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**(1995) 02 MAD CK 0036**

**In the Madras High Court**

**Case No :** C.R.P. No. 684 of 1994 and CMP. No's. 3601 and 5731 of 1994

M. Sadaksharavel

APPELLANT

Vs

State Bank of India

RESPONDENT

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**Date of Decision :** 21-02-1995

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 151

**Citation :** (1995) 1 CTC 266

**Hon'ble Judges :** Raju, J

**Bench :** Single Bench

**Advocate :** C.A. Sundaram, for the Appellant; R. Sreekrishnan, for the Respondent

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## **Judgement**

Raju, J.—Having regard to the nature and scope of consideration involved both in the Civil Miscellaneous Petitions and the main revision, a

date has been fixed for the hearing of both the petitions by an order dated 19-12-1994. Hence, both are taken up together for hearing. The above

revision has been filed against the order of the learned 3rd Additional Subordinate Judge, Coimbatore, dated 24.1.1994 in I.A.No. 9 of 1994 in

OS.8 of 1985, wherein the application filed by the second defendant (defendant) in the suit came to be rejected. In the said application filed u/s

151 of the Civil Procedure Code, read with Section 125 of Companies Act, the second defendant sought for treating the issue regarding limitation

and the sale of shares, as preliminary issue and dispose them of as such before finally adjudicating the suit.

2. In the affidavit filed in support of the said application, it was stated that the suit by the plaintiff was for the recovery of Rs. 2,96,87,614/-, that

the plaintiff was not entitled to the suit claim, since the plaintiff has committed

breach of trust without sufficient considerations on account of selling the shares of the company held in Revahi CP Equipment limited at a very low price without sanction from the court, especially during the pendency of the lis and that the acknowledgment by signing the confirmation of statement will not have the effect of the renewal of the original pronote and the confirmatory statement will not give a cause of action making the suit claim viable u/s 125 of the Companies Act and that the suit claim itself is barred by limitation. In the light of the above, the issues pertaining to the above contentions were sought to be got tried as preliminary issues. It is at the time of hearing while reiterating the above stand, the learned counsel for the petitioner also contended that if the issues were not tried as preliminary issues, grave injustice will be caused to the second respondent and that the plaintiff would be placed in a position, giving an unreasonable upper hand against the second defendant. The application was opposed by the plaintiff by filing a counter. It was also contended that neither of the issues sought to be tried as preliminary issues, could be decided as pure questions of law, on the basis of pleadings without going into the evidence and facts of the case and that the object of the petitioner was only to delay the completion of the trial in which the plaintiffs evidence was already over and the petitioner has taken more than once adjournments to examine himself The Court below by the order under challenge in this revision has rejected the application holding that the issues can be tried and disposed of only on the basis of the oral and documentary evidence also and not merely on the basis of submission of legal issues and that therefore there was no justification in seeking the Court to decide the issues as preliminary issues. Hence the above revision.

3. The learned counsel for the petitioner while reiterating the stand taken in the grounds made in the Memorandum of Grounds, contended that apart from the plea of limitation which had to be adjudicated as a preliminary issue, the issue relating to the legality, validity and propriety of the sale of the shares would help, in case the second defendant is able to substantiate his claim, to set off the real sale market value of the shares as against the suit claim. The learned counsel also contended that according to them, the real sale market value of the shares would be about Rs. 24 crores as against the suit claim of Rs. 2 crores and odd and that it is all the more

necessary for the reason that the plaintiff has chosen to sell the shares belonging to the second defendant during the pendency of the suit without even obtaining the orders or directions of this court, to the detriment of the second defendant. The learned counsel further contended that there is ample power and authority in the trial court to accede to the request made to decide the issues in question as preliminary issues to do substantial justice to parties and that the failure to do so constitutes failure to exercise jurisdiction vested in the Court below and this warrants interference of this Court even at this stage of the proceedings.

4. The learned counsel for the respondent/plaintiff placed reliance upon Order 14 Rule 2 of Civil Procedure Code; as also the decisions reported in

Usha Sales Ltd. Vs. Malcolm Gomes and Others, , Major S.S. Khanna Vs. Brig. F.J. Dillon, , S.M. Peter Soundaraj v. P.S. Irudayaraj 1986

TLNJ 311 Dhirendranath Chandra Vs. Apurba Krishna Chandra and Others, to substantiate their claim that the issues in question cannot and need

not be tried as a preliminary issue and that the order of the Court below does not call for any interference. Before dealing with the respective

contentions of the Learned Counsel, it becomes necessary to advert to the relevant provisions of law relied upon by the learned counsel and also

the decisions cited supra.

