

(1969) 01 BOM CK 0003

In the Bombay High Court

Case No : Company Application No. 89 of 1968 in Company Petition No. 30 of 1968

Marketing and Advertising Associates Pvt. Ltd.

APPELLANT

Vs

Telerad Private Ltd.

RESPONDENT

Date of Decision : 13-01-1969

Acts Referred:

Companies (Court) Rules, 1959 — Rule 7

Citation : (1969) 39 CompCas 436

Hon'ble Judges : R.M. Kantawala, J;Kotwal, J

Bench : Division Bench

Advocate : P.P. Khambatta, for the Appellant; S.J. Sorabjee, for the Respondent

Judgement

Vimadalal, J.—The petitioners have filed this petition for winding-up the applicant-company, and the petition was accepted in the ordinary course and the usual direction for notice to the company was given. When the petition came up for admission on 24th April, 1968, and for directions in regard to advertisement, the parties arrived at certain consent terms, a copy of which has been annexed to the affidavit filed in support of the present summons and marked "A". Under the said consent terms, the company agreed to pay to the petitioners an aggregate sum of Rs. 1,50,000 by certain instalments which were payable on the 30th day of each month. A consent order was passed by the court in accordance with those terms. It may be stated that, under the said consent terms, an installment of Rs. 25,000 became payable on or before the 30th of August, 1968. The actual amount due to the petitioners was, under the said consent terms, left to be decided either by agreement, or by reference to the arbitration of counsel Mr. A. B. Diwan. Clauses 4 and 5 of the consent terms were in the following terms :

"4. In the event of there being a default in payment of any of the aforesaid instalments mentioned in clause (i) above on its due date irrespective of any dispute to be resolved under clause 2 the petition to stand admitted, with liberty to apply forthwith for consequential directions for advertisement and returnable

date and the company will not oppose such application, and the said amount of Rs. 1,50,000 or the balance remaining due at the date of the default to become payable forthwith.

5. In the event of Rs. 1,50,000 (Rupees one lakh fifty thousand only) being paid as aforesaid petition to stand dismissed with no order as to costs, irrespective of the pendency of the arbitration or otherwise."

2. The company duly paid to the petitioners the instalments provided for in the consent terms up to and inclusive of the 30th of July, 1968, aggregating to Rs. 1,10,000. As far as the instalment of Rs. 25,000 which fell due on the 30th of August, 1968, was concerned, the company forwarded to the petitioners their cheque for the said sum on that very day, but the same was dishonoured on presentation for payment by the petitioners. It is the case of the applicant-company on the present summons that they came to know of the dishonour of the said cheque on the 5th of September, 1968, and that the same was dishonoured "due to inadvertence" in certain circumstances which have been set out by the company in paragraph 5 of the affidavit in support of the present summons. It is stated in the said paragraph that the applicant company had two accounts in the Central Bank of India Ltd., which were called account No. 1 and account No. 2, respectively, that the said cheque was drawn by the company on account No. 1, that on the 31st of August, 1968, the company desired to transfer a sum of Rs. 20,000 from account No. 2 to account No. 1, that if that transfer was effected there would have been a sufficient balance in account No. 1 to honour the cheque in favour of the petitioners, but that "due to oversight and inadvertence" the cheque which was intended to be drawn on account No. 2 for the purpose of effecting the said transfer was drawn on account No. 1 and that it was under those circumstances that the company's cheque in favour of the petitioners was dishonoured by the non-payment. The company has stated in the affidavit in support of this summons that, as soon as they discovered this on the 5th of September, 1968, they offered to send a pay slip to their bankers for the sum of Rs. 25,000 to the petitioners which, however, the petitioners declined to accept. It is under those circumstances that the applicant-company has taken out the present judge's summons for condonation of the delay or default in payment of the said instalment of Rs. 25,000 which was payable on the 30th of August, 1968, and for extension of time for payment of the same to such date as the court may deem fit. In fact, the applicant-company has, in the course of the hearing of this summons, offered to hand over to the petitioners not only the said pay-slip for Rs. 25,000, but also the balance of Rs. 15,000 which has not yet fallen due and which, under the consent terms, was payable on the 30th of September, 1968, by another pay-slip which they had with them ready in court and which would complete the payment of the entire amount of Rs. 1,50,000 provided for in the consent terms. That offer was also declined by Mr. Cooper on behalf of the petitioners.

3. In support of the summons, Mr. Nariman, for the applicant-company, has

relied on rule 7 of the Companies (Court) Rules, 1959, which is in the following terms :

"7. Power of court to enlarge or abridge time. - The court may, in any case in which it shall deem fit, extend or abridge the time appointed by these rules or fixed by an order of the court for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

4. It may be mentioned that the said rule is the same in all material respects as rule 310 of the Bombay High Court Rules (O.S.), 1957, which in its turn is identical in terms with rule 288 of the Bombay High Court Rules (O.S.), 1930. It is the contention of Mr. Nariman that the said rule in terms gives jurisdiction to the court to enlarge the time for doing any act, even after the time has expired. Relying on the decision of a single judge of this court in the case of Yusuf Ismailbhai Abdullabhai Lalji Vs. Abdullabhai Lalji, , Mr. Nariman has submitted that the words "an order" in rule 7 of the Companies (Court) Rules are wide enough to include an order by consent. The short facts of that case were that an order for sale of certain salt works at Aden by the Commissioner was made on the 9th of October, 1930, by consent of all the parties, except two against whom it was made in invitum, fixing the date of sale on the 15th of November, 1931, and giving the parties liberty to apply. Defendant No. 10 in the said suit thereafter took out a notice of motion for stay of the sale so fixed, until further orders of the court, or, in the alternative, until some date in April or May, 1932. All the parties who appeared at the hearing of the motion were agreeable to that extension of time, except defendant No. 9 who opposed the same, and raised a preliminary objection that the notice of motion sought to vary a consent order, and was, therefore, misconceived and could not lie. Wadia J., who passed orders on the said notice of motion, held : (1) that an interlocutory consent order can be varied or set aside only on grounds which would invalidate an agreement; (2) that the liberty to apply reserved to the parties under the consent order of 9th October, 1930, cannot be used to vary or set aside that order, but can only be used to carry out the order; and (3) that rule 288 of the Rules of the High Court, on its Original Side, was wide enough to include an order by consent. The learned judge held that by applying to the court for enlargement of the time fixed by the order of 9th October, 1930, defendant No. 10, and the parties who supported him, did not "in substance wish to have the order set aside or even to vary it except in respect of the time at which it is to be carried out". The next step in Mr. Nariman's argument was that rule 7 of the Companies (Court) Rules, which he has submitted is wider in terms than section 148 of the Civil Procedure Code, is applicable even in the case of self-operative orders, and in support of that contention he has relied upon the decision of the Supreme Court in the case of Mahanth Ram Das Vs. Ganga Das, . A Division Bench of the High Court of Patna, whilst deciding an appeal, passed a peremptory order fixing time for payment of deficit court-fees, and providing that if the amount was not paid

