(1988) 11 GUJ CK 0005

In the Gujarat High Court

Saurashtra Cement and Chemicals Industries Ltd. and Others APPELLANT

Vs

Esma Industries P. Ltd. and Others RESPONDENT

Date of Decision : 19-11-1988

Acts Referred:

Companies (Court) Rules, 1959 — Rule 2, 2, 6, 6, 9, 9
Companies Act, 1956 — Section 10, 2, 397, 397(1), 398

Citation : (1990) 69 CompCas 372 : (1989) 2 GLR 541

Hon'ble Judges : S.B. Majmudar, J

Bench : Single Bench

Advocate : Anil Diwan, for the Appellant; Ram Jethmalani, for the Respondent

Judgement

Majmudar J.

1. In this company application, the applicants have sought dismissal of the main Company Petition No. 62 of 1986 in view certain preliminary

objections about the ,maintainability of the petition that they seek to raise by way of this application.

2. In order to appreciate the nature of the controversy posed for my consideration in this application, it is necessary to note a few introductory

facts. The respondent, Esma industries P. Ltd., has filed the main Company Petition No, 62 of 198 in this court. The said petition is filed under

sections 397 and 398 of the Companies Act, 1956(""the Act"", for short). It seeks to challenge certain alleged acts of Amazon/commission said to

have been committed by original respondents Nos. 2 and 3 in the company petition who are in charge of the management of the company. It is

alleged that they are conducting the affairs of the company in a manner oppressive to its shareholders and also in manner prejudicial to the interest

of the company. At the admission stage, this was opposed vehemently by the present applicants. Ultimately, after hearing both the parties, this

court(G. T. Nanavati J.) was pleased to admit the company petition to final hearing on November 14, 1986. So far as interim relief is concerned,

Company Applicant No. 57 of1986 was moved by the respondents (original petitioners). The learned judge did not grant interim relief as prayed

for therein.

3. Against admission of the company petition, the original applicants preferred O.J. Appeal No. 13of 1987 in this court. They also challenged the

order passed by G. T. Nanavati J. in Company Application No. 57 of 1986 on November 14, 1986, refusing to grant interim relief. They first

moved the Supreme Court by ways of a petition for Special Leave to Appeal (Civil) No. 15518 of 1986. That petition was allowed to be

withdrawn with liberty to the respondents to prefer an appeal before a Division Beach of this court. Accordingly, O.J. Appeal No. 20 of 1986 was

moved before the Division Bench of this court against the order of the learned single judge refusing to grant interim relief to the respondents. So far

as O.J. Appeal No. 13 of 1987 was concerned, by an order dated July 15, 1987, the Division Bench of this court, consisting of P.R.

Gokulakrishnan C. J. and R. C. Mankad J. was pleased to permit the learned advocate for the appellant in that appeal, i.e., the present applicants,

to withdraw the appeal as the learned advocates for the present applicants before the Division Bench stated that he will have the right to raise the

preliminary question of maintainability of the petition before the learned single judge and if the learned judge decides that such a question can be

raised, he can record evidence, if necessary, and pass appropriate orders. The Division Bench also recorded the statement of the learned advocate

for the respondent, Mr. Jethmalani, that he will not raise an objection to the effect that the court cannot go into the question by reason of the fact

that the petition has been admitted. It was made clear that the respective parties will have full opportunity to make their submissions as to whether

the issue of maintainability should be heard as preliminary issue. In view of the consensus arrived at between the parties, O. J. Appeal No. 13

1987 was withdrawn. So far as O.J. Appeal No. 20 of 1986 was concerned, it was admitted by the Division Bench and limited interim relief was

granted pending further orders on December 22, 1986, by the Division Bench consisting of R.C. Mankad and B.S. Kapadia JJ.

