

(1931) 08 BOM CK 0027**Bombay High Court****Case No:** O.C.J. Suit No. 2638 of 1921

Yusuf Ismailbhai Abdullabhai
Lalji

APPELLANT

Vs

Abdullabhai Lalji

RESPONDENT

Date of Decision: Aug. 6, 1931**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 148

Citation: AIR 1932 Bom 615 : (1932) 34 BOMLR 880 : (1932) ILR (Bom) 231**Hon'ble Judges:** Wadia, J**Bench:** Single Bench**Judgement**

Wadia, J.

This is a notice of motion taken out by defendant No. 10 for an order inter alia that the sale by the Commissioner of this Court of certain salt works at Aden referred to in the Order of October 9, 1930, made by Mirza J. be stayed until the further orders of the Court or in the alternative until some date in April or May 1932. The Order of October 9, 1930, was made by consent of all parties except the plaintiff and defendant No. 7, who were absent, and was made in the same terms in *invitum* as against them. Under it the Commissioner was ordered to fix the date of sale of the salt works on November 15, 1931, and he was further ordered not to proceed with the settlement of the necessary preliminaries before the sale until July 15, 1931. Liberty was reserved under the order to the parties to apply. All the parties who appeared before me are agreeable that an order should be made in terms of the notice of motion except defendant No. 9 who opposes the notice, and his counsel has raised a preliminary objection that the notice of motion seeks to vary a consent order, and is, therefore, misconceived and cannot lie.

2. It is well settled that a consent decree is a mere creature of the agreement on which it is founded, and may be set aside on any ground which will invalidate an agreement between the parties, such as misrepresentation, fraud or mistake. But

unless all the parties agree, an application cannot be made to the Court of first instance in the original suit to set aside the consent decree ; it must be done by a fresh suit brought for the purpose. As was pointed out by Beaman J. in *Fatmabai v. Sonbai I.L.R (1911) Bom. 77 : s.c. 13 Bom. L.R. 573* there is good reason why questions of fraud and misrepresentation, etc., should not be opened up by motions in which the Court ordinarily has to rest its decisions upon affidavits. The only alternative which the law allows is an application for review which must of course be filed within time, A consent order can also be impeached on the same grounds which invalidate an agreement (see *Huddersfield Banking Company, Limited v. Henry Lister & Son, Limited [1895] 2 Ch. 273* A consent order, however, in some points stands on a different footing from a consent decree. A consent order which is in the nature of a judgment on the substantive rights of the parties and on the merits of the case must also be set aside by a regular suit. But an interlocutory consent order which is merely made to facilitate the progress of the suit or to grant interim relief may be set aside on " proper grounds " by an application in the original suit itself: *Yusuf v. Abdullabhoi Lalji (No. 2) ILR (1929) Bom. 372 : s.c. 32 Bom. L.R. 667*. In my opinion, " proper grounds " are grounds such as fraud, misrepresentation or mistake, or any other ground which invalidates an agreement, and the question, therefore, arises whether the Court has any jurisdiction to set aside or vary a consent order on a ground other than a ground invalidating an agreement. In *Mullins v. Howell (1879) 11 Ch. D. 763* Jessel M.R. stated that the Court has a general control over orders made on interlocutory applications, and in that case a unilateral mistake was considered sufficient to give the Court jurisdiction to discharge an interlocutory order made by consent, though such a mistake is not sufficient to invalidate an agreement. In India also, u/s 22 of the Indian Contract Act, a contract merely caused by the mistake of one party as to a matter of fact is not voidable. It was argued on the strength of that decision that the expression " proper grounds " is not necessarily limited to grounds which invalidate an agreement, but I am not prepared to extend the meaning of that expression any further than what has been decided by the cases. In my opinion an interlocutory consent order cannot be varied or set aside merely on the ground of a greater benefit or convenience arising from its variation or from setting it aside, except of course by consent of parties. In *Australasian Automatic Weighing Machine Company v. Walter [1891] W.N. 170* the Court refused to make an order for enlargement of time for transfer of shares to the plaintiff company by the defendant. In the case before me the interlocutory consent order is sought to be varied on the ground that the sale of the salt works will be more beneficial to the parties if postponed to a later date. That is not a " proper ground " for varying the consent order, and the order is none the less by consent so far as defendant No. 10 is concerned, as he was a consenting party to it, though the order was made *in invitum* as against the plaintiff and defendant No. 7, the absent parties.

3. It was further argued that the consent order could be varied under the liberty to apply which was reserved to the parties, as the reservation of the liberty showed that the order fixing the date for November 15, 1931, was not meant to be final. In my opinion, however, the liberty to apply is merely liberty to carry out the order and not to vary it or set it aside. I do not think, therefore, that the liberty to apply helps defendant No. 10 either.

4. Under Rule 288 of the High Court Rules, however, the Court or a Judge has power inter alia to enlarge or abridge the time fixed by any order enlarging time, for doing any act 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 appointed time. 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. I do not agree with the statement of defendant No. 9 made in his affidavit in reply that it was understood at the date of the order of October 9 last that the parties who did not wish for the sale of the salt works at the time would not apply for a further postponement of the sale. There is nothing in the order to warrant that statement, and I cannot look beyond the order for any terms agreed or rather alleged to have been agreed upon between the parties. I may add here merely by way of analogy, that, u/s 148 of the Civil Procedure Code, the Court has power, in its discretion, to enlarge the period for the doing of any act prescribed or allowed by the Code itself.

5. In my opinion, the notice of motion is not misconceived, and the application must, therefore, be heard on its merits.

6. [After hearing arguments the learned Judge passed the following order:-]

P.C.: Sale of the salt works at Aden as per order of October 9, 1930, stayed until April 30, 1932, and all proceedings before the Commissioner stayed until the further orders of the Court.

7. Liberty to all parties to apply.

8. Costs of all parties out of the partnership assets, those of the receivers as between attorney and client.