within the time so fixed, the appeal would "stand dismissed". The time fixed was to expire on 8th July, 1954, but the appellant was not able to find the money and filed a petition on that very day applying for extension of time which was refused by another Division Bench on the ground that the appeal already stood dismissed by reason of the amount not having been paid within the time fixed. The appellant then made an application by way of a petition u/s 151 which was rejected by still another Division Bench on 2nd September, 1954, the said Bench being of opinion that the proper remedy was by way of review. The appellant then filed a third application, this time by way of a petition u/s 151 read with Order 47, rule 1, of the Code of Civil Procedure, setting out the reasons for his inability to find the money, and offering to pay the deficit court-fees within such further time as the High Court might fix. The Division Bench before which that application came up held that neither section 148 nor section 149 of the CPC were applicable as they applied only to cases which were not finally disposed of, and time could be extended under those sections only before the final order was actually made. They therefore dismissed the application, both under Order 47, rule 1, as well as u/s 151 of the Code of Civil Procedure. The appellant appealed to the Supreme Court which held (paragraph 5) that such procedural orders though peremptory (conditional decrees apart) are, in essence, in terrorem, and do not completely estop a court from taking note of events and circumstances which happen within the time fixed. Hidayatullah J. then proceeded to observe, "such orders are not like the law of Medes and Persians", that the court should have extended time on July 13, 1954, and again when the two petitions were filed for the exercise of its inherent powers. The orders passed by the High Court on those occasions were, therefore, set aside by the Supreme Court which granted the appellant two months' time for payment of the deficit court-fee.

5. Mr. Cooper for the petitioners opposed the application for extension of time made on this summons on four grounds : (1) that the order in the present case was a consent order which could be set aside or varied only by consent; (2) that the said order was a self-operative order and the court had no jurisdiction to set it aside after the time fixed had already expired and the court had become functus officio; (3) that the company, having obtained certain advantages by reason of that consent order, should be estopped from applying to have it set aside or varied; and (4) that, in any event, the court should decline to exercise its discretion in favour of the company as sufficient grounds have not been made out in support of this summons.

6. The main contention of Mr. Cooper which lies at the root of the first two of the four submissions formulated in the preceding paragraph is that an order admitting a winding-up petition is not a mere procedural or interlocutory order, but is a final order as far as the matter before the court at the stage of admission is concerned. I am afraid I cannot accept that contention of Mr. Cooper. As held by my brother Mody in his unreported judgment dated 23/24th November, 1964, in Company Petition No. 59 of 1964, at the stage of admission, the court takes only a prima facie view of the petition on the material before it and has to

consider whether that material would justify the court in summarily dismissing the petition, or whether it would require further investigation. Though there was an appeal from the said decision of my brother Mody (Appeal No. 86 of 1964), this view taken by my brother Mody has not been disturbed by the appellate bench in its unreported judgment dated 8/9th April, 1965. An order admitting a winding-up petition is, therefore, whilst it cannot be called an interlocutory order, it is certainly not a final order and is not akin to a decree. The consent order in the present case, which is a well-operative order, was, therefore, in my opinion, not in the nature of a conditional decree, but was an order which would fail within the ratio of the decision of the Supreme Court in Mahanth Ram Das Vs. Ganga Das, cited above. Mr. Cooper has cited numerous decisions before me, but it is unnecessary for me to discuss them in view of the fact that they were all decisions of final orders or decrees, and indeed, Mr. Cooper has not been able to cite a single case in which the power to extend time has not been exercised in a case in which time was fixed under an order which was not a conditional decree or final order.

7. As far as the first of the four propositions formulated by Mr. Cooper is concerned, viz., that rule 7 of the Companies (Court) Rules cannot authorize extension of time under an order made by consent of parties, he has relied strongly on a very recent decision of the Supreme Court in the case of Hukamchand Vs. Bansilal and Others, . The said case was not a case under rule 7 of the Companies (Court) Rules, but Mr. Cooper has sought to apply the principle which, he says, is laid down therein in regard to section 148 of the Civil Procedure Code, to rule 7 of the Companies (Court) Rules with which the court is concerned in the present case. The facts of Hukamchand's case were rather complicated, but they may be stated in a simplified form for the purpose of the present case. The respondents before the Supreme Court, who were members of a co-operative housing society, had created a mortgage of their property in favour of that society. The Registrar of Co-operative Societies passed an order in the nature of a preliminary decree for sale on the mortgage at the instance of the society in its favour. As the amount was not paid within the time fixed by the said order, the property in question was sold on the 7th of April, 1958, and was purchased by the appellant as the highest bidder. On 3rd May, 1958, one of the respondents applied under Order 21, rule 90, of the Code of Civil Procedure, for setting aside that sale on the ground of material irregularity and fraud in publishing and conducting it. At the hearing of the said application on the 7th of October, 1958, it was agreed between the parties that the time to deposit the amount of the mortgage decree should be extended till 21st November, 1958, and that the application under Order 21, rule 90, should be allowed to be dismissed as withdrawn. The executing court passed an order in accordance with those terms arrived at between the parties and dismissed the application under Order 21, rule 90. On 20th November, 1958, an application was made by the respondents for extension of time for one day beyond the 21st of November, 1958, which was a holiday, and that application came up for hearing before the

