

(1964) 08 CAL CK 0006
In the Calcutta High Court
Case No : Company Petition No. 217 of 1963
In Re: New Standard Coal Co. Pvt. Ltd.

Date of Decision : 25-08-1964

Acts Referred:

Companies Act, 1956 — Section 19, 3(a), 3(c), 3(d), 397
Transfer of Property Act, 1882 — Section 105, 107

Citation : 69 CWN 18

Hon'ble Judges : B.C. Mitra, J

Bench : Single Bench

Advocate : R.C. Deb, for the Appellant; B. Das for Harakali Bose, S. Mukherji for Lodna Collieries and S. Chowdhury and T.P. Das for Madhavji K. Varma and Sons (P) Ltd., for the Respondent

Judgement

B.C. Mitra, J.—This is an application by Provash Kumar Basu, a member of New Standard Coal Co. Private Ltd. (hereinafter referred to as the company) for an order revoking, recalling or setting aside the order dated February 7, 1984, under which the Special Officer entered into an agreement dated February 11, 1964, for an order directing the Special Officer not to take any further action under the agreement dated February 11, 1964, for an order directing the Special Officer to make a full and proper inventory of all goods and articles of the Lodna Colliery, Suratand Colliery and Lodna Engineering Works, an injunction restraining Madhavji K. Varma and Sons Private Ltd., the Respondent No. 6 from taking out any plant, machinery, stores etc. from the Lodna Colliery of the company, an order directing Madhavji K. Varma and Sons Private Ltd. to render account of all raising of coal from the colliery and also directing it to vacate the colliery and make over immediate possession to the Special Officer and for costs. The company was incorporated as a Private company for exploiting certain collieries in the district of Dhanbad. The shares in the capital of the company are held by the members of the family of one Bipinbehari Basu and also by a distant relative Harakali Basu. Particulars of shares held by the different members have been set out under paragraph 6 of the affidavit of the applicant affirmed on May 2, 1964. The applicant holds two shares in his individual and personal capacity

and also holds 149 shares jointly with other members of his branch of the family. For sometime past disputes and differences arose between the members of the company with the result that the affairs of the company were not properly conducted, the liabilities of the company kept on mounting from year to year. To solve the difficulties the applicant along with other members of the company approached one Chotalal Madhavji Varma, a director of Madhavji K. Varma and Sons Private Ltd., the respondent No. 6 with a proposal for lease of certain collieries which were then being exploited by the company. Negotiations took place and by letter dated September 4, 1963, an offer was made by the said Varma to take over the collieries of the company and also the Engineering Works known as Lodna Engineering Company on a lease for thirty years.

2. In October, 1963, two applications were made to this Court by Harakali Bose under sections 397, 398 and 402 of the Companies Act, 1956, regarding the New Standard Coal Co. Private Ltd. and North Burrakar Coal Co. Private Ltd. On October 3, 1963, interim orders were made on both the applications whereby Mr. K.C. Mukherjee, Barrister-at-Law, was appointed the Special Officer of the two companies. The board of directors of the companies was superseded and all powers and functions of the board were vested in the Special Officer. The Special Officer was directed to consider the offer made by Varma for lease of the collieries.

3. Thereafter the Special Officer carried on negotiations with Varma for lease of the collieries and for this purpose held several meetings of the shareholders of the company. The offer made by Varma was discussed and revised at the meetings held by the Special Officer. At one of such meetings held on November 13, 1963, the terms and conditions of Varma's offer were altered and modified at the suggestions of shareholders. This meeting was attended by the applicant. Subject to the alterations and modifications made at the meeting, the offer of Varma was accepted by all the shareholders including the applicant except four shareholders, namely, Sm. Chabirani Basu, Chirakumar Basu, Jaladhi Basu and Bidyut Basu. Subsequently these four members sold and transferred their shares to two of the Varmas on January 15, 1964. On November 14, 1963, the Special Officer made a report to this Court recommending acceptance of the offer of Varma made on his behalf in the letter of November 13, 1963, as modified at the said meeting.

4. On November 22, 1963, an order was made by me, in the application made by the Special Officer for confirmation of the reports made by him dated November 14, 1963, and November 19, 1963. This application was opposed on behalf of Sm. Chabirani Basu, Chirakumar Basu, Jaladhi Basu and Bidyut Basu. By this order directions were given to invite offers for lease of the collieries by, advertisements in several newspapers and the Special Officer was directed not to accept the offer of Varma for a period of six weeks from the date of the order, to see if a better offer was received as a result of the advertisement, pursuant to this order, advertisements were made, but no better offers were received by the

Special Officer. The said order of November 22, 1963, is of some importance and I shall revert to it later.

5. On January 14, 1964, the matter came up before me for further orders and by consent of all the parties an order was made directing the Special Officer to accept the offer of Varma in terms of his report dated January 14, 1964, and subject to variations contained in two letters dated January 6, 1964, and January 7, 1964. The Special Officer was directed to enter into an agreement for lease pending permission of the Central Government and the State Government and he was also directed to take steps for obtaining such permission. Pursuant to this order the Special Officer accepted the offer of Varma by a letter dated January 15, 1964. Thereafter a draft agreement was prepared and it was approved by the solicitors of the parties. On February 7, 1964, the said agreement for lease as approved by the parties was placed by the Special Officer before me and thereupon two orders were made, with consent of all parties. The agreement was approved by the order made on that date and each page of the approved agreement was initialled by the Court Officer. On February 11, 1964, the said agreement for lease was executed by the Special Officer on behalf of the companies and by the respondent No. 6.

6. It is the order made on February 7, 1964, approving the draft agreement for lease and directing the Special Officer to execute the same, that is sought to be set aside or recalled in this application.

7. Having regard to the contentions of the parties it is necessary to go into the terms of the agreement dated February 11, 1964. The agreement is between New Standard Coal Co. Private Ltd. and North Burrakar Coal Co. Private Ltd. represented by Kamakshya Charan Mukherjee (the Special Officer appointed by this Court) as the lessor, Madhavji K. Varma and Sons Private Ltd. as the lessee and Chotalal Madhavji Varma as the confirming party. After various recitals dealing with the events antecedent to the agreement, it provides that the lessor through the Special Officer agreed to grant transfer and demise to the lessees by way of lease the collieries and the Engineering Works on various terms and conditions, the material ones of which are as follows:-

(a) Possession of the collieries and the Engineering Works to be made over to the lessee with the execution of the agreement.