4. It is the light of the consensus arrived at before the Division Bench of this court in O.J. Appeal No. 13 of 1987 that the applicants have

preferred this summons. The prayers made in this judge''s summons read ass under :

(a) to dismiss company petition No.62 of 1986 in view of the preliminary objection regarding the maintainability of the petition raised by the

applicants in the application:

(b) to try the question regarding maintainability of the petition raised in the affidavit in support of the judge''s summons as a preliminary objection

and here same, before proceeding with Company Petition No.62 of 1986;

(c) pending final hearing and disposal of Company Petition No.62 of 1986, to stay further proceeding in Company Petition No.62 of 1986 and

connected matters;

(d) to stay the operation of interim orders passed in the aforesaid proceeding.''''

5. In the affidavit, it has been contended that the petition as field by the respondents is not maintainable on the following grounds:

(1) On the date of presentation of the petition, i.e., April 19, 1986, the petitioner did not hold 10% of the issued share capital of the first

respondent-company. That the issued share capital was raised to Rs. 7.15 crores. Pursuant to the decision of the extraordinary general meeting of

the shareholders held on January 15, 1986, the board of directors at the meeting held on February 28,1986, resolved to raise the issued share

capital and application forms were sent to the shareholders inviting them to subscribe to the the issued higher share capital. In these circumstances,

since the issued share capital was increased to Rs. 7.15 crores and application forms for subscribing to the shares so issued were posted to the

shareholders, the decision for increasing the issued share capital has been acted upon and made irreversible. Under the circumstances, since the

petitioner and those who have consented to the petition claimed to hold shares worth approximately Rs. 40 lakhs, they are holders of less than

10% of the issued share capital of the company and, therefore, this petition is not maintainable in view of the provisions of section 399 of the Act.

This objection is reflected by para 41A of the affidavit - in - reply filed in the main company application.

(2) The petition is not maintainable as the consent given by the holders who are alleged to constitute 10% of the issued share capital have not give

a valid consents in the petition were considered by the consenting shareholders and that they had applied their mind to the allegations raised in the

petition . A consent letter from Smt. Devkidevi Ruparel has been field. To the best information of the applicants she does not know English and,

therefore, could not have understood even the contents of the petition or the contents of the consent letter filed along with the petition. This

objection was raised in para 41D of the affidavit - in reply to the main company petition. (3) In order to maintain a petition under sections 397 and

398, it will be necessary to establish that the company deserves to be wound up on the ground that it is just and equitable to do so. No case been

made out, nor any averment made in the petition to this effect. Only an attempt has been made to show that the financial substratum has vanished.

Surprisingly, for purchasing shares in such a company, the petitioner claims to have paid twice the market price and face value of the shares. The

averment in the petition are contradictory. The latest financial position of the company as on April 30, 1986, clearly established the inherent

financial worth of the company. Therefore,there being no justification for winding up, there is no question of maintaining a petition u/s 397 and 398

of the Act. This objection is raised in para 41F of the affidavit - in - reply to the company petition. In order to maintain a petition under sections

397 and 398 of the Act, apart from showing that the company deserves to be wound up, it is also necessary to show that the passing of an order

of winding up would unfairly prejudice the petitioner. The petitioners have not mad any attempt to show as to how the passing of an order of

winding up would unfairly prejudice the petitioners nor have they made any averment in that behalf. Under the circumstances, the petition deserves

to be dismissed not only because it fails to make out an adequate case for the passing of a winding up order but also because it does not make out

a case that the passing of an order of winding up would unfairly prejudice the petitioners. This objection is also raised in para 41G of the affidavit-

in-reply to the company petition.

On the basis of the aforesaid preliminary objections, the following preliminary issues are sought to b raised by the applicants with a request to try them as such :

(1) Whether, in view of section 399 of the Companies Act, the petitioners can maintain nd prosecute the petition under sections 397 and 398

against No. 1 company?

(2) Whether the petitioners held 10% of the issued share capital of the company on the date of the presentation of the petition?

(3) Whether the petitioner and those who support the petition had given valid consent on the date of the presentation of the petition so as to ensure

that persons holding at least 10% of the issued share capital of the company have validly consented on the date of filing of the petition ?