court on the 22nd of November, 1958. The respondents, however, did not deposit any amount in court on that day. The court took the view that the time which had been fixed by consent of parties could not be extended by the court and it, therefore, rejected the application for extension of time, and thereafter confirmed the sale as required by Order 21, rule 92, Civil Procedure Code. After an appeal to the District Court and to a single judge of the High Court, and a Letters Patent Appeal to a Division Bench which set aside the order of confirmation of sale and held that the court could extend time for depositing the amount of the decree, the matter was taken up in appeal to the Supreme Court. The Supreme Court proceeded to consider the question on the footing that Order 34, rule 5, of the Civil Procedure Code, applied and took the view (at pages 116-117 *Hukamchand Vs. Bansilal and Others*,) that unlike Order 34, rule 4(2), Order 34, rule 5(1) did not contain any provision for extension of time and postponement of confirmation of sale, and that the provisions of Order 21, rule 92(1) made it absolutely clear that if an application under Order 21, rule 90 was disallowed, the court "has to make an order confirming the sale". The Supreme Court stated in its judgment (at page 117) that the provisions of Order 34, rule 5 and Order 21, rule 92 must be given a harmonious interpretation, and when so interpreted, there was no question of time being granted under Order 34, rule 5, and if the provisions of Order 21, rule 92(1) applied, the sale "must be confirmed", unless before the confirmation the mortgagor has deposited the amount as permitted by Order 34, rule 5, which he had not done in the case before the Supreme Court. The Supreme Court, therefore, took the view (at page 118) that once the application under Order 21, rule 90 had been dismissed on 7th October, 1958, "the court was bound to confirm the sale but for the compromise between the parties giving time up to November 21, 1958". It was then observed in the judgment of the Supreme Court (at page 118 *Hukamchand Vs. Bansilal and Others*,) that though the executing court had not referred to Order 21, rule 92, in its order, it held that it should not grant time in the absence of agreement between the parties, because Order 21, rule 92 required that as the application under Order 21, rule 90 had been dismissed, the sale must be confirmed, and the Supreme Court was of opinion that the executing court was right in doing so. The Supreme Court then proceeded to observe (at page 118 *Hukamchand Vs. Bansilal and Others*,) :

"We are of the view that in the circumstances it was not open to the executing court to extend time Without consent of parties, for time between October 7, 1958, and November 21, 1958, was granted by consent of parties. Section 148 of the CPC would not apply in these circumstances ..."

8. The Supreme Court, therefore, allowed the appeal and held that the sale stood confirmed in favour of the appellant. On first impression, the said decision of the Supreme Court does appear to lay down the proposition for which it was cited by Mr. Cooper, and indeed Mr. Nariman conceded that it did lay down that proposition. Mr. Nariman, however, sought to draw a distinction between the provisions of section 148 of the CPC which were referred to by the Supreme

Court in *Hukamchand Vs. Bansilal and Others*, , and the provisions of rule 7 of the Companies (Court) Rules which, according to him, were much wider and would even authorise the enlargement of the time fixed under a consent order. In my opinion, however, there is no distinction between the provisions of section 148 and rule 7 of the Companies (Court) Rules which can be said to be material for the purpose on the point I am now considering. As, however, the question as to whether the time fixed by a consent order can be enlarged under the relevant statutory provisions or rules, is purely a question of law, the court is not bound to proceed on the basis of a concession by counsel on that point and be driven to misconstrue a decision of the Supreme Court in *Hukamchand Vs. Bansilal and Others*, very carefully and a close scrutiny of that judgment has made me come to the conclusion that it is no authority for the proposition that section 148, Civil Procedure Code, does not apply to a consent order. In view of the fact that on a harmonious interpretation of Order 34, rule 5, and Order 21, rule 92 there is no power in the court to extend time, and the sale "must" be confirmed, unless before the confirmation the mortgagor has deposited the amount as permitted by Order 34, rule 5, section 148, Civil Procedure Code, cannot apply and the only way in which time could be extended would be consent of parties. To invoke section 148, Civil Procedure Code, in such a case would be to render the provisions of Order 34, rule 5, read with Order 21, rule 92, nugatory, and that is what the Supreme Court meant when it stated *Hukamchand Vs. Bansilal and Others*, , Civil Procedure Code, would not apply "in these circumstances". The Supreme Court has, however, not laid down the general proposition that section 148 cannot apply to consent orders. The only observation which might convey the said impression is the statement *Hukamchand Vs. Bansilal and Others*, : "We cannot, therefore, accept the contention that time was not granted by consent of parties and, therefore, the court had power u/s 148 to extend time which had already been granted". That statement must, however, be read in the context of the said paragraph which deals with a contention that was advanced on behalf of the respondents which is mentioned at the beginning of the said paragraph, and it is because the contention was put in that form that it was negated by the Supreme Court in the words just quoted by me. In my opinion, that statement was not intended to convey or lay down the general rule that section 148 does not apply to consent orders, as Mr. Cooper has contended. The position, therefore, is that the view taken by Wadia J. in the case *Yusuf v. Abdullabhai* A.I.R 1932 Bom. 615 already cited above, that the words "any order" in rule 288 of the Bombay High Court (O.S.) Rules, 1930 (which was identical with the present rule 310 and is the same in all material respects as rule 7 of the Companies (Court) Rules) are wide enough to include an order made by consent of parties, still prevails and is the correct view. The first contention of Mr. Cooper must, therefore stand rejected.

9. As far as the second submission of Mr. Cooper is concerned, viz., that the said order was a self-operative order and the court has no jurisdiction to set it aside after the time fixed had already expired and the court had become functus

officio, in view of the conclusion at which I have arrived that an order admitting a winding-up petition is not in the nature of a final order but is procedural order, the present application falls within the decision of the Supreme Court in Mahanth Ram Das Vs. Ganga Das, which was made u/s 151, Civil Procedure Code, and the third petition which was made u/s 151, Civil Procedure Code, read with order 47, rule 1, of that Code were both made after the time fixed under the self-operative order had expired, and yet the Supreme Court held (at page 884, paras. 5 and 6) that the court should have exercised its powers and extended the time even on those two petitions. I must, therefore, hold that the court has the jurisdiction to extend time under rule 7 of the Companies (Court) Rules, even though it is a self-operative order and the time fixed has already expired. In my opinion, as the court is still seized of the case, no question of its having become functus officio arises at all.