(b) The lessee shall be entitled to carry on mining operations in the collieries and to raise and despatch coal and also to work the Engineering Works simultaneously with the execution of the agreement.

(c) The lessee shall pay and discharge all existing liabilities of the companies up to a maximum of Rs. 15,00,000/-.

(d) The liabilities of the companies shall be ascertained by the Special Officer by employing an auditor.

(e) The lessee shall pay up all current liabilities from the date of the agreement

including liability for royalty under the head "lease".

(f) On taking over possession the lessee shall under the Special Officer carry on all works, raise and despatch coal and realise moneys in connection with the works and sale of coal.

(g) If the liabilities of the companies did not exceed Rs. 10,00,000/- the lessee shall pay the balance of Rs. 10,00,000/- to the Special Officer for the companies at the end of five years.

(h) If the liabilities exceeded Rs. 15,00,000/- the lease shall pay such excess to the extent of Rs. 1,00,000/- and shall adjust this excess payment of Rs. 1,00,000/- against payment to be made to the said companies.

(i) The lessee shall pay commission at the rate of 62 nP. per rupee for every metric ton of coal for five years of the lease and thereafter at the rate of 75 nP. for the rest of the term of the lease.

(j) The lessee shall pay commission at 94 nP. per metric ton of soft and hard coke for five years and thereafter at the rate of Re. 1.12 nP. for the rest of the term.

(k) Commission at the rate of 7 1/2 per cent. on the total gross sale proceeds of materials in respect of the Engineering Works subject to a minimum payment of Rs. 5,000/- per year.

(l) Rs. 300/- per month to be paid as minimum commission even if there is no raising and for the interim period from the date of this agreement.

(m) All buildings, Dhowrahs, structures, director's bungalows and other quarters and the Engineering Works shall be in the possession of the lessee both during the period up to execution and registration of the lease as also during the period of the lease. But the company's representatives should be allowed to stay in director's bungalow whenever necessary.

(n) The Special Officer to apply within a week from the date of the agreement for permission of the State and Central Government under the Mineral Concession Rules, 1960, Mines and Minerals (Regulation and Development) Act, 1957, or any other enactment for the time being in force to demise and transfer the collieries agreed to be demised and transferred under the agreement and if such permission is refused the lessee undertakes to hand over possession to the Special Officer and the lessee shall be entitled to all the sums and moneys paid or that may be paid towards payment of the aforesaid liabilities. The lessee was not to be entitled to receive any money to be spent by it for current expenses and it undertook to make over possession of the collieries and Engineering Works with all machineries and plants to the Special Officer.

(o) Within a week from the date of receipt of the permission from the Government the Special Officer shall sign and execute and register a lease in favour of the lessee for a term of thirty years from the date of execution thereof

with an option for a further period of fifteen years.

(p) The lessee to pay all wages of labourers and other staff or employees of the company in terms of any award or recommendations of the Government.

(q) If owing to lessee's default the mines are flooded the lessee to take steps at its own costs for de-watering the mines.

(r) The Special Officer of the company to have the right to inspect the collieries and its assets and send representatives to the colliery to inspect the books and records.

(s) Subject to the terms of the agreement the transfer and demise agreed upon shall be completed within three months from the date of delivery to the lessee's solicitor of all necessary permission, certificate and consent of the Government.

8. It is next necessary for me to refer to the order made on February 7, 1964. This order was made by consent of all the parties appearing and without prejudice to the contentions of the head lessors, namely, Lodna Collieries Company (1920) Ltd. and also of Loyalka Credit Corporation. By this order leave was given to the Special Officer to enter into an agreement the draft of which was produced by the Special Officer with the modifications made therein. Prior to this, an order was made on November 22, 1963, whereby liberty was given to the Special Officer to accept the offer made by C.M. Varma as set out in the report of the Special Officer subject to appropriate sanction and approval from the Central Government, the State Government and other authorities. The offer of Varma was not to be accepted for six weeks and directions were also given for advertisements. A copy of the order dated November 22, 1963, was produced at the hearing of this application by the Learned Counsel for the Special Officer.

9. The order made on February 7, 1964, is challenged on the ground that it contravenes the provisions of Rule 37 of the Mineral Concession Rules, 1960, which prohibits without previous consent in writing of the State Government (which in the case of a mining lease in respect of certain specified minerals) shall not be given except under previous approval of the Central Government. The prohibition under the Rule relates to:

(a) Assignment, subletting, mortgaging or in any other manner transferring the mining lease or any right, title or interest therein.

(b) Entering into or making any arrangement, contract or undertaking whereby the lessee may be directly or indirectly financed to a substantial extent by or under which the lessee's operations or undertaking will or may be substantially controlled by any person.

10. It is contended that the agreement for lease is nothing but a present demise with transfer of possession of the collieries, buildings, structure, machinery and also the right to exploit the colliery. This therefore, although described as an agreement for lease, is in substance and reality a lease of a colliery, and having

been made without the sanction of the Central and State Governments, contravenes Rule 37 and is therefore void and of no effect. Mr. R.C. Deb appearing for the applicant formulated the proposition as follows:

Agreement dated February 11, 1964, is a subletting within the meaning of Rule 37(1)(a) and in any event it operates as a transfer of right, title and interest in a mining lease. Further it is hit by Rule 37(1)(b) as the companies are directly financed by virtue of this document and the company's mining operations and undertakings are or might be substantially controlled by the Varmas.

11. Mr. Deb referred to the preamble to the Rules which have been framed under the Mines and Minerals (Regulation and Development) Act, 1957 and also to several sections of the Act, namely, sections 3(a), 3(c), 3(d), 4(2) and 19. He also referred to the first Schedule, item 4 of which is coal, and argued that besides State Government's permission, permission of Central Government was also necessary.