6. This application has been opposed by the respondents by filing the affidavit-in-reply of Mr. Premjibhai K. Ruparel, a director of the respondent-

company. It is submitted that the proposed preliminary issues cannot be tried as such for the reason that such an exercise would be barred under

Order 14, rule 2 of the CPC (""the Code"", for short). That they do not touch upon th question of jurisdiction of the court nor do they indicate about

the bar of maintainability of the suit under any provisions of law. Even on merits, it has been submitted that it is not correct to suggest that the

petition if not maintainable on any of the grounds as sought to be made out by the applicants as per these issued and, therefore, the application

deserves to be dismissed with costs.

7. It has been further submitted that it is not true to suggest that on April 10, 1986, the issued share capital of the company was Rs.7.15 crores. It

was only Rs. 4 crores. The company''s resolution for increasing the company''s equity share capital passed at its general meeting held on January

15, 1986, as well as the decision of the company''s board of directors to issue additional equity share capital are contrary to the provisions of the

Act and void. The question whether the issued share capital of the company on the date of presentation of the petition was or is Rs. 7.15 crores

would depend upon the decision of the question whether the company''s decision at its extraordinary general meeting of the company''s board of

directors to issue additional equity share capital are valid. Therefore, even if the issues relating to the maintainability of the petition were to be heard

ask preliminary issues, the same would involve not hearing all the issues arising in the petition together. It is therefore, contended that there is no case for raising any preliminary issues and trying them as such.

8. Mr. Anil Diwan, learned counsel for the applicants, in support of this application, contended that the proceedings under sections 397 and 398 of the Act are a complete code by themselves. That the court has ample power u/s 402 of the Act to pass appropriate orders in public interest and in the interest of the company and all the shareholders. That this type of proceedings is not strictly speaking analogous to a suit between two private parties but these are proceedings in which members of the public are vitally interested and consequently, the provisions of Order 14, rule 2 of the Code cannot be pressed into service for deciding the present proceedings. It was submitted the the provision of Order, 14 rules 1 and 2 of the Code apply in their full vigour to suits before the civil court and that they do not automatically apply to proceedings of the present nature before the company court and that this court has ample jurisdiction to raise and try and issue as a preliminary issue if it goes to the root of the maintainability of the petition even if such issue involves decision on of law and fact, its trial as a preliminary issue is not precluded so far as the present proceedings are concerned. Mr. Diwan submitted that, if this court, in its discretion holds that these issues need not be tried as preliminary issues it would be a different matter. But the provision of Order 14, rule 2 of the Code cannot be made applicable to the present proceedings. He, therefor, submitted that these issues may be raised may be raised and tried as preliminary issues.

9. Mr. Jethmalani, learned counsel for the respondents, on the other hand, submitted that though personally speaking, he will have no objection if these preliminary issues are tried as such and decided as, in his view, there is no substance in these preliminary issues, as an officer of the court, he submitted that such issues cannot be raised and tried as preliminary issues and that the strict bar of Order 14, rule 2 squarely applies to the present case. Placing reliance on section 141 of the Code and rules 6 and 9 of the Companies (Court) Rules, 1959, it was submitted that there is nothing to indicate that the provisions of Order 14, rule 2 of the Code can be ruled out while trying a petition under sections 397 and 398 of the Act. They avoid protracted and piece-meal trial of the proceedings and possibility of remand after a number of years. They also rule out the tendency of

having short cuts in deciding such matters and consequently, there is no reason why a full-fledged trial of such petition should not be insisted upon

nor is there any reason to try such proceedings in a piece-meal manner as suggested by the applicants. It was submitted that public interest and the

interest of the company and interests of the entire body of shareholders as such clearly indicate that the provisions of Order, 14, rule 2 of the Code

should be made applicable to such proceedings and there is no reason why they should be ruled out. On the contrary, ruling them out would be

contrary to public interest and contrary to the interest of all concerned.