10. As far as the third contention of Mr. Cooper relating to the estoppel is concerned, I hold that the facts of the present case do not attract the rule of estoppel. As laid down by the Supreme Court in the case of Gyarsi Bai and Others Vs. Dhansukh Lal and Others, , to invoke the doctrine of estoppel, three conditions must be satisfied : (1) a representation by a person to another, (2) the other should have acted upon that representation, and (3) such action should have been detrimental to the interests of the persons to whom the representation has been made. There is no representation which the company has made in the present case on the basis of which the petitioners have acted to their prejudice. The consent terms do not contain any representation that the company would not apply for extension of time for the making of any of the deposits. Even if the consent terms are construed as implying such a representation, I do not see how that representation has caused the applicants to act upon it to their prejudice. I fail to see how an application for extension of time by reason of a few days' inadvertent delay in making one of the payments stipulated for in the consent terms can cause any prejudice so as to found a plea of estoppel. I have no hesitation in rejecting this contention of Mr. Cooper also.

11. As far as the last contention of Mr. Cooper is concerned, viz, that having regard to the merits of this case, even if the court has jurisdiction to extend time, it should not exercise its discretion in favour of the company, I am afraid, that contention is also ill-founded. I do not see that prejudice would have been caused to the petitioners if they had accepted payment on the 5th September, 1968, when the company offered payment to them, and, in my opinion, the conduct of the petitioners in declining to accept that payment was perverse, or in any event somewhat difficult to understand. The company, on the other hand, has done all it could to remedy the inadvertent mistake as a result of which the payment was delayed only by five days, and at the hearing of this summons the company has even offered to pay the last instalment remaining to be paid under the consent order which has not still fallen due, but that offer has also been rejected unceremoniously by the petitioners. In my opinion, far from the conduct of the company being such as to disentitle them to the relief which they have

sought on the summons, it is the petitioners' conduct that is devoid of merit. In the result, I make the summons absolute in terms of prayer (a) and extend the time for payment of the sum of Rs. 25,000 which was payable by the applicants to the petitioners under the consent terms dated 24th April, 1968, on 30th August, 1968, to 27th September, 1968. The company would be well-advised to make payment of the said amount, as well as of the last instalment which falls due on or before 30th September, 1968, in cash and well in time. Though the petitioners have adopted an attitude in respect of which I have indicated my disapproval in this judgment, since the company is being granted an indulgence under this order, it must pay the petitioners' cost of this summons.

ORDER OF DIVISION BENCH

The judgment of the court was delivered by

Kotval, C.J.

13. This is an appeal against the order of Mr. Justice Vimadalal extending time in favour of the respondent company to pay in balance of the amount due under an order passed upon consent on the 24th April, 1968.

14. The appellants, Marketing and Advertising Associates Private Ltd., were creditors of the respondent-company, Telerad Private Limited. On 18th March, 1968, the appellant company presented an application winding up of the respondent company upon the allegation that the respondent company owed the appellants Rs. 2,12,699.52. The application showed the appellant as the sole creditor. The application, it is not in dispute, was made under the provisions of section 433(e) read with section 434(1)(a) of the Companies Act on the ground that respondent company was unable to pay its debts. After the petition was filed, but before it was admitted, the parties came to a settlement on the 24th April, 1968, and in this appeal we are concerned with the implementation of these consent terms.

15. By clause 1 of the consent terms it was provided that the respondent was to pay the appellant Rs. 1,50,000 in the following instalments :

(a) Rs. 25,000 on or before 30th April, 1968;

(b) Rs. 35,000 on or before 30th May, 1968;

(c) and the balance of Rs. 90,000 by monthly instalments of Rs. 25,000 each payable on or before 30th of each successive month. That would leave the last instalments of Rs. 15,000 only which agreed to be paid by 30th September, 1968.

16. It will be noticed that clause 1 only provided for the sum of Rs. 1,50,000 but according to the appellants the debt due to them was Rs. 2,12,699.52. Therefore the parties provided that, so far as that amount which was in dispute between the parties was concerned, the parties would try to ascertain the amount and settle the matter between themselves or in the event of a dispute they would refer the dispute to the arbitration of Mr. A. B. Divan as an arbitrator.

17. As to what was to happen in the event of default in payment, clauses 4 and 5 are important and they are as follows :

"Clause 4 : In the event of there being a default in payment of any of the aforesaid instalments mentioned in clause (1) above on its due date irrespective of any dispute to be resolved under clause 2 the petition to stand admitted, with liberty to apply forthwith for consequential direction for advertisement and returnable date and the company will not oppose such application and the said amount of Rs. 1,50,000 or the balance remaining due at the date of the default to become payable forthwith.

Clause 5 : In the event of Rs. 1,50,000 (Rupees one lakh fifty thousand only) being paid as aforesaid petition to stand dismissed with no order as to costs, irrespective of the pendency of the arbitration of otherwise".

18. Pursuant to the terms of this settlement the respondent-company said sum of Rs. 1,10,000 up to and inclusive of the instalment due on the 30th of July, 1968. On that date there were outstanding two further instalments, namely, the instalment of Rs. 25,000 which was to fall due on the 20th August, 1968, and the further instalment of Rs. 15,000 which was to fall due on the 30th September, 1968.

19. We are concerned in this appeal with the payment or tender of the amount of the instalment due on the 30th August, 1968. The facts as stated in the affidavit supporting the application of the respondent-company were briefly as follows :

20. The respondents alleged that, in payment of the instalment of Rs. 25,000 which was payable on or before the 30th August, 1968, they had forwarded a cheque for the said sum on that very day but it was presentation. They came to know that the cheque was dishonoured on the 5th of September, 1968, and they alleged that this was due to inadvertence. It was the respondents' case that they had two accounts in the Central Bank of India, account No. 1 and account No. 2, respectively, and that the cheque was drawn on account No. 1 but they intended on the next day, i.e., 31st August, 1968, to transfer to this account No. 1 a sum of Rs. 20,000 from account No. 2 from which that amount was available to them. Both these accounts, it appears, were overdraft accounts and had a certain limit for the overdraft and it is not in dispute today that they in account No. 2 there were more than sufficient accommodation within the limit of the overdraft to meet the payment of Rs. 20,000 or more. In fact it was alleged before us that the account was good for at least Rs. 80,000. The respondent-company then alleged that due to oversight and inadvertence the cheque which was to be drawn for effecting the transfer from account No. 2 to account No. 1 was wrongly drawn on account No. 1 and, therefore, the cheque came to be dishonoured. They also alleged that as soon as they discovered their error on the 5th of September, 1968, they sent a pay-slip of their bankers for the sum of Rs. 25,000 to the appellant-company which the appellants declined to accept.

