam Thirumala v. Anavemaraddy* ILR (1934) Mad 560 and approved by the Supreme Court in *State of Uttar Pradesh Vs. Maharaj Narain and Others*, the words "time requisite for obtaining a copy of the decree" mean the time beyond the party's

control occupied in obtaining the copy which is tiled with the memorandum of appeal and no an ideal lesser period which might have been occupied if the application for the copy had been filed on some other date.

18. The latest decision of the Supreme Court in *Santimay Dey Vs. Suraiya Properties (Pvt.) Ltd. and Others*, is directly on the question with which we are concerned, namely if a rule of practice can be exalted to a rule of limitation. That question arose before the Supreme Court with regard to the very practice on the original side of this Court. A Division Bench of this Court held that the appellant not having followed the practice, he was not entitled to the exclusion of the entire period from the date on which he applied for the certified copy of the judgment and the date on which the certified copy was ready for delivery. It has been observed by the Supreme Court that granting that the procedure of the kind described by the High Court in its judgment is of a long standing and is widely known, due allowance should have been made in the case for the fact that the appellant was conducting the litigation in person until the Letters Patent Appeal was filed. Thereafter, it has been observed that a rule of practice cannot be exalted to a rule of limitation because a rule of practice can only indicate how discretion should "be exercised by the court in determining whether having regard to the circumstances of the case, the party concerned has been guilty of laches or undue delay; in other words, by treating a rule of practice as a rule of limitation, the court cannot reject a petition for condonation of delay without considering whether in fact the petitioner is guilty of laches or undue delay. It is, therefore, manifestly clear from the above observation of the Supreme Court with regard to this practice prevalent on the original side of this Court, that such practice cannot be treated as a rule of limitation, so that in case of non-compliance with the same, it cannot be said that the appellant will not be entitled to the exclusion of the time taken for such non-compliance. We are unable to accept the contention of the respondent that the said observation has been made by the Supreme Court as the appellant had appeared in person and was not aware of the practice. The consistent view of the Supreme Court expressed in the decisions referred to above including the present one is that a rule of practice cannot be engrafted into the provision of Section 12(2) of the Limitation Act. In this connection, it may be pointed out that in an unreported decision of the Division Bench consisting of A.N. Ray, J. (as he then was), and S.K. Mukherjee, J., in *Taher Brothers v. Benami -Properties* disposed of on 18th April, 1969, though the said practice was referred to, yet it was not relied on. In a later unreported decision of the Division Bench in *Sudhir Kumar Banerjee v. Tukver Co. Ltd.* (Appeal No. 51 of 1963 decided on 7/10th October, 1977 Calcutta High Court), Ramendra Mohan Datta and Hazra, JJ., did not also rely upon the said practice as a rule of limitation. In our opinion, the Supreme Court in *Santimay Dey Vs. Suraiya Properties (Pvt.) Ltd. and Others*, has in unequivocal terms ruled that such practice cannot be treated as a rule of limitation. In view of the said decision of the Supreme Court, we are unable to hold that as the appellant had not followed the practice by informing the officer concerned of the Current

Record Department of the filing of the order appealed from, the delay caused thereby should not be excluded as time requisite within the meaning of Section 12(2) of the Limitation Act and the Appeal should be held to be barred by limitation.

19. Our attention has been drawn to the fact that the respondent itself made an application for a certified copy of the order in question on 25th November, 1981, and got the information about the number of folios and stamps to be furnished by it from the department concerned on 30th November, 1981. The certified copy was ready for delivery on 18th December, 1981, and on that day it was also delivered to the respondent. It is contended that in view of the fact that the respondent obtained the certified copy must earlier than the appellant inasmuch as the respondent had informed the officer concerned of the filing of the order in the department, the appeal should be held to be barred by limitation. We are unable to accept this contention. The contention may be answered in the language of the Full Bench decision of the Madras High Court in Panjam Thirumala v. Anavemaraddy- ILR (1934) Mad 560 (FB) that the words "time requisite for obtaining a copy of the decree" mean not an ideal lesser period but the time beyond the party's control. In our opinion, a party applying for a certified copy is not required to do something which is not incumbent upon him to do under the law. The contention is, therefore, rejected.

For the reasons aforesaid we hold that the memorandum of appeal was not filed beyond the period of limitation as contended on behalf of the respondent. The preliminary objection is accordingly overruled.

20. Now we may consider the merits of the case. The respondent manufactured medicines at its manufactory containing alcohol, which are dutiable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, and also non-alcoholic preparations which are not dutiable under the Act. The alcoholic products are made by the respondent under a licence issued in form No. L-2 under the Medicinal and Toiler Preparations (Excise Duties) Rules, 1956 (hereinafter referred to as the Rules). The licence is renewed from year to year.