12. Mr. Deb next referred to a decision of the Supreme Court in *Badriprosad & ors. v. Nagormall & ors.* (1) (1959) C.L.J. 205. He referred to the passage in the judgment at page 209 of the report in which it was held that if an objection is taken on the provisions of a public statute, then whenever the objection is taken and even if it is taken at a late stage, the question should not be excluded from consideration. It is a pure question of law. The Supreme Court was dealing with s. 42 of the Rewa State Company Act, 1935, and reliance was placed upon a decision of the Privy Council in *Surajmull Nagormall v. Triton Insurance Co. Ltd.*, (2) 52 I.A. 126. The passage in the judgment of Lord Somner referred to by the Supreme Court is as follows:

The suggestion may be at once dismissed that it is too late now to raise the question as an answer to the claim. No court can enforce as valid that which competent enactments have declared, shall not be valid, nor is obedience to such an enactment, a thing from which a Court can be dispensed by the consent of the parties or by a failure to plead or argue the point at the outset; *Nixon v. Albion Marine Insurance Co.*, (3) the enactment is prohibitory. It is not confined to affording a party a protection, by which he may avail himself or not as he pleases.

13. Thereafter the Supreme Court referred to another decision of the Judicial Committee in *Shivaprosad Singh v. Srish Chandra Nandy*, (4) 76 I.A. 244, in which the Judicial Committee held that the provisions of a public statute cannot be ignored. In the case before the Supreme Court the claim was by some members of an illegal association against another member on the footing that the association should be treated as legal in order to give rise to liability to account in respect of transactions of the association. It was held that such a claim was untenable as the plaintiff came to Court on allegations which on the face of them showed that the contract of partnership, on which he sued was illegal and it was further held that the only course open to Court is to say that

the plaintiff was not entitled to any relief on the allegations made as the Courts could not adjudicate in respect of contracts which the law declared to be illegal.

14. Mr. Deb next submitted that a mining sub-lease is included in the term "mining lease" and therefore the sub-lease created by the Special Officer was void. H argued that a mining sublease is equivalent to a mining lease and therefore if such a sub-lease is granted in contravention of the Act or "the Rules, it would be void. In support of this argument he relied upon a decision of the Supreme Court in the Mineral Development Ltd. v. Union of India & anr. (5) AIR (1960) S.C. 1373. In this case the question whether a sub-lease is equivalent to a lease was raised under the Mines & Minerals (Regulation & Development) Act of 1948. It was held that a mining lease as defined in s. 3(d) of the Act included a sub-lease. Under the present Act however, namely, the Mines & Minerals (Regulation & Development) Act, 1957, the ambiguity has been removed in s. 3(c) by defining a mining lease to mean a lease and also to include a sub-lease. Mr. Deb contended that the new Act leaves no room for doubt that for the purpose of the Act and the Rules a sublease has to be treated as a lease. Mr. Deb argued that the agreement is illegal and cannot be given effect to.

15. On the question of jurisdiction of the Court to vacate or recall the order, Mr. Deb referred to the decision in Mullins v. Howell (6) 11 Ch. D. 763. In this case an undertaking by the defendant was recorded in a consent order. The defendant later found that the undertaking went further than what he intended or was aware of. The defendant thereupon applied for discharge of the undertaking on the ground that consent was given by mistake and inadvertence induced by the plaintiff. It was held that the Court had jurisdiction to discharge an order made on a motion by consent when it was proved to have been made under a mistake though the mistake was on one side only. This decision however is an authority for the proposition that a consent order can be set aside by a motion when the consent was given under a mistake. In the instant case now before me however, there is no question of any mistake having induced the consent of the parties. The parties did contemplate sanction being obtained from the authorities for the purpose of the lease and the order of November 22, 1963, makes it quite clear that sanction or permission had to be obtained by the Special Officer granting a lease. The parties had given their consent after fully understanding the requirement of the statute and indeed in the agreement as executed, it was made clear that permission or sanction of the Central and State Governments had to be obtained. This decision therefore does not help the applicant.

16. Mr. Deb next referred to a decision of the Judicial Committee in Macfoy v. United Africa Co. Ltd., (19) (1961) 3 A.E.R. 1169. In this case a statement of claim in an action for recovery of moneys was delivered during the long vacation. Such delivery was made in breach of Order 64, Rules 4 and 5 of the Rules of the Supreme Court which were applicable. The defendant having failed to file his defence within time, judgment was signed against him in default of defence. An application to have the judgment set aside failed and in appeal the defendant for

the first time took the point that the delivery of the statement of claim was a nullity and all subsequent proceedings were void. The matter came in appeal before the Judicial Committee and Lord Denning drew a distinction between an act which was void and an act which was merely voidable. It was further held that if an act was void, then in law it was a nullity and it was incurably bad and there was no need for an order of the Court to set it aside as it was automatically null and void. Every proceeding founded on such an act was held to be bad and incurably bad. But in the instant case before me I cannot say that the orders which were made on November 22, 1963, and February 7, 1964, are void. Both the orders did contemplate permission being obtained from appropriate authorities. But the agreement as executed, appears to have infringed certain provisions of the said Act and Rules. The said two orders have not been made in contravention of the Act or the Rules. On the other hand direction had been given to the Special Officer to apply for permission from the appropriate authorities. This decision therefore does not apply to the facts of the instant case now before me.

17. Mr. Deb next referred to another decision of the Judicial Committee in *K. Khiarajmal & Ors. v. Daim & Ors.* (7) L.R. 32 LA. 23. In this case the only question was whether a decree binds mortgagors who were not parties to the mortgage suit and whether sales in execution of the mortgage decree were valid. It was held that the Court had no jurisdiction to sell property of persons who were not parties to the proceedings and as against such person the decrees and sales would be a nullity and might be disregarded without any proceeding to set them aside. All that was decided in this case was that persons who were not parties to the suit are not liable nor bound by the decree and that so far as they are concerned the decree was a nullity. The question was one of jurisdiction, and if a decree binds parties who were not parties to the suit in which the decree was passed. This decision again does not help the applicant as the instant case now before me is not a case in which the orders made by this Court are sought to be enforced against parties who were not parties to the application in which the orders were made.