21. In addition to these facts it is necessary to state certain other facts which

transpired before the court below and which have been duly noted in its judgment. In the course of the hearing of the judge's summons the respondent-company not only offered to pay Rs. 25,000 due on the 30th August, 1968, but also the balance of Rs. 15,000 which was to fall due on the 30th of September, 1968, even before it had become due. The learned judge has noted that the offer was declined by counsel on behalf of the appellants. The same facts are also noted in the last paragraph of the judgment of the learned single judge.

22. On 6th September, 1968, the respondent-company took out a judge's summons wherein they prayed that the delay or default which had occurred in the payment of the instalment of Rs. 25,000 on 30th August, 1968, should be condoned.

23. The appellants opposed the contention and claimed that in terms of the consent order passed on the 24th April, 1968, the court was bound to order that the winding-up petition was admitted and upon such admission the court should give directions as to advertisement and returnable date. They also raised the issue that having regard to the consent terms upon which the order dated 24th April, 1968, was passed there was no power in the court to condone the delay or to extend the time. They urged that the order was an order passed upon consent and could only be varied by consent and in no other way. Moreover, it was an order which was, so to say, a self-operative order or an order which had automatic effect and, therefore, the court would have no jurisdiction to intervene by grant of time or condonation of delay or in any manner to set it aside. It was also urged that the respondents were estopped by its own conduct in that the respondent-company had gained time and certain advantages and could not now turn round and overthrow the consent order. Lastly, it was urged that, in any event, assuming that the court had jurisdiction to condone the delay and extend the time, the court should not exercise its discretion in favour of the respondents having regard to their conduct and want of any adequate explanation. All these points were determined against the appellants by the learned single judge and they have been substantially re-argued in this court by Mr. Khambatta on behalf of the appellants.

24. The principal provision of law upon which the respondents relied to show power or jurisdiction in the court to condone the delay or to grant them time is rule 7 of the Companies (Court) Rules, 1959. That rule provides :

"Power of court to enlarge or abridge time. - The court may, in any case in which it shall deem fit, extend or abridge the time appointed by these rules or fixed by an order of the court for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after expiration of the time appointed or allowed."

25. For the purpose of appreciating some of the earlier decisions on the question it is necessary to state that this rule is identical with rule 288 of the Bombay

High Court Rules (O.S.), 1930, and with rule 310 of the present Bombay High Court Rules (O.S.), 1957.

26. Now the rule says in terms that in any case in which the court deems fit it may extend or abridge the time appointed by or fixed "by an order of the court" for doing any act or taking any proceedings upon such terms (if any) as the justice of the case may require. It also gives power to the court to enlarge time notwithstanding the fact that the application for extension or enlargement of the time is made after the expiration of the time appointed or allowed by the order. Since the rule clearly speaks of "an order of the court" it is clear that even an order passed upon consent could be "an order of the court". In rule 288 of the Bombay High Court Rules (O.S.), 1930, the words were "any order of the court", but we do not think that much can turn upon the use of the word "an" instead of the word "any" because the word "an" is capable of being read as meaning "any - whatsoever" : see Stroud's Judicial Dictionary, volume I, third edition, page 132 and that appears to be the meaning here intended to be conveyed. Therefore, upon the terms of the rule it seems to us clear beyond any doubt that the rule would take within its ambit the consent terms also.

27. But it has been strongly contended on behalf of the appellants that the rule cannot apply to consent orders because of the context in which the words "an order of the court" are used in the rule, and emphasis has been placed upon the succeeding words "for doing any act or taking any proceedings". We do not see how even having regard to those words following the expression "an order of the court", it can be legitimately urged that the words "an order of the court" do not comprise within their ambit an order passed upon consent. Both those expressions "doing of any act" and "taking of any proceedings" can equally well come into operation in a consent order. They do not, therefore, by implication negative a consent order being included within the expression "an order of the court".

28. We are supported in this conclusion by a comparison of rule 288 of the Bombay High Court Rules to which we have referred and which is in *pari materia*. In fact the point has been decided in the judgment of a single judge of this court in *Yusuf Ismailbhai Abdullabhai Lalji Vs. Abdullabhai Lalji*, . This is what Wadia J. in that case said at page 883 :

"By applying to the court for enlargement of the time fixed by the order of October 9, 1930, the defendant No. 10 and the parties who support him do not in substance wish to have the order set aside or even to vary it except in respect of the time at which it is to be carried out. All the parties, as I have said except defendant No. 9, are agreed that the time for the sale of the salt works should be enlarged, and I have the power to enlarge the time fixed by the order under rule 288, provided I am satisfied that a good case has been made out for the enlargement upon the merits of the application. The words "any order" in rule 288 are wide enough to include an order by consent."

29. In our opinion, and we say so with respect, that was a correct view to take of rule 288. It is a provision which is in pari materia with rule 7 of the Companies Court Rules with which we are concerned and therefore the ratio of that decision will equally apply to the construction of rule 7. We have already said that the use of the word "any" in rule 288 and the word "an" in the present rule will not make any substantial difference. Thus it seems to us that the power to condone the delay and enlarge the time can clearly be spelt out upon the provisions of rule 7 and if that power be there, which was the principal point of contest before the learned single judge, then the only question which survives is whether that power was rightly exercised in favour of the respondent. But before we deal with that question it is necessary to notice the other contentions advanced on behalf of the appellants.