5. The application itself came to be filed u/s 151 of the Code of Civil Procedure, invoking the inherent powers of the Court. It is by now well

settled that the inherent powers of a Court are not only in addition to, but also complementary to the powers expressly conferred under the Code

and that such power will not normally be exercised, if it is inconsistent and comes into conflict with any of the powers expressly or by necessary

implication conferred by the other provisions of the Code. If there are any express provisions exhaustively covering a particular topic normally in

such case, the Court will not resort to exercise its power in a manner other than the one prescribed by such provisions, by having recourse to the

inherent power of the Court. In substance under the inherent power of the Court, it can act ex-debito justitiae to do real and substantial justice

without violating any specific provision to the contrary contained in any part of the Code. Order 14, Rule 2 on which reliance has been placed for the

respondent/plaintiff provides that notwithstanding that a case may be disposed

of on a preliminary issue, the court shall, subject to the provisions of sub rule (2), pronounce judgment on all issues. Sub rule (2) of Order 14 Provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try first that issue which relates to, (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. Learned counsel for the petitioner contended that the claim of the second defendant/petitioner in the present proceedings does not satisfy the requirements of Rule 2 of Order 14 and that therefore the Court below was right in rejecting the request made by the petitioner.

6. In *Usha Sales Ltd. Vs. Malcolm Gomes and Others*, , a learned Single Judge of the Bombay High Court held, while construing the scope of Order 14 as amended in 1976, that after amendment in 1976 there is an obligation cast upon the Court that even though a case may be disposed of on a preliminary issue, the Courts shall subject to the provision of sub rule (2) pronounce judgment on all issues and in other words, the obligation to decide a question of law as a preliminary issue if that decision dispose of the case or part of the case is no longer there. It was also held that the discretion to decide any other issue/her than the one contemplated under sub rule (2) of Order 14 as a preliminary issue has been taken away totally from the Court and an obligation has been cast upon the Court that it must proceed to hear all the issues and pronounce judgment on the same. In 1986 TLNJ 311, in the case of *S.M. Peter Soundaraj v. P.S. Irudayaraj* a learned single Judge of this Court has chosen not to interfere with an order of the trial Court rejecting a petition to try an issue as a preliminary issue on being satisfied with the soundness of the reason given by the trial Court in support of its decision. The decision as could be seen from the reported decision, proceeds merely on the scope of interference in exercise of the revisional jurisdiction of this Court with the reasons assigned and the discretion exercised by the trial court. In that case, it had the approval of the learned Judge as being supported by sound reasons and proper exercise of the judicial discretion. This would only

go to show that there cannot be any invariable or uniform rule as such of universal application in this regard and to some extent the particular facts and circumstances of the case alone would be of considerable relevance.

7. In *Major S.S. Khanna Vs. Brig. F.J. Dillon*, , the Supreme Court held that the jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court that the whole suit may be disposed of on the issue of law alone and the Code conferred no jurisdiction upon the Court to try a suit on merely issues of law and facts as preliminary issues and normally all the issues should be tried by the Court and that failure to do so would result in a lopsided trial of the suit.

8. In *Dhirendranath Chandra Vs. Apurba Krishna Chandra and Others*, , a learned Single Judge of the Patna High Court held expressing a view that a plain reading of Rule 2 will show that ordinarily even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgment on all issues and that the ordinary rule is subject to only one exception carved out in sub rule (2). It was also held therein that where the trial Court disallowed the request of the petitioner to try the issue, namely, whether the suit was barred u/s 66(1) of the CPC as preliminary issue there was no error touching the exercise of jurisdiction on the part of trial Court as that was itself a discretionary matter.

9. In *Ramdayal Umraomal Vs. Pannalal Jagannathji*, , a Full Bench of the Madhya Pradesh High Court expressed the view that even an issue relating to jurisdiction can be tried as a preliminary issue only if it can be disposed of without recording any evidence and that where an issue relating to jurisdiction, is a mixed question of law and fact requiring recording of evidence the same cannot be tried as a preliminary issue.