10. In view of the aforesaid rival contentions, the following points arise for my 1determination :

(1) Whether the provisions of Order 14, rule 2 of the Code apply to a company petition u/s 397 and 398 of the Act ?

(2) Whether the suggested issues can be tried as preliminary issues ?

(3) What order?

Point No.1 : So far as the first point is concerned, it is necessary to look at the relevant statutory provisions. Section 10 of the Act deals with

jurisdiction of courts and sub-section. (1) thereof states that the court having jurisdiction under this Act shall be :

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situated, except to the

extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to the High Court in pursuance of sub-section

(2) : and

Sections 397 to 409 occur in Chapter VI which deals with prevention of oppression and mismanagement. The concerned relevant provisions

proper to their amendment by the Companies (Amendment) Act, 1988, are provided as under. As per section 397(1), any member of a company

who complains that the affairs of the company are being conducted in a manner oppressive to any member or members including any one or more

of them-selves may apply to the court for an order under the section, provided such members have a right so to apply in virtue of section 399.

Sub- section (2) thereof provides that if, on any application under sub-section (1), the court is of opinion :

(a) that the company''s affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members

; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a

winding up order on the ground that it was just and equitable that the company should be wound up

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. Section 398 provides for application to

the court for relief in cases of mismanagement. It lays down that ""Any members of a company who complain :

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the

company ; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of

shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its board of directors or of

its managing agents or secretaries and treasurers or in the ownership of the company''s shares or if it has no share capital, in its membership, or in

any other manner whatsoever and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner

prejudicial to public interest or in a manner prejudicial to the interest of the company :

may apply to the court for an order under this section provided such members have a right so to apply in virtue of section 399. Sub-section (2)

thereof provides that if the court is of the opinion that the affairs of the company are being conducted as aforesaid or by reason of any material

change in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the court may, with

a view to bringing to an end or preventing the matters complained of or apprehended, make such orders as it thinks fit. Then follows section 399

which deals with right to apply under sections 397 and 398. It will be necessary to extract the entire section a under :

399. (1) The following members of a company shall have the right to apply u/s 397 and 398 :

(a) in the case of a company having a share capital, not less than on hundred members of the company or not less than one-tenth of the total

number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company,

provided that the applicant or applicants have paid all calls and other sums due on their shares ;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or shares are held by two or more 0persons jointly, they shall be counted only as one

member.

(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained

the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members

of the company to apply to the court u/s 397 and 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of

sub-section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members to give security for such amount as the Central Government may

deem reasonable for the payment of any costs which the court dealing with the application may order such member or members to pay to any

other person or persons who are parties to the application.

11. Section 400 deals with the procedure of issuing notice to be given to the Central Government of applications under sections 397 and 398.

Section 401 lays down the right of the Central Government to apply under sections 397 and 398 ; while section 402 deals with powers of the

court on an application u/s 397 or 398.

12. The Supreme Court, in exercise of its powers conferred upon it by sub-sections (1) and (2) of section 643 of the Act, has made the

Companies (Court) Rules, 1959. Rule 2 (4) defines ""Code"" to mean the Code do Civil Procedure, 1908. Sub-rule (5) defines `court'' to mean a

court having jurisdiction under the Act ; while sub- rule (12) defines ""Act"" to mean the Companies Act, 1956. It is analogous to section 151 of the

Code. It provides that ""nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such directions or

pass such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the court. As per rules 11(a), 12 and 13,

applications under sections 397 and 398 have to be made in the form of petitions and as per rule 12(a), such petitions are to be heard in the open

court. Rules 88 to 91 deal with the procedure regarding the filing of petitions under sections 397 and 398 of the Act and prescribe requirements

about relevant averment to be contained in the petition and the format of notice to be issued to the Central Government and other procedural

details for effectively carrying out the orders passed under these provisions by the court. Section 141 of the Code is another important provision

which is required to be noticed at this stage. It reads as under :

The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any court of civil

jurisdiction.