30. It was next urged that the order was, so to say, an automatic order making a complete provision for all matters settled between the parties and that therefore the court was precluded from interfering with that order in any way and extending the time was such an interference. In the first place we do not see what is really implied by saying that an order is automatic or self-operative. Every order passed upon consent makes provision for the fulfillment of certain terms by either party and usually provides for what is the consequence of breach of any of its terms.

31. In that sense every order is an order which is self-operative, but we do not see how, assuming that an order is self-operative in this sense, it can necessarily be inferred that the court's jurisdiction to pass such orders as it deems fit in the interests of justice, can be limited or taken away. Turning to the consent terms upon which the order was passed it is clear that the consequence of the non-payment of the instalments is provided in clause 4 of the consent terms and the consequences which flow are four in number. Firstly, that the petition for winding up would stand admitted; secondly, that the creditor (the appellants before us) would be at liberty forthwith to apply for consequential directions regarding advertisement and returnable date; thirdly, that the respondent-company would not be able to oppose such an application and, lastly, that the entire amount of Rs. 1,50,000 or the balance remaining due on the date of default would become payable immediately. Though these consequences are provided in the settlement itself and the order passed on the basis of the settlement, we cannot see how these consequences lead to the conclusion that the court's power of extension of time is in any way curbed or taken away. None of these clauses refers to the question of extension of time or the condonation of delay in the payment of the instalments and we think that much more than is stated in clause 4 would be necessary before an ouster of the statutory power of the court conferred by rule 7 can be inferred.

32. In a similar case the Supreme Court has negatived the contention that peremptory orders passed which are so to say self-operative orders necessarily indicate that the court's powers to interfere with the orders in the interests of

justice are taken away. In Mahanth Ram Das Vs. Ganga Das, , an order was passed in the following terms :

"If the amount is not paid within the time given, the appeal will stand dismissed. If the court-fee is paid within the time given, the appeal will be allowed with costs and the suit brought by the plaintiff will stand decreed with costs and the plaintiff will be granted a decree declaring ..."

33. One of the contentions raised before the Supreme Court is stated in paragraph 5 of its judgment at page 883 Mahanth Ram Das Vs. Ganga Das, . The Supreme Court commented upon the undesirability of fixing time peremptorily for a future happening which leaves the court powerless to deal with events that might arise in between; nevertheless they proceeded to observe that :

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed."

34. Therefore, even automatic or self-operative orders passed upon consent do not necessarily oust the jurisdiction of the court to condone delay and extend time.

35. We have so far shown that even though an order may be an order passed upon consent or an order which is automatic in its operation or a self-operative order, still the court will have jurisdiction to extend time and the fact that it is an order passed on consent or it self-operative in effect does not necessarily show that the time limited by the order cannot be extended. Nevertheless it was contended on the strength of a recent decision of the Supreme Court that whatever may be the view prior to that decision the law has now been altered. The decision referred to is Hukamchand Vs. Bansilal and Others, . In that case the Supreme Court was concerned with the question whether time could be granted to pay up the decretal amount plus the 5% commission after the sale under the provisions of Order 21, rule 90, of the Code of Civil Procedure. The judgment debtor having failed to deposit the amount within the time limited by that rule had prayed for extension of time and this prayer was turned down and the sale confirmed. It was held that that was a correct order. At page 90 the Supreme Court, after discussing the entire case, remarked :

"We cannot, therefore, accept the contention that time was not granted by consent of parties and, therefore, the court had power u/s 148 to extend time

which had already been granted."

36. It is this remark which has been strongly relied on to urge that time would not be granted without further consent of the parties.

37. Now *Hukamchand Vs. Bansilal and Others*, was a case where an award of the Registrar of Co-operative Societies which amounted to a decree was made ordering the respondents therein to pay a sum of Rs. 9,000 with 12% interest. That amount was not paid as directed in the order and a certain property of the judgment debtor had been sold on the 7th April, 1958, and was purchased by the appellant, Hukamchand. No application was made under Order 21, rule 90. An application was made on 3rd May, 1958, but that application appears to have been disposed of. The proceedings under Order 21, rule 90, terminated on 7th October, 1958. On that day the respondents requested for the grant of one months time to deposit the decretal amount along with the auction purchaser's commission and the society (the decree-holder) as well as the auction purchaser had no objection to time being allowed. Therefore, the executing court granted time till November 21, 1958, to deposit the entire decretal amount along with the auction purchaser's commission. On 20th November, 1958, the respondents further applied with reference to the order of 7th October, 1958, that 21st November, 1969, was a holiday and it was not possible to deposit the amount on that day though they were prepared to do so. They consequently prayed for time for one day so that the deposit might be made on November 22, 1958. This application was opposed by the society (the decree-holder) as well as the auction purchaser (the appellant before the Supreme Court) and the question was whether time could be extended. It was in this context that the Supreme Court made the remark which we have reproduced above and it has been urged strenuously that the above remarks of the Supreme Court necessarily imply that without further consent the previous order could not be set aside.

38. Now, it seems to us that *Hukamchand Vs. Bansilal and Others*, , does not lay down any general principle, such as has been contended for, that a consent order can only be set aside by consent and not otherwise. In our opinion, *Hukamchand Vs. Bansilal and Others*, was a case where the provisions of Order 21, rule 92, read with rules 89, 90 and 91 came into play and, whatever may have been the view taken of the provisions contained in those rules earlier, the principle was settled by the decision of the Privy Council in AIR 1931 33 (Privy Council) . In AIR 1931 33 (Privy Council) the Privy Council laid down that Order 21, rules 89, 90 and 91, of the Code of Civil Procedure, were complementary to Order 21, rule 92. They indicated that execution proceedings arising in consequence of an application under Order 21, rule 2, are proceeding only between the judgment debtor and the decree-holder when no other interests had come into being but "when once a sale has been effected, a third party's interest intervenes, and there is nothing in this rule (Order 21, rule 2) to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in rule 89, viz., by

depositing in court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale : see article 166, Schedule I, Limitation Act, 1908 (as the Act then stood). That this is so is, in their Lordships' opinion, clear under the wording of rule 92, which provides that in such a case (i.e., where the sale has been duly carried out), if no application is made under rule 99, "the court shall make an order confirming the sale and thereupon the sale shall become absolute."