18. The next case relied upon by Mr. Deb is a decision of the Supreme Court in *Kiran Singh & Ors. v. Chaman Paswan & ors.* (8) AIR (1954) S.C. 340. In this case again the whole question was one of jurisdiction of the Court on the basis of valuation of the suit and it was held that it was a fundamental principle that a decree by a Court without jurisdiction was a nullity and its invalidity could be set up whenever it was sought to be enforced or relied upon. A defect of jurisdiction, whether pecuniary or territorial, it was held struck at the very authority of the Court to pass any decree and such defect could not be cured even by consent of parties. This decision does not help the applicant as in the instant case before me, the question is not of want of jurisdiction of this Court to pass the order. Indeed this Court exercising its jurisdiction under the Companies Act, 1956, is the only Court which could pass the order now sought to be set aside. In my opinion, this decision also does not help the applicant.

19. The next case relied upon by Mr. Deb is *Lazard Bros. v. Banque Industrielle De Moscou*, (9) (1932) 1 K.B. 617. In this case an English firm commenced an action against a Moscow bank, claiming a large sum of money. No appearance was entered and thereupon judgment by default was signed against the bank. It was found later on that the Moscow bank went out of existence long ago. It was in these circumstances that it was held that if it came to the knowledge of the Court that judgment has been entered in default of appearance against a person who was dead or a company which was dissolved or non-existent, the Court was bound after hearing parties of its own motion to set aside the judgment. It was an action against a company which was non-existent and it was held that an order made against such a company should be set aside. I do not see how this case helps the applicant because there is no question of any want of jurisdiction in this Court because some of the parties were dead or non-existent.

20. The next case relied upon by Mr. Deb was *Maritime Electric Co. Ltd. v. General Dairies Ltd.* (10) (1937) A.C. 610. In this case the appellant company who were suppliers of electric energy made a mistake in calculating the amount payable by a consumer with the result that the latter paid much less than what was due. The appellant company later claimed the balance due and it was in these circumstances that the House of Lords held that where "the statute imposed a duty of positive kind not voidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstances that the estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore be availed in such a case to re-release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part." The question in this case was one of estoppel and if a party could avoid statutory liability on the plea of estoppel. In my view neither in fact nor in law this case has any application to the instant case now before me.

21. Mr. B. Das, Learned Counsel for Harakali Bose, submitted that the only question was if the agreement created a present demise and if it did then it was hit by Rule 37 of the Mineral Concession Rules. Mr. Das referred to s. 4(2) of the Mines and Minerals (Regulation & Development) Act, 1957, and submitted that by reason of the provisions of that sub-section, Rule 37 of the Mineral Concession Rules, 1960, was attracted. He contended that s. 4(2) of the Act and Rule 37 constituted a complete bar to the agreement. Mr. B. Das next referred to s. 19 of the said Act and argued that inasmuch as the lease was granted in contravention of Rule 37, the agreement was void and of no effect. Referring to the terms of the agreement, Mr. B Das argued that there can be no doubt that the instrument created a present demise, and as such demise is in clear violation of the said Rule 37, the transfer of interests sought to be created by the instrument was void and no effect could be given to the same.

22. In support of his argument Mr. B. Das referred to a decision of this Court in *Ramjoo Mohamed v. Haridas Mallick & Ors.* (11) AIR (1925) Cal. 1087. This was an action for specific performance of an agreement to grant a lease of certain premises in Calcutta. It was held that whether an agreement was a present demise or not depended upon the intention of the parties which was to be gathered from the language in which the agreement was couched. Mr. Das argued that if in this case the agreement was looked into as a whole, there could be no doubt that it was a present demise and not a mere agreement to grant a lease.

23. Mr. B. Das fortified his argument by referring to paragraph 20(iii) of the affidavit of Chotalal Madhavji Varma affirmed on June 11, 1964, in which it has been stated that the agreement was sent for adjudication as to stamps and the Collector treated the document as a lease and assessed stamp duty at Rs. 36,175.50 nP. Mr. Das next argued that in the recitals of the agreement there was no mention that permission of the Central and State Governments had to be obtained. He also referred to the recital in which it is stated that the confirming party to the said agreement took over possession of the collieries and spent large sums of money up to February 6, 1964. Mr. Das next referred to several conditions of the agreement and contended that the agreement was nothing but a present demise. The first condition required the Special Officer to make over possession of the collieries and the engineering works to the lessee simultaneously with the execution of the agreement. He next referred to the second condition which provided that the lessee would be entitled to carry on all mining operations in the collieries and also to despatch coal and coke and to run the engineering works and realise all the prices and moneys in connection with the sale and despatch of coal and also the engineering works. He next referred to the fifth condition which provided that on taking over possession the lessee was to carry on all works, raise and despatch coal and coke and realise moneys for the same under the Special Officer.

24. Mr. B. Das next contended that one important element of a lease was exclusive possession and the terms of the agreement made it clear that the lessee was to remain in exclusive possession of the collieries and other buildings, and structures therein. That being so, the transfer of interest under the agreement was nothing but a present demise. In support of this argument, Mr. Das referred to a decision of this Court in *Ram Protap Kayan v. The National Petroleum Co. Ltd.* (12) AIR (1950) Cal. 23. This was an action for ejectment of the defendant appellant from a go-down and a shed. Discussing the tests for determining whether an instrument was a present demise or operates as a licence, it was held following several English decisions, that exclusive right of occupation though subject to reservations, is a demise of the land itself. Mr. Das argued that this test was satisfied in this case as the lessee was given exclusive possession and control of the colliery and also the engineering works.

25. Mr. Mukherjee appearing for Lodna Collieries Ltd., the superior landlord,

opposed the application and submitted that the question raised could not be gone into in this application. The order of February 7, 1964, had been made by consent of all the parties and has been acted upon.

26. Mr. T.P. Das, Learned Counsel for the respondent No. 6, first of all contended that the application was mala-fide, inasmuch as the order of February 7, 1964, was a consent order. Not only the parties gave their consent to the order, the Central Government also gave its consent. He argued that some sanctity should be attached to the orders of this Court and an order once made and acted upon, could not be challenged in this fashion. He next argued that the agreement was entered into by the Special Officer under orders of this Court. It was therefore an act of the Court. Rule 37 contemplates act of parties and cannot affect an act of the Court. He next referred to s. 402(g) and s. 403 of the Companies Act, 1956, and submitted that the Court could make any order in an application under s. 397 and s. 398 of the Act. In exercise of the powers under the two sections, the Court had made an order directing the Special Officer to enter into an agreement, and therefore according to him, neither the sections in the Mines & Minerals (Regulation & Development) Act, 1957 nor the Mineral Concession Rules, 1960, had any application.