10. I have carefully considered the submissions of the learned counsel appearing on either side on the correctness or otherwise of the claim as also the need for determining the issues sought to be adjudicated as preliminary issues. The Court below had chosen to reject the claim mainly, rather on the only ground that the adjudication of the issues sought to be tried and decided as a preliminary issue would also require oral and documentary evidence and that therefore, there was no justification in the plea on behalf of the petitioner to have the two issues raised tried as preliminary issues. In my view, after the amendment to the provisions contained

in Rule 2 of the Order 14 by the substitution of a new rule in the place of the old Rule 2, the disposal of a claim made in the suit should be by pronouncing a judgment on all issues. Notwithstanding the fact that the case may be disposed of on a preliminary issue also. The exception carved out is only in respect of the issues visualised and specified under Sub Rule (2) of the Rule 2 of Order 14. The learned counsel for the petitioner contended that the restriction or embargo placed under Rule 2 of Order 14 could be applicable only in respect of where the case itself would be disposed of and not in respect of cases where such a result would not in respect of cases where such a result would not follow as an unsuitable consequence upon the result of the main case itself. Though attractive the submission may appear to be, in my view, the same cannot withstand a close scrutiny and consideration. Accepting such a proposition would mean that in all cases where the adjudication of an issue may not result in the ultimate disposal of the claim or the case itself, the Court can decide the issues as it likes or it suits the court. That in my view, could not be the object of the provisions contained in the Order 14, Rule 2, and an interpretation of that type, if countenanced, would defeat the very object of the amendment itself. The explanation carved out in sub rule (2) of Rule 2 of Order 14 is only in respect of cases, where the issues are merely issues of law simpliciter and upon the decision of which the case or a part thereof may be disposed of and that too when it relates only to the jurisdiction of the Court or in respect of a bar to the suit created by any law for the time being in force. Having regard to the nature of issues involved in this case which are sought to be got adjudicated as preliminary issues, it cannot be contended that the same could be decided merely as legal issues or issues of law only without the necessary factual basis or evidence in support or aid of the same. The questions involved particularly the plea of limitation could be only mixed question of fact and law and not merely an issue of law. The other issue relating to the legality and the propriety of the sale of the shares for gross under value is concerned, unless the necessary facts relating to the market value etc., are brought on record, there is no scope for deciding such an issue and therefore permitting a partial trial in respect of the two issues only at this stage resulting in the Court undertaking a perfunctory exercise of power, may even lead to, as

the Supreme Court is pleased to put it, a lopsided trial of the suit, and consequent miscarriage of Justice.

11. The learned counsel for the petitioner no doubt is right in saying that the decision on the two issues as above would safeguard his interest and

save the defendant from much of embarrassment and inconvenience and enable him to safely project the claim of set off or a counter claim but that

allegation, in my view, is no ground to direct the trial of the two issues as preliminary issues, particularly when the reasons given by the court below

for rejecting such a claim of the petitioner constitute sufficient and valid grounds and do not appear to be either an injudicious or arbitrary and

unreasonable exercise of its discretion. For all the reasons stated above, in my view no interference is called for with the order of the Court below

and the revision, therefore, fails and shall stand dismissed. In view of the above, no further order is necessary in the connected civil Miscellaneous

petition.

12. The learned counsel for the petitioner would contend that the rights of the petitioner accruing or flowing from and out of any ultimate findings on

the trial and disposal of the suit, in respect of the issues sought to be tried as preliminary issue should not be jeopardised to plead for adjustment or

appropriation or to set off the suit claim in its entirety or portion and such rights and liberties should be protected and preserved and liberty should

be granted to work out his remedy in this behalf at the later stages. The learned counsel for the respondent objects to any such protection or liberty

being granted. In my view, objection on the part of the learned counsel for the respondent only betrays, perhaps the unethical and unreasonable

course of action taken by the sale of the shares during the pendency of the trial of the suit without even obtaining any orders or permission of the

Court, as pleaded by the learned counsel for the petitioner to the detriment of the rights of the second defendant. In my view, but for the fact that

the order of the court is a discretionary one which has not been shown to be patently illegal or to be vitiated by perversity of approach and the

amended provisions of law there was every justification even to countenance the claim of the petitioner in view of the piquant situation created by

the plaintiff by resorting to the sale of shares after the filing and during the pendency of the list. Consequently the request of the learned counsel for

the petitioner appears to be well-merited and justified. The petitioner shall be at liberty to work out his remedies, as prayed for.

13. In view of the above order, no orders are required in the Civil Miscellaneous Petitions.