39. Now it seems to us that this view of the Privy Council was directly before the Supreme Court in *Hukamchand Vs. Bansilal and Others*, and the Supreme Court affirmed that principle.

"The observation of the District Judge that the court has always the power to postpone passing orders confirming sale of immovable property is in our view incorrect, in the face of the provisions contained in Order XXI, rule 92(1). That provision makes it absolutely clear that if no application is made under rule 89, rule 90 or rule 91 or where such application is made and disallowed, the court has to make an order confirming the sale and thereupon the sale becomes absolute. It is not open to the court to go on fixing date after date and postponing confirmation of sale merely to accommodate judgment-debtor. If that were so, the court may go on postponing confirmation of sale for years in order to accommodate a judgment-debtor. What Order XXI, rule 92 contemplates is that where conditions thereunder are satisfied an order for confirmation must follow."

40. It will thus be seen that in this case the Supreme Court were not concerned with any general principle regarding consent orders, but they were concerned with mere application of the provisions of Order XXI, rule 92, read with rules 89, 90 and 91 and since rule 92, which has been quoted above by the Supreme Court, expressly enjoined that unless an application under Order XXI, rules 89, 90 or 91, is made, they held that the court is bound to confirm the sale under order XXI, rule 92. Therefore, in that case the Supreme Court took the view that the sale ought to be confirmed and there was no scope for grant of extension of time. That is not the same thing in saying, as has been argued in the present case, that a consent order can never permit a court to extend time except upon further consent of the parties. In our opinion, the decision in *Hukamchand Vs. Bansilal and Others*, does not lay down the general proposition for which the appellants contend in the present case.

41. We may also in this connection invite attention to the decision of the Supreme Court in *Janak Raj Vs. Gurdial Singh and Another*, , where the Supreme Court has taken a similar view as regards the provisions of Order XXI, rules 89, 90, 91 and 92, and in that case the Supreme Court expressly referred to and approved of the decision in AIR 1931 33 (Privy Council) , see paragraph 15 at page 612. That is why the Supreme Court did not refer to that case in their subsequent decision in *Hukamchand Vs. Bansilal and Others*, .

42. Next, reference was made to decision of the then High Court of Nagpur in *Vyankatrao v. Shamrao* AIR 1952 Nag. 185, where the following remarks of Hidayatullah J., as he then was (now Chief Justice of India), were relied on :

"Now a party who has taken the benefit of a compromise cannot get out of the compromise in the absence of any fraud. The power of the court to grant time was taken away by the agreement of the parties which by being incorporated in the decree became also an act of the court. It is open to parties in certain cases to contract themselves out of the operation of law".

43. These remarks were made in view of the special facts in that case. If one turns to paragraph 2 of that judgment one finds that the preliminary mortgage decree which was passed on a compromise between the parties on 2nd August, 1933, and by that preliminary decree the sum due was to be paid in two instalments and on default of both the instalments a final decree was to be passed, but the express term of the compromise was that no further time was to be granted and the last date of payment was thus 31st January, 1935. It was in view of this express agreement between the parties that no further time was to be granted, that learned judge held that the power of the court to grant time was taken away by the agreement of the parties which by being incorporated in the decree became also an act of the court. The position, therefore, is clear. The mere fact that an order is passed by consent or the mere fact that the order contains terms which are to come into effect automatically or, in other words, that the order is self-operative, does not necessarily imply that the court's power to extend time is taken away, but there may be cases where the parties by express terms can shut out the power of the court by showing their intention not to ask the aid of the court at all, as, for instance, in *Vyankatrao's* case AIR 1952 Nag. 185 where the parties had agreed that no further time was to be granted. Short of such special circumstances, therefore, it is clear that even in the case of consent orders, as in the case of orders having automatic operation, the power of the court to extend time would be there.

44. The principle was well put - we say so with respect - in an unreported decision of this court in *Haridas Mafatlal Gangalbhai v. Vijayalakshmi Navinchandra Mafatlal* (Appeal No. 84 of 1956), decided on 4th July, 1957, by Chief Justice Chagla. In that case the material part of the order which fell to be construed was "that if the deposit was not made by the date aforesaid, i.e., the 30th June, 1957, this appeal do stand dismissed with costs". The Division Bench put the principle thus :

"Now the principle of law is well settled and does not require much elaboration. The court has always the jurisdiction to extend time for the doing of any act by a party. Section 148 of the CPC deals with those matters which have got to be done under the Code or allowed by the Code, but independently of section 148 the court has inherent jurisdiction to extend time for the doing of any order made by the court, and there can be no question that the court has jurisdiction to extend the time for payment of Rs. 3 lakhs. But the important and essential

limitation upon this jurisdiction is that the matter in which the court wishes to exercise its jurisdiction must be a matter which is still alive, over which the court had control, and which matter has not come to an end. It is elementary that if a matter has come to an end, the court is functus officio, and however much the court may desire to do justice or to remove hardship or to prevent anomalies, the matter being no longer pending in court and having come to an end, the court cannot exercise any jurisdiction with regard to that matter."

45. Looked at from this point of view it is clear to us that the consent terms and the order passed thereupon clearly kept the matter alive in the present case. This stipulation as to default in clause 4 was that, in the event of there being a default in payment, four consequences would follow, namely, (1) that the petition for winding up was to stand admitted; (2) that the petitioner was at liberty to apply for consequential directions for advertisement and returnable date; (3) that the respondent-company would not oppose that application and (4) that the amount of Rs. 1,50,000 or the balance remaining unpaid would become exigible forthwith. Now the very fact that the parties contemplated that the orders of the court will be solicited shows that as between the parties they had not put an end to the matter and had left it open to the decree-holder to obtain further orders from the court. Clause No. 2 also indicates the same. There is no indication therefore in clause 4 to suggest that it was the intention of the parties that the order upon consent should be, so too say, a Code in itself taking effect automatically without any further reference to the court.