27. Mr. T.P. Das next argued that the agreement which had been treated as a lease by the applicant was in substance nothing but an interim arrangement for working the collieries and the engineering works pending the grant of permission by the Central and the State Governments. In support of this argument Mr. Das referred to the fifth condition of the agreement which provided that the lessee should work the colliery under the Special Officer and not independently. This condition made it quite clear that the Special Officer was in control and possession and the lessee was merely working the collieries under the Special Officer. Mr. Das next referred to the tenth condition of the agreement under which, until the permission of the Government was obtained, and the lease agreed to be granted was finally executed and registered in favour of the lessee, all sums to be paid for payment of the existing liabilities were to form a first charge upon the collieries and all the assets thereof. This condition again, Mr. Das argued, quite clearly provided that the arrangement was an interim arrangement. If a lease or a present demise was granted there would be no question of creating a charge as provided by the tenth condition. Mr. Das next referred to the thirteenth condition of the agreement which again made it clear that the permission of the Central and State Governments had to be obtained under the said Act and the Rules and that if such permission was refused the lessee was to restore possession to the Special Officer for the companies and was to be entitled to all sums and moneys paid towards the liabilities of the companies. Mr. Das argued that the conditions in the instrument and the terms thereof made it amply plain that the parties contemplated that permission of the Central and State Governments had to be obtained and until such permission was obtained, an interim arrangement was made for the exploitation of the colliery and the working of the factory.

28. Mr. S. Chaudhuri also appearing for the Respondent No. 6 contended that this Court had no jurisdiction to make any order on this application. The order has been made and acted upon. No grounds have been made out for revision of that order. No fresh materials have been produced to justify any order the effect of which will be to reopen the order already made. Secondly, Mr. Chaudhuri contended that the order was a consent order. The parties after mature deliberation and upon competent legal advice, had chosen to accept the terms and had obtained an order from this Court by consent of all. Mr. Chaudhuri next argued that it was well-known to the parties that his client, the respondent No. 6, had advanced large sums of money to put the colliery in a working condition. While the applicant wants to have the order recalled, no suggestions have been made for indemnifying his client for moneys spent by it under the order of this Court. The parties had taken full advantage of the services of his client and have also enjoyed the benefit of the large sums of money spent by it to maintain the collieries in a running condition. One should expect, Mr. Chaudhuri argued, that if they want to have the order recalled or set aside and the agreement cancelled, the least that the party should do was to compensate his client for the money spent by it.

29. It was next argued by Mr. Chaudhuri that assuming it was a lease, the same was created by an order of this Court and was not created by an act of the parties. That being so, even assuming that the instrument was a present demise, it was not hit by the said Act and the Rules. Mr. Chaudhuri next referred to the definition of a lease in S. 105 of the Transfer of Property Act and also to S. 107 of the said Act and contended that the instrument could not be treated as a lease, which could only be created by a registered instrument. Mr. Chaudhuri next referred to the various clauses in the agreement and argued that it could not be treated as a lease because his client was to exploit the colliery under the Special Officer. Permission of the Central and State Governments was clearly contemplated and provision was also made for restoration of possession to the Special Officer in the event of permission being refused. It cannot therefore be said that the instrument was a lease and was hit by the said Act and the Rules.

30. Mr. Chaudhuri next argued that if the agreement was void, it was open to the applicant or other members of the company to file a suit for cancellation of the same and also for recovery of possession. If it was void, Mr. Chaudhuri argued, why should this Court which had authorised the Special Officer to enter into the agreement take any further action on it?

31. In support of his argument that the agreement is not a present demise Mr. Chaudhuri relied upon a decision of the Supreme Court in *Tolaram Relumal & anr. v. The State of Bombay*, (13) AIR (1954) S.C. 496. In this case the question of construction of a document claimed to be a lease came up for consideration and it was held by Mahajan, C.J., that an instrument was usually construed as a lease if it contained words of present demise and it should be construed as an executory agreement "notwithstanding that it contains words of present demise,

where certain things have to be done by the lessor before the lease is granted, such as the completion or repair or improvement of the premises, or by the lessee, such as the obtaining of surety." Relying upon this decision Mr. Chaudhuri argued that although there are indications of a present demise in the agreement, there remained various things to be done by the Special Officer, namely, the permission to be obtained by him from the appropriate authorities and therefore, Mr. Chaudhuri submitted, that the agreement was not a present demise, but a mere executory agreement. There is good deal of force in this contention of Mr. Chaudhuri. But in whatever manner the agreement is described, it cannot be overlooked that under its terms there is a transfer of some right, title or interest to the respondent No. 6. To that extent it contravenes the provisions of Rule 37(a) of the said Rules.

32. The next case relied upon by Mr. Chaudhuri is *Ainsworth v. Wilding*, (14) (1896) 1 Ch. 673 (663). This case was relied upon by Mr. Chaudhuri in support of his proposition that where a judgment had been passed even by consent and under a mistake, it could be set aside only in a fresh action brought for that purpose and by no other means. *Romer, J.*, held that the judgment could not be set aside on a motion at any rate without the consent of the parties. It is not necessary for me to deal any further with this question, because I am of opinion, for the reasons hereinafter stated, that the order made on February 7, 1964, cannot be and should not be set aside or recalled.

33. Mr. Chaudhuri next referred to a decision of this Court in *In the Matter of Steel Construction Co. Ltd.*, (15) 39 C.W.N. 1259, in which it was held that an order made by a Judge which has been drawn up but not completed or filed is an order which has not been perfected and may properly be reconsidered by the Judge and if necessary, recalled. Mr. Chaudhuri submitted that in the instant case before me the order has been drawn up, perfected and acted upon and therefore I have no jurisdiction to recall or vacate the same. It seems to me that there is a good deal of force in Mr. Chaudhuri's contention. The order has been drawn up, perfected, filed and acted upon and it cannot therefore be recalled or vacated on this application. If the order is a nullity for one or other of the reasons discussed earlier, it can be ignored, as it was of no effect. But indeed I cannot hold for reasons hereinafter mentioned that the order made on February 7, 1964, is a nullity.

