

(1968) 09 BOM CK 0004

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 : 23-09-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148
Companies (Court) Rules, 1959 — Rule 7
Companies Act, 1956 — Section 439(8)
Evidence Act, 1872 — Section 115

Citation : AIR 1969 Bom 323 : (1969) 2 CompLJ 91

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Advocate : F.S. Nariman, for the Appellant; K.S. Cooper, for the Respondent

Judgement

1. 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 Terms, an instalment of Rs. 25,000/- became payable on or before the 30th 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 lac 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". The company duly paid to the petitioners the instalments provided for in the Consent Terms upto 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 of the said cheque on the 5th of September 1968, and that the same was dishonoured "due to inadvertence" in certain circumstance 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, than 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 honoured by the non-payment. The company has stated in the Affidavit in support of his Summons that, as soon as they discovered this on the 5th of September 1968, they offered to send a pay slip of 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 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 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.

2. 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."

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 v. Abdullabhai 34 Born LR 880 =AIR 1932 Bom 615 , Mr. Nariman has submitted that the words "an order" in the R. 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 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 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 CPC 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.

3. 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.

4. 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 (Bom), 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 (Bom). An order admitting a winding up petition is, therefore, a procedural order made in the progress of the hearing of the petition and, 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 self-operative order, was, therefore, in my opinion, not in the nature of a conditional decree, but was an order which would fall 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.

5. 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 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 of the purpose of the present case. The respondents before the Supreme Court, who were members of co-operative housing 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 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 CPC of r 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 O. 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. 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, C. P. C. After an appeal to the District 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 C. P. C. applied and took the view (at pp. 116-117 of Bom LR) = (at pp. 87-88 of AIR) 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 p. 117 of Bom LR)=(at pp. 88-89 of AIR) 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 O.34, Rule 5, and if the provision 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 p. 118 of Bom LR)=(at p. 89 of AIR) 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 upto November 21, 1958." It was then observed in the judgment of the Supreme Court (at p. 118 of Bom LR)=(at p. 89 of AIR) that though the executing Court had not referred to O. 21 R. 92 in its Order, it held that it should not grant time in the absence of agreement between the parties, because O. 21 R. 92 required that as the application under O. 21 R. 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 p. 118 of Bom LR)=(at p. 89 of AIR):

"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."

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 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 intended 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 inferred to by the Supreme Court in

Hukumchands" case, and the provisions of Rule 7 of the Companies (Court) Rules which, according to him were much wider and would even authorize 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 of 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. I have considered the judgment 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 S. 148 C. P. C. does not apply to a consent order. In view of the fact that on a harmonious interpretation of O. 34 R. 5 and O. 21 R. 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 O. 34 R. 5, Section 148 C. P. C. cannot apply and the only way in which time could be extended would be by consent of parties. To invoke Section 148 C. P. C. in such a case would be to render the provisions O. 34 R. 5 read with O. 21 R. 92 nugatory, and that is what the Supreme Court meant when it stated (at p. 118 of Bom LR) = (at p. 89 of AIR) that Section 148 C. P. C. 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 (p. 118). "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 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 in 34 Bom LR 880 = (AIR 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.

6. As far as the second submission of Mr. Cooper is concerned viz., 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, 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 a procedural order, the present application falls within the decision of the Supreme Court in Mahanth Ram Das Vs. Ganga Das, . The second petition in Mahanth Ram Das Vs. Ganga Das, which was made under S. 151 C. P. C., and the third petition which was made under S. 151 C. P. C. read with O. 47 R. 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 p. 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.

7. 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 v. Dhansukh Lal AIR 1965 1061, 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 person to whom the representation has been made. There is no representation which the company has made in 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 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 a plea of estoppel. I have no hesitation in rejecting this contention of Mr. Cooper also.

8. As far as the last contention 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 what prejudice would have been caused to the petitioners if they had accepted payment on the 5th of 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 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' costs of this Summons.

KSB

9. Summons made absolute.