46. So far we have discussed the question upon the terms of clause 4 alone, but it seems to us that, when we turn to consider the concluding clause of the order (clause 5 of the consent terms), it becomes clear beyond doubt that the order did not put an end to the matter between the parties and the order was not a self-operative order. The concluding clause of the order says : "In the event of Rs. 1.50,000 (rupees one lakh fifty thousand only) being paid as aforesaid petition to stand dismissed" The expression "as aforesaid" necessarily refers back to clause 4, for, though the instalments are prescribed by clause 1 what is to happen on default of payment of instalments is prescribed by clause 4. If one reads clauses 1 and 4 in conjunction with clause 5, it is clear that the parties contemplated that upon Rs. 1,50,000 being paid in terms mentioned above, the petition was to stand dismissed. Clause 5 was an independent provision controlling both clauses 1 and 4 and, if so, it seems to us that it clearly gave to decree-holder the right to pay Rs. 1,50,000 and get the petition dismissed without reference to the time limited in clause 4 or clause 1. Of course it was contended on behalf of the respondents before us and rightly contended that clause 5 only comes into operation on payment which, in any case, has not been done in the present case. We shall presently show that in fact on the 25th September, 1968, the full amount of the balance, namely, Rs. 40,000 was clearly offered to the appellants by the judgment-debtor. If so, though it would not amount to a payment, we can see no reason why we should not take this fact into account. After all, the order passed by the learned judge was a discretionary

order and, in considering whether the discretion was properly exercised, the circumstance that the entire balance was offered to be paid, can and ought to be taken into account and, it taken into account, we do not see any reason why we should interfere with the discretion exercised by the learned judge. Upon this ground it would really be unnecessary to go into the further question whether further consent is necessary in order to modify the consent order although we have discussed it above.

47. So far as the question of estoppel is concerned, we are also in agreement with the view taken by the learned judge, relying upon the decision in *Gyarsi Bai and Others Vs. Dhansukh Lal and Others*, , for the purposes of establishing an estoppel a party must show that a particular representation has been made and that a party other party acted upon that representation to his detriment. In the present case there is no representation whatever on the face of the consent terms or on the face of the order passed on the basis of the consent terms that Telerad Private Limited would not apply for extension of time. Therefore, there was no estoppel against them in so applying. The view the learned judge took was, with respect, quite correct.

48. We are also in agreement with the findings of the learned judge that the debtor-company had done all it could to remedy the inadvertent mistake as a result of which the payment was delayed only by five days and that after the delay they offered to pay the last instalment remaining to be paid under the consent order, though it had not still fallen due but that offer had been rejected by the appellant. The facts on this question are clear and stated in the judgment of the learned judge himself. On 5th September, 1968, the debtor-company offered to pay Rs. 25,000 which was the amount of the instalment till then defaulted, but objection was taken that the full amount alone could then be offered and that objection was upheld by the learned judge. Then what happened is noted in the judgment under appeal which is dated 23rd September, 1968 :

"In fact, the applicant-company has, in the course of the hearing of this summons, offered to hand over to the petitioners not only the said pay-slip for Rs. 25,000 but also the balance of Rs. 15,000 which has not yet fallen due and which under the consent terms was payable on the 30th of September, 1968, by another pay-slip which they had with them ready in court and which would complete the payment of the entire amount of Rs. 1,50,000 provided for in the consent terms. That offer was also declined by Mr. Cooper on behalf of the petitioners."

49. The debtor-company has also produced before us a certificate of a notary public in support of its offer of payment of Rs. 40,000 and it appears from all this that the amount of Rs. 40,000 was offered to be paid by the debtor-company on the 23rd September, 1968, and on 25th September, 1968. The appellants have not disputed these facts but the contention is that there is no proof that the debtor-company had an amount sufficient to meet the balance unpaid under the consent terms. As to that also debtor-company produced for inspection of

counsel for the appellants the bank's statements of accounts from which it does appear that debtor-company still enjoyed overdraft facility of almost Rs. 80,000 in account No. 2 against which it had drawn the cheque in account No. 1 which came to be dishonoured, due to the error as regards the correct account.

50. No doubt these are facts which have transpired subsequent to the order under appeal, but where it is a matter of judging whether the discretion vested in the trial judge was correctly exercised or not, we can see no reason why we should not take into account these circumstances which have subsequently arisen. It is settled law that the court may take into account subsequent events in determining an appeal. We are satisfied that the debtor-company was able to pay the amount of Rs. 40,000 and that in fact it made a valid offer of payment of Rs. 40,000 on the 23rd and 25th September, 1968, in full satisfaction of the balance due out of the amount of Rs. 1,50,000.

51. The position between the parties, therefore, is that a creditor has filed a petition for winding up a company alleging that the company owed him Rs. 2,12,699.52; that the parties agreed that Rs. 1,50,000 was payable by the debtor-company to the appellants and as regards that amount set out consent terms upon which an order was passed. As to the balance the parties agreed to settle it between themselves or, in the absence of settlement, to refer it to the arbitration of Mr. Divan. Therefore, so far as the balance is concerned, nothing turns upon it in this appeal. As regards the amount of Rs. 1,50,000 it is clear that the debtor-company was able to pay and made a valid offer to pay the balance out of it. Although it was not a payment as provided in the consent terms, the fact remains that they did offer to pay up the full amount and could have paid it. The question then is, should this court in appeal lend its assistance to a petition for winding up the company when, although the petitioner is being paid the full amount which he bargained for, he deliberately does not accept it and insists on the company being wound up. We do not think that we can lend the aid of the court to such a party.

52. Although in the foregoing discussion we have dealt with the arguments as if it were a question of execution of a decree and order we must stress here that the learned single judge was exercising jurisdiction under the Companies Act and that under the Companies Act many more circumstances than the mere debt payable by the debtor-company and receivable by the creditor have to be considered. There is, for instance, the interest of the whole body of shareholders and the court has to determine taking into account all circumstances whether the company is unable to pay its debts. The petition was made u/s 433(e) read with section 434(1)(a) of the Companies Act and in exercise of its powers under the Act it seems to us that the court has a clear discretion notwithstanding the indebtedness of the company to order or not to order the admission of the petition for winding up of the company. That discretion, the trial judge has, in our opinion, correctly exercised.

53. We dismiss the appeal with costs. The respondents may, if so advised, now

deposit the amount of Rs. 40,000 in court. The stay order passed on 27th November, 1968, will stand vacated. The respondents' attorneys shall be at liberty to withdraw the amount of Rs. 500 towards costs.