21. For the purpose of removal of dutiable goods from the manufactory, the respondent has to comply with certain procedure prescribed by the Rules. Under the procedure, an application in form A.R. 2 in triplicate containing full details of the quantity, quality and description of the dutiable goods is to be filed with the Excise Officer on duty at the manufactory of the respondent. The Officer after checking, verifying and comparing the same with the entries in the M.G. 4 Register maintained by the respondent, assesses the duty payable thereon, and endorses the same on the A.R. 2 forms, two copies of which are retained by him. In accordance with the said procedure, the respondent removed dutiable goods from its manufactory during the period from 1st April, 1961 to 31st March, 1971, and paid excise duty amounting to Rs. 1,08,263.40.

22. On 8th November, 1971, the appellant No. 3, the Deputy Commissioner of

Excise (Special), West Bengal, served a notice on the respondent calling upon him to show cause why its L-2 licence should not be revoked under Rule 87 and or why it should not be dealt with under Rules 124, 125 and 9(2) of the Rules for its alleged failure to maintain correct and proper accounts of dutiable goods manufactured by it during the period from 1st April, 1971 to 16th September, 1971 and demanded a duty of Rs. 34,931.65 being the difference between the duty payable on the goods removed and the duty paid by the respondent. The said sum of Rs. 34,931.65 was paid by the respondent. After the payment of the said amount, the respondent claimed the return of the books seized by the appellants before the said show cause notice was issued.

23. Instead of returning the books, the appellant No. 3 served notice on the respondent on 7th October, 1972, informing the respondent that a sum of Rs. 1,80,677.97 was payable by the respondent as duty on the dutiable goods manufactured by it and removed from the manufactory without payment of duty during the period from 1st April, 1961 to 31st March, 1971. After some written and personal representations were made by the respondent, the appellant No. 3 by his order dated 28th December, 1972, directed the respondent to pay the sum of Rs. 1,75,677.97 as arrear of excise duty for the said period. Being aggrieved by the said order, the respondent preferred an appeal to respondent No. 2, the Commissioner of Excise (Special), West Bengal, but the said appeal was dismissed by the order dated 25th July, 1973.

24. On 21st September, 1973, the respondent moved a writ petition before this Court challenging the legality of the demand for payment of Rs. 1,75,677.97 alleged to be due by the respondent on account of excise duty for the said period from 1st April, 1961 to 31st March, 1971. It was inter alia, contended on behalf of the respondent that the appellant had no jurisdiction to make the "best judgment" assessment for there was no such provision for such assessment in Act or in the Rules, and that the said demand was barred by limitation under Rule 11 of the Rules. During the pendency of the writ petition, the respondent had to pay a total sum of Rs. 1,64,500 in terms of the order of this Court towards the arrear of excise duty as demanded.

25. The writ petition was, ultimately, heard by T.K. Basu, J., on 14th December, 1976. In disposing of the writ application,, the learned Judge directed appellant No. 2, the Commissioner of Excise (Special), West Bengal, to give a fresh hearing to the respondent after making available to it certain information that was obtained by the appellants from the Central Government and such other matter as might be required by the respondent and to reconsider the impugned order dated 25th July, 1973, in the light of the submissions of the respondent at the further hearing. The learned Judge made it clear that he did not decide any question raised in the writ application and the respondent would be entitled to agitate all questions of fact and law at the said further hearing before appellant No. 2.

26. Pursuant to the said order of the learned Judge, appellant No. 2 gave a

further hearing to the respondent, but he confirmed the previous order dated 25th July, 1973, except that the period from 1st April, 1961 to 30th June, 1961, was directed by him to be excluded from the computation of excise duty. Being aggrieved by the said order of appellant No. 2, the respondent preferred an appeal before the State Government under Rule 127(1) of the Rules which was heard by Mr. Ashoke Mitra, the Finance Minister of the State Government. The said appeal was, however, dismissed by the Finance Minister.

27. Thereafter, the respondent moved the present writ application and obtained the rule nisi out of which this appeal arises. Khastgir, J., who heard the rule nisi, came to the conclusion, inter alia, that the appellants had no jurisdiction to make a "best judgment" assessment which is not provided for in the Act or in the Rules. It was also held by the learned Judge that the demand made by the appellants was barred by Rule 11 of the Rules. Upon the said findings, the learned Judge quashed the impugned assessment and demand and directed the refund of the said sum of Rs. 1,64,500 to the respondent. The rule nisi was made absolute. Hence, this appeal.

28. The principal question with which we were concerned in this appeal is whether the demand made by the appellant is barred under Rule 11 of the Rules. It is contended by Mr. Arun Prokash Chatterjee, learned senior standing counsel appearing on behalf of the appellants, that Rule 11 has no application, and the rule under which the demand was made is Rule 9(2) of the Rules. In any event, it is submitted by him that Rule 12 which is residuary in character will apply. In order to appreciate the contention, it is necessary to refer to the said rules which are set out below :

"9. Time and manner of payment of duty. - (1) No dutiable goods shall be removed from any place where they are manufactured or any premises appurtenant thereto, which may be specified by the Excise Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Excise Commissioner may require :

Provided that such goods may be deposited without payment of duty in a warehouse or may be exported out of India under bond as provided in Rule 97 :

Provided further that the Excise Commissioner may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a warehouse keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals not exceeding three months, and the account-holder shall periodically deposit a sum therein sufficient in the" opinion of the Excise Commissioner to cover the duty on the goods intended to be removed from the place of manufacture or storage.