13. It is true, as submitted by Mr. Diwan for the applicants, that proceedings u/s 397 of the Act are not like suits between private parties and it is

also true, as held by the Supreme Court in the case of Cosmosteels P. Ltd. v. Jairam Das Gupta [1978] 48 Comp Cas 312 , that these provisions

represent a complete code by themselves. However, the question remains whether the provisions of Order 14, rule 2 of the Code apply to these

proceedings or not. The combined thrust of section 141 of the Code and rule 6 of the Companies (Court) Rules clearly indicates that the

provisions of Order 14, rule 2 of the Code would apply to these proceedings as far as they can be made applicable. The phrase ""as far as

applicable"" has been construed by the Supreme Court in the case of Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others, , to mean

that the concerned provisions may be made applicable to the given proceedings keeping in view the nature of the proceedings and the relief

claimed therein. It has, therefore, to be found out whether the applicability of Order 14, rule 2 is in any way ruled out by the settings in which

petitions under sections 397 and 398 are entertainer. The moot questions are whether there is anything in these provisions which, by necessary implication, contraindicates the applicability of these provisions, whether the applicability of Order, 14 rule 2 would whittle down or stultify the

effective operation of these provisions ? If they are found to so stultify these proceedings then, can it legitimately be held that Order 14, rule 2 in its

vigour cannot apply to these proceedings. But if on the other hand, it is found that they do not whittle down the play and efficacy of these

provisions and they can harmoniously coexist with these provision, would they squarely get attracted and get superimposed on these proceedings

by the combined thrust of section 141 of the Code and rule 6 of the Companies (Court) Rules.

14. Placing reliance on a decision of the Bombay High Court in the case of Kelly and Henderson P. Ltd. In re [1980] 50 Comp Cas 646, 650, it

was submitted by Mr. Diwan for the applicants that the provisions of Order 23, rule 3 of the Code were held not to apply in their vigour to

proceedings u/s 397 and 398 of the Act by the Bombay High Court. Mrs. sujata Man-hour J., in that case, was concerned with the question

whether proceedings under sections 397 and 398 can be disposed of as compromised between the parties in the light of Order 23, rule 3 and

whether further inquiry by the court in the matter was ruled out. Mr. Sujata Man-hour J., speaking for the Bombay High Court, considered the

scheme of section 397 and 398 of the Act and took the view that if Order 23, rule 3 was applied in its vigour to all such proceedings, then, such

proceedings would get stultified and the very purpose of that provision would be frustrated if such proceedings can be compromised between the

parties and the court would feel helpless in the light of Order 23, rule 3 and would be bound to pass a decree or order in terms of the compromise.

In this connection, it was held (at, 651 of 50 Comp Cas) :

Basically, the provisions of both these sections provide for relief in cases of oppression of minority shareholders and in cases where the affairs of

the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. Wide powers

are given under these sections to the court to pass an order which will be in the interstice of the company. Similar powers are given when relief is

asked for in the case of mismanagement. In such a situation, where the petitioners ask for relief from oppression or mismanagement, any compromise which deals with the manner in which the affairs of the company will be conducted in future must be scrutinized by the court before the

court gives its sanction to the compromise. In the case of a compromise, therefore, which is arrived at in a petition under sections 397 and 398 of

the Companies Act, the compromise will be in the best interests of the company.

15. Thus, the provisions of Order 23, rule 3 of the Code were applied with due modification to the proceedings under sections 397 and 398 of the

Act. Mr. Diwan for the applicants also invited my attention to another decision of the Bombay High Court in the case of Vadilal Chatrabhuj Gandhi

v. Thakorelal Chimanlal Munshaw [1954] 24 Comp Cas 25 wherein the provisions of Order 23, rule 3 of the Code were applied to a liquidator''s

misfeasance summons.