34. In support of the same proposition Mr. Chaudhuri also referred to another decision of this Court in *Sarupchand Hukumchand v. Madhoram Raghmalal*, (16) 28 C.W.N. 755, in which it was held that once an order is drawn up, completed and filed, the Judge passing the order ceases to have any jurisdiction over the matter. That proposition to my mind is well founded and in my opinion Mr. Chaudhuri is right in his contention that in so far as the order has been completed, perfected and filed, this Court has no jurisdiction to recall or set aside the same.

35. Mr. Chaudhuri next relied upon the decision in *Gilbert v. Endean*, (17) 9 Ch.

D 259. In this case a decree was made by consent by which the defendant gave a bond for payment of a sum of money. Subsequently, a compromise was entered into between the parties by which the plaintiff agreed to accept a smaller sum. Later the plaintiff sought to enforce the decree notwithstanding the compromise, on the ground that he had entered into the compromise by misrepresentation. It was held that the question whether the compromise was invalid ought to have been made the subject-matter of a new action and should not have been tried on a motion, but since the case had been argued on merits on a motion in the trial Court, the Court of appeal held that the objection could not be taken in appeal. This proposition also is well founded and in my opinion an order once made, perfected, filed and acted upon cannot be challenged on a motion and the appropriate remedy is to proceed by way of an action.

36. The next case relied upon by Mr. Chaudhuri was *Kinch v. Walcott & Ors.* (18) (1929) A.C. 482. Dealing with the question of consent order it was held in this case that an order made by consent and not discharged by mutual agreement is as effective as an order of the Court made otherwise than by consent and that a party must obey such a consent order unless and until it has been set aside in proceedings duly constituted for that purpose. To my mind this decision is not of any assistance because it is not an issue in this application if the order made on February 7, 1964, is binding on the parties. That order so long as not set aside, remains in force and binds the parties as effectively as any other order.

37. Mr. Chaudhuri next argued that the agreement was not affected by Rule 37(a) or Rule 37(b) as it was not a case of a lease by a private party. It was a case of a lease by the Special Officer under orders of the Court. It was therefore an act of the Court and not an act of either the lessor or the lessee. A distinction must be made, Mr. Chaudhuri argued, between a lease granted by a party and a lease which has been created by an order of Court. In the case of a lease which is entered into under an order of Court, the limitation imposed by the said Act or the Rules has no application. I cannot accept this contention for reasons hereinafter mentioned.

38. The question now before me is whether the agreement dated February 11, 1964, is void under the provisions of the Mines and Minerals (Regulation and Development) Act, 1957, and the Mineral Concession Rules, 1960. The said Act and the Rules prohibit and restrict transfer of interest in mining leases except on conditions laid down therein. In this case, it has been argued, that the said agreement is a transfer of interest in mines in violation of the conditions in the said Act and the Rules and therefore it is void. It has been argued that the effect of the agreement is to create a present demise inasmuch as there has been a transfer of interest in the collieries, a transfer of possession of the buildings, structures, plant and machinery. Further, a right has been conferred to exploit the collieries, to sell coal and coke and also the products of the engineering company and finally the possession which has been given to the respondent No. 6 is exclusive in nature. That being so, the agreement, it has been urged by the

applicant and also on behalf of Harakali Bose, created a present demise and therefore it is void.

39. On the other hand it has been urged that the agreement is nothing more than a mere interim arrangement, embracing a variety of subjects including working the colliery and the engineering company and marketing the same. But all these activities are being done under the Special Officer appointed by this Court and the provisions in the agreement, it has been argued, can leave no room for doubt that the Special Officer appointed by this Court is in charge and control of the assets of the companies and there is no present demise as has been contended by the applicant. It has been also urged on behalf of the respondents, that the order has been made by this Court by consent of all the parties, no grounds have been made out for review or revision of that order, no fresh materials have been placed before this Court for that purpose and there cannot therefore be any question of reopening the same by an application of this nature.

40. Upon a consideration of the terms of the agreement, it seems to me that there are certain features in it, which do confer upon the respondent No. 6 a right to exclusive possession of the company's assets and also a right to exploit the colliery, despatch and sale of coal and coke and also the right to exploit the engineering works. It is true that the possession of the respondent No. 6 is a possession under the Special Officer and not in its own right. There is also provision for restoration of such possession to the Special Officer in the event of permission by the Central and State Governments being refused. But under the agreement the Special Officer is required to make over possession of the collieries and the engineering works to the respondent No. 6, who would thereupon be entitled to carry on all mining operations including despatch and sale of coal and coke and also to run the engineering works and to realise the price and moneys. While there is provision for making over possession by the Special Officer there are also provisions that the respondent No. 6 will work the collieries and deal with coal under the Special Officer. To this extent it seems to me, the terms of the agreement infringe the said Act and the Rules. The agreement on the one hand contemplates that the possession of the respondent No. 6 would be the possession under the Special Officer. On the other hand, exclusive possession is made over to it by the Special Officer. No doubt there are provisions in the agreement which provide for a lease for a term of thirty years being executed, application being made to the appropriate authorities for permission under the said Act and the Rules and also for restoration of possession in the event of such permission being refused. Besides there is also a provision that the transfer and demise by the Special Officer will be completed within three months from the date of delivery to the lessee's Solicitor of all necessary permission, certificate and consent.

41. It seems to me that the parties did not intend that there should be a present demise or transfer of any interest in the assets of the company in violation of the

provisions of the Act or the Rules. Mr. Deb conceded, and I think rightly, that there was no intention on the part of the Special Officer to create any interest or transfer any interest in the company's assets in violation of statutory provisions. But the terms of the agreement are somewhat inconsistent. And in my opinion some of the terms have the effect, if not of creating a present demise, of creating at any rate a transfer of interest in the mines. The question is what order should be made on this application, in the events that have happened. In order to determine that question, it is necessary for me to refer to some of the events that happened prior to the order of February 7, 1964.