(2) If any dutiable goods are, in contravention of sub-rule (1) deposited in or

removed from, any place specified therein the manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or is left at the manufactory or his dwelling-house, and shall also be liable to a penalty to be determined by the Excise Commissioner which may extend to two thousand rupees, and such goods shall also be liable to confiscation.

11. Recovery of duties or charges short-levied " or erroneously refunded, When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an Excise Officer, or through misstatement as to the quantity or description of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

12. Residuary powers for recovery of sums due to Government. - Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting Government under the Act or these rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

29. It may be stated here that Rules 9, 11 and 12 are verbatim the same as rules 9 and to and 10A respectively of the Central Excise Rules, 1944, except that in Rule 11 of the Rules, the period of limitation is six months, whereas in Rule 10 of the Central Excise Rule it is three months

30. Rule 9(2) of the Rules provides for the imposition of penalty and confiscation of the goods if removed without payment of excise duty in contravention of sub-rule (1). In *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, it has been laid down by the Supreme Court that in order to attract sub-rule (2) of Rule 9 of the Central Excise Rules, which is the same as sub-rule (2) of Rule 9 of the Rules, the goods should have been removed clandestinely and without assessment. There is no allegation in the instant case that the respondent had clandestinely removed the goods from its manufactory. On the contrary, it is not disputed that the goods were removed on the basis of applications made by the respondent in A.R. 2 forms on payment of duty assessed by the Excise Officer. There is, therefore, no question of clandestine removal of the goods, and accordingly, Rule 9(2) will have no application. It is, however, contended on behalf of the appellants that the respondent must have deliberately made misstatements in A.R. 2 as to the quality and quantity of goods removed by it as

a result of which the excise duty was short-levied. It is true that if really the duty had been short-levied as alleged by the appellants, the goods must have been removed on the basis of some deliberate misstatements made in A.R. 2 forms. The appellants have not, however, in the show cause notice alleged that any misstatement was made in A.R. 2 forms. Even assuming that the respondent had made misstatements in A.R. 2 forms as a result of which the duty was short-levied the rule under which such duty can be realised is Rule 11 and not Rule 9(2). Rule 11 prescribes a limitation of six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any. Admittedly, the demand for realisation of the amount of duty short-levied was made by the respondent long after the expiry of the said period of six months. So the demand of the appellants for the said sum of Rs. 1,75,677.97 was barred on the date the notice was served on the respondent.

31. The learned senior standing counsel, however, submits that when, goods are removed on the basis of deliberate misstatements in A.R. 2 forms, it would tantamount to clandestine removal, so that such demand for the payment of the excise duty short-levied would come within the purview of Rule 9(2) which prescribes no period of limitation. We are unable to accept this contention. Such a contention was made in respect of Rule 10 of the Central Excise Rules which is similar to Rule 11 of the Rules with which we are concerned, before a Division Bench of this Court in *Inspector, Central Excise v. Bengal Paper Mills Co. Ltd.* - 82 CWN 766. It was held in that case that the word "misstatement" in Rule 10 of the Central Excise Rules does not mean only bona fide "misstatement", but also includes statements which are alleged to be false. Rule 11 of the Rules will be attracted if the short-levy of the duty takes place, inter alia as a result of collusion of the owner of the goods with the Excise Officer. If there is such a collusion, between the owner and the Excise Officer, there must necessarily be a misstatement in A.R. 2 forms regarding the description or quantity of goods removed from the manufactory. In that case, the misstatement would undoubtedly be a false statement, but it cannot be said that Rule 11 would not apply, for there is the collusion with the officer. So, if the meaning of the word "misstatement" is confined only to unintentional wrong statement, it would be difficult to reconcile such a meaning with an intentional misstatement or false statement made by the owner in collusion with the officer concerned. As held in *Bengal Paper Mill's case*- 82 CWN 766, the word "misstatement" in Rule 11 is not confined only to a bona fide wrong statement, but it included a false statement as well. So, if in consequence of a false statement in A.R. 2 forms, duty is short-levied, Rule 11 will apply and the demand has to be made within six months of such short-levy, which has not been made in the instant case.

32. We are not impressed with the contention of the learned senior standing counsel that in any event, Rule 12 will apply. Rule 12 is a residuary provision and it applies only when there is no other specific provision in the Rules. As we have found that Rule 11 applies, there is no scope for invoking the residuary provision of Rule 12. The learned Judge, therefore, was perfectly justified in holding that

the demand of the appellants was barred by Rule 11 of the Rules.

33. In view of our above finding, it is not necessary for us to consider the contention of the respondent that appellant No. 3 could not make a "best judgment" assessment though such an assessment is not provided for in the Act or in the Rules.

34. For the reasons aforesaid, the appeal fails and it is dismissed. There will, however, be no order as to costs.

35. No order need be made on the application which shall be deemed to have been disposed of along with this judgment.