16. In my view, therefore, before applying any provision of the Code to the proceedings under the Act, it would be necessary to find out the nature

of the proceedings and the relief claimed therein and the effect of the applicability of the concerned procedural provisions of the Code to these

proceedings, meaning thereby, whether the applicability of procedural provisions would in any way thwart or stultify these proceedings and the

reliefs claimed therein ? If the concerned procedural provisions are found to have such obnoxious effect, their applicability will have to be suitably

modified, so that the procedural provisions may not over-reach the substantive provisions. But if, on the other hand, the concerned procedural

provision is not found to have such obnoxious effect and if it is found running parallel to it and also found to streamline the procedure and make it

more effective, such procedural provisions, instead of being found to be deleterious, would be found to be fully commensurate with the substantive

provisions of the Act and can fully and harmoniously co-exist in all their vigour and vigour with the concerned provision of the Act. With this

prelude, let us have a look at the relevant provisions of the Code around the applicability of which the present controversy rotates. Order 14, rule

2 reads as under :

2(1). Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provision of sub-rule (2), pronounce

judgment on all issues.

(2) 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 that issue first if that issue 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.

17. After the amendment in this provision in 1976, it becomes clear that the Legislature has frowned upon trial of suits piecemeal. The reason is

obvious. If, on a preliminary issues, the suit is tried and if the issue is decided one way or the other, it would lead to further proceedings by way of

appeal or revision. A number of years would lapse and ultimately when the highest court which is approached in the hierarchy decides the matter

one way or the other, a stage may be reached where the suit has to be tried further and that would involve a lot of delay and the parties would get

completely exhausted and exasperated by the passage of time underlying such piecemeal trial of suits. With a view to avoiding such delay and

exasperation to the litigant public, this provision of Order 14, rule 2 in the amended from has been brought in the statute book. Consequently, the

underlying principle of this provision is a laudable and beneficial one. As per this provision, it is indicated by the Legislature that suits must be tried

as a whole on all issues, save and except in the following exceptional circumstances, wherein trial of preliminary issues can be permitted :

(1) That the concerned issue must be a pure issue of law, meaning thereby, no question of leading evidence to prove or disprove the issue would

be countenanced. Even a mixed issue of law and fact cannot be tried as preliminary issue ;

(2) Even as a pure issue of law, a preliminary issue can be framed and tried only if it touches upon the question of jurisdiction of the court ; or

(3) Such pure issue of law raises the question about proceedings being barred by any provision of law.

18. As for example, a suit being barred by any provision of law like section 85 of the Tenancy Act r a suit being barred on account of not giving a

statutory notice like section 80 of the Code or similar such provision. In all other cases, even if preliminary objections are taken about maintainability of the proceeding, issue either of pure law or issues raising mixed questions of law and fact cannot be tried as preliminary issues.

This is the clear mandate of Order 14, rule 2. Let us see whether the application of this mandate to proceedings u/s 397 and 398 of the Act would,

in any way, frustrate these proceedings under the ACt or would whittle them down in any manner. It is no doubt true that proceedings u/s 397 and

398 of the Act are not, in the strict sense of the term, proceedings between private parties like a plaintiff and defendant in the suit and they have

wider coverage and they touch upon the public interest of a large body of creditor, shareholders and they are taken to be in the best interest of the

company''s business in the commercial world. In these proceeding, even the Central Government has interest. However, when, in these

proceedings, an objection is taken by the other side who is interested in getting these proceedings dismissed that these proceedings are not

maintainable, is it necessary to try such objection as a preliminary issue ? So far as this question is concerned, I fail to appreciate how non-

considering of such issue as preliminary issue would frustrate these proceedings which are initiated in the best interest of the company, the body of

creditors and shareholders. It is pertinent to note that, by way of general practice, when such petitions are moved, they are placed for admission

unlike suits. If, despite these objections being raised and considered, the learned company judge decides, in his discretion, to admit the petition,