42. The company was in a moribund condition. The wages of the workers could not be paid, there was default in payment of the electricity bill and a threat by the suppliers to discontinue supply of electrical energy, there was also danger of the mines being flooded for insufficient working of the pumps. The public demand against the company reached several lacs of rupees. The paucity of funds was so acute that the question of raising funds by sale of a motor vehicle to pay off the electricity bill was considered. Indeed it was a dark and dismal picture and it was in this state of things that an application was made to this Court under S. 397 and S. 398 of the Companies Act, 1956, and the Special Officer was appointed. Even after such appointment, the Special Officer had tried to induce the parties to advance funds in order to work the collieries and pay off the dues of the creditors. But no means could be devised of raising funds, in order to meet the company's liabilities. It was in these circumstances that the members of the company negotiated with the representative of the respondent No. 6 for the purpose of preservation and protection of the collieries. It is to be noticed however, that the arrangement that has been entered into with the respondent No. 6 was arrived at, after prolonged deliberation on the terms, clause by clause, and modification thereof wherever necessary. Further, advertisements were issued under orders of this Court inviting offers for taking over the colliery and the engineering works. But there was no response to such advertisements. It was only then that the Special Officer with the approval of all the members conducted negotiations with the representative of the respondent No. 6 and the agreement had been concluded. By reason of the agreement, and under the terms thereof, the respondent No. 6 has invested large sums of money to work the collieries and the engineering works. It has done so under orders of this Court obtained by consent of all the members. Its right to protection for the funds which it has already invested and its right to a lease of the colliery in terms of the agreement, subject to the permission of the Central and the State Governments being obtained, cannot be and should not be lightly interfered with. The company and its members have enjoyed the benefit of the enterprise and the funds of the respondent No. 6, who without a doubt has saved the company from the imminent danger of total ruin.

43. The order made by this Court on November 22, 1963, made it quite clear that the Special Officer was to accept the offer for lease made by C.M. Varma subject to the appropriate sanction and approval being obtained from the Central

Government, the State Government and other authorities. It is plain that the lease was to be granted by the Special Officer upon approval and permission being obtained as required under the Act and the Rules. There was therefore no question of a lease being granted to the respondent No. 8 in violation of the provisions of the Act or the Rules. So far as the order made by this Court is concerned, the sanction given to the Special Officer was subject to permission being obtained from the appropriate authorities. But the terms of the agreement however appear to be somewhat inconsistent with each other, as I noticed earlier, and also inconsistent with the real intention of the parties with regard to the rights that have been conferred upon the respondent No. 6. The terms however were agreed upon by the parties each one of whom had obtained competent legal advice. The consent given by the parties was given after mature deliberation, and without a doubt after obtaining competent legal advice. It is one of these parties who now contends, though not altogether without substance, that the agreement is void as it violates and offends against, the provisions of the said Act and the Rules.

44. But in my view the order made on February 7, 1964, cannot be set aside. It is an order which has been completed and filed and has been acted upon by the parties and effect has been given to it. The respondent No. 6 acting upon that order has invested moneys in working the collieries and the engineering works. The agreement was entered into by the Special Officer on the basis of that order and if that agreement is to be interfered with, the respondent No. 6 should be given all the protection which this Court can give. The ends of justice demand that the rights of the respondent No. 6, whatever they are under the said agreement, must get the fullest protection which this Court can give.

45. The order dated February 7, 1964, cannot be recalled or set aside for another and more important reason. As I have already stated an order was made concerning this company on November 22, 1963. This order was made in Company Petition No. 217 of 1963 and the material paragraph of that order is as follows: "It is ordered that the said Special Officer shall be at liberty to accept the offer for a lease made by Mr. C.M. Varma on the terms set out in his said report, but subject to provision being made for payment of royalty to Lodna Colliery (1920) Ltd. and subject also to the appropriate sanctions and approval being obtained from the Central Government, the State Government and any other authorities that may be required." But even if the order of February 7, 1964, is recalled, the order of November 22, 1963, would still remain in force and be binding upon the Special Officer and all other parties. That order has given leave to the Special Officer to accept the offer for lease made by C.M. Varma. No grounds have been made out, nor is there any prayer in this application for setting aside or recalling the said order of November 22, 1963. The order of February 7, 1964, was made for the purpose of giving effect to, and carrying out the order made on November 22, 1963. It however appears that the agreement which has been entered into by the Special Officer with the respondent No. 6, contravenes some of the terms of the said Act and the Rules,

in so far as it transfers an interest in the colliery to the respondent No. 6 and confers upon it the right to exploit the collieries and also to deal with the products thereof. To that extent in any even, the agreement is in contravention of the provisions of the Act and the Rules.

46. It was urged on behalf of the respondents that the agreement was entered into by the Special Officer under orders of Court and therefore it was not an act of the parties. The Act and the Rules contemplate a lease or transfer of interest therein by act of the parties and inasmuch as the Special Officer is an officer of this Court, the Act and the Rules are not attracted. I cannot accept that contention. While it is true that the Special Officer was appointed by this Court, he is by no means an officer of this Court as in the case of a Receiver exercising his powers under Order 40 of the Code of Civil Procedure. The Special Officer represents the Board of Directors of the company which has been superseded. Indeed the agreement has made that position quite clear, namely, that the Special Officer was acting as a representative of the two companies on whose behalf the agreement was entered into.

47. But even assuming that the Special Officer was acting as an officer of this Court, this Court should not direct its officer to act in contravention of existing statutes. On the other hand, this Court should see that statutory provisions are not violated by its officer in any act done pursuant to orders of this Court. The order made on November 22, 1963, in terms provides for permission being obtained of the appropriate authorities under the Act and the Rules. Orders made by this Court in exercise of its powers under Sections 397 and 398 of the Companies Act, 1956, cannot override the provisions in other statutes.

48. It now remains to consider the order to be made on this application. Mr. Deb had rightly and very frankly conceded that the parties had misled themselves in giving their consent to the terms of the agreement. There was misapprehension with regard to the terms and scope of the agreement. It seems to me that there was misapprehension regarding the rights that were being conferred on the respondent No. 6 under the terms of the agreement.

49. But before making the order, I should consider another question, namely whether this Court has the power to make appropriate orders in this application having regard to the events that have happened. The application on which the order dated February 7, 1964 was made, was an application for interim relief under sections 397 and 398 of the Companies Act, 1956. The main application under sections 397 and 398 is still pending and has not been disposed of. u/s 403 of the Companies Act, 1956, this Court has power to make any interim order which it thinks fit, for regulating the conduct of the company's affairs upon such terms as appear to this Court to be just and equitable. The powers of this Court to make interim orders in applications under sections 397 and 398 are wide and ample. The orders that I now propose to make are interim orders for conducting the company's affairs by the Special Officer appointed by this Court. In my view this Court has the power and indeed this Court should make appropriate orders

having regard to the events that have happened.

50. In my view, for the reasons mentioned above any further operation of the agreement dated February 11, 1964, should be suspended. To the extent that the parties to the agreement have acted upon it, and given effect to the terms of the same, they will be entitled to the benefits conferred upon them and the protection provided thereunder in respect of their rights, obligations, claims and demands. But such protection should extend only to acts done, obligations incurred and claims accrued in respect of all that has been done under the said agreement up to today. There should be an order for injunction restraining the parties to this application or their servants and agents from giving effect or any further effect to the said agreement dated February 11, 1964.

51. The order dated February 7, 1964, cannot and should not be revoked, recalled or cancelled. This order has been completed, perfected and filed. It has been acted upon by the parties, all of whom gave their consent to the order and it was upon such consent that the order was made. Under that order the said agreement has been executed by the Special Officer on behalf of the company. The respondent No. 6 acting upon the said agreement has gone into possession and in so far as it has invested money in giving effect to the agreement, it has acted to its detriment and changed its position. This order took notice of the order made on November 22, 1963, by which leave was given to the Special Officer to accept the offer for lease subject to the appropriate sanction and approval being obtained from the Central Government, the State Government and other authorities. The Special Officer is required to obtain necessary permission and sanction of the appropriate authorities before he accepts the offer of lease, and such acceptance was expressly directed to be subject to the appropriate sanction and approval of the Central and the State Governments and other authorities. The order dated February 7, 1964, has not been made in violation or contravention of the Mines and Minerals (Regulation and Development) Act, 1957, and the Mineral Concession Rules, 1960, and cannot therefore be treated as a nullity. But while the said order cannot be recalled or set aside or revoked, operation or any further operation of the agreement dated February 11, 1964, should be suspended as hereinbefore directed.

52. The respondent No. 6 should forthwith make over possession of all the assets of the company which were made over to it under the said agreement dated February 11, 1964, to the Special Officer and should cease to be in occupation of the lands, buildings, structures, factories and workshop and all other assets of the company. The Special Officer is directed to take over possession of all the assets of the company which were made over to the respondent No. 6 under the said agreement. But simultaneously with taking over possession of the said assets from the respondent No. 6 in terms of this order, the Special Officer is directed to appoint Madhavji K. Varma, Nanalal M. Varma, Karsanji K. Varma and Chhotalal M. Varma (Directors of the respondent No. 6) as managers, without security and without remuneration, under the Special Officer to operate and

exploit the collieries of the company and also the Lodna Engineering Company. I wish to make it clear that the Special Officer should remain in complete charge and control of all the assets of the company and also of the operation and exploitation of the collieries and the said Lodna Engineering Company. All contracts for sale, despatch, delivery and disposal of coal, coke and the products of the said engineering company are to be made in the name of the Special Officer and for and on his behalf. All moneys to be realised by sale, despatch or disposal of coal, coke and any other asset of the company, after this order, are to be made over to the Special Officer, who will be at liberty to make such payments to the managers for the purpose of running the collieries and the engineering company as may be necessary. The Special Officer should maintain a separate account in respect of all transactions entered into, moneys realised and collected and payments made by the managers for and on his behalf.

53. The Special Officer is directed forthwith to apply to all appropriate authorities including the Central Government and the State Government for permission to grant a lease to the respondent No. 6 in terms of the agreement dated February 11, 1964. Until the lease is executed by the Special Officer after obtaining requisite permission and sanction, the managers appointed by this order should work the collieries and the said engineering company under the Special Officer in terms of this order. If the permission of the Central Government and the State Government is refused, the appointment of the managers made by this order should stand terminated.

54. The Special Officer will be at liberty to take loans and advances from the managers to meet public demands or other liabilities of the company and also for working capital for the purpose of working the collieries and the said engineering company. Loans and advances, if any, taken by the Special Officer from the managers should form a charge on the assets of the company subject to any existing charges. The Special Officer will be at liberty to repay loans and advances, if any, from the managers out of the funds in his hands. Liberty is given to the Special Officer and all the other parties to apply to this Court for such further order and directions as may be necessary.

55. In prayer (b) of the application the applicant has prayed for an order directing the Special Officer not to take any further action under the agreement dated February 11, 1964. This prayer has been disposed of by the order made herein. Prayer (c) is for an order directing the Special Officer to make an inventory of the collieries and the engineering works. It appears that no inventory of the assets of the company was made by the Special Officer. It was submitted by the Learned Counsel appearing for the Special Officer that no order was made directing the Special Officer to make any inventory. Learned Counsel for the applicant submitted that an inventory ought to be made of the assets of the company. I therefore direct the Special Officer to make an inventory of all the assets of the company as early as possible. Copies of such inventories should be furnished to all the members of the company.

56. There is a prayer for an injunction restraining the respondent No. 6 from taking out any plant, machinery, goods and other assets from the colliery. The charge relating to removal of the said plant and machinery has not been pressed and therefore no. order is made on the prayer for injunction.

57. The respondent No. 6 should furnish an account of all raisings, despatch and sale of coal and coke to the Special Officer.

58. Each party to bear and pay its own costs. The Special Officer will be entitled to retain the costs of this application, as between attorney and client, out of the assets in his hands. All parties are directed to act on a copy of the minutes countersigned by the Court Officer. On default by the parties the Special Officer is directed to have this order drawn up and completed.