there is no reason why such dispute should be further raised by way of preliminary issue and, bifurcating the trial of the main petition of merits, this

issue should be tried as a preliminary issue, if it is not a pure issue of law pertaining to jurisdiction of the court or dealing with the question of the

petitioning to jurisdiction of the court or dealing with question of the petition being barred by any provision of law. If any interim relief is granted in

these proceedings against the other side, it has every right to prepare an O. J. appeal before a Division Bench of the High Court and get

appropriate relief. That remedy is always available to the other side against whom interim relief is granted by the learned single judge. If, on the

other hand, no interim relief is granted, the other side is not affected at all. Mere admission of the petition by itself would naturally not be treated as

amounting to harassment to the respondent. Merely because a petition remains pending for a couple of years on the file of the High Court without any interim relief, it cannot be said that the other side gets harassed and, that therefore in order to alleviate this harassment, the issue of

maintainability of such petition should be treated as a preliminary issue, as the provisions of Order 14, rule 2 of the Code would not permit such

exercise. It is also pertinent to note that even against orders admitting such petitions, appeals are usually filed before the Division Bench of this

court by way of O.J. appeals as was done in the present case itself. It is also pertinent to note that as per section 483 of the Act, appeals lie from

any order made or decision given in matters of winding up of companies by the court. Thus, O.J. appeals are available in plenty against the orders

or decisions of the court, dealing with various company petitions under the Act. Even L.P. As. are also permitted under clause 15 of the Letters

Patent against any orders or decisions which are judgments within the meaning of the clause, when such judgment are given by the court exercising

original jurisdiction under the Act. Consequently, if Order 14, rule2 of the Code is made applicable to these proceedings, it cannot be said that the

nature of the remedy and the relief claimed in these proceedings would get whittled down by the applicability of these procedural provisions. On

the other hand, the applicability of these provisions would really streamline these provisions and would make them more effective. It is obvious that

if a petition u/s 397 and 398 is decided on a preliminary issue de hors the provision of Order 14, rule 2 and if it is held that such proceedings are

not maintainable and after going through the hierarchy of appeals before the High Court and the Supreme Court, ultimately, if is held that such

proceedings were maintainable, there would be a possibility of remand after a number of years and the proceedings would be revived on the file of

the High Court possibly after a decade if not more and by that time, all necessary data and evidence would be lost and the received proceedings

may even fail on merits on account of paucity of data and absence of relevant evidence which may have been lost by passage of years. If, on the

other hand, Order 14, rule 2, is applied in its full vigour to such a petition, all that would happen is that save and except parte preliminary issues as

contemplated by Order 14, rule 2, all other issues would be tried at the same time by the High Court, all evidence would be led and a

comprehensive decision would be rendered at the earliest by the learned single judge so that all concerned parties may know where they stand on issues of maintainability of the petition as well as on merits and a final decision can be rendered at the same time so that, once and for all, these

proceedings come to an end before the first court with the result that the appellate court also can go into these questions comprehensively in appeal

against the decision of th first court. This situation would result if the provisions of Order 14, rule 2 are applied to these proceedings. It, therefore,

beseemed clear that applicability of provisions of Order 14, rule 2 to proceedings u/s 397 and 398 will avoid unnecessary protraction of trial and

avoidable delay and will rule out possibility of these proceedings getting stultified and frustrated by paucity of evidence due to delay that may result

in piecemeal trial of these proceedings while non-applicability of these provisions or their applicability in a diluted form on the contrary would

frustrate these very proceedings and public interest underlying them and would make these proceedings in a given contingency abortive and

meaningless. In that view of the matter, it cannot be said that importing of the provisions of Order 14, rule 2, in their vigour and rigour via rule 6 of

the Companies (Court) Rules and section 141 of the Code would, in any way, frustrate the proceedings under sections 397 and 398 of the Act as

submitted by Mr. Diwan for the applicants, nor can it be said that applicability of these procedural provisions is, in any way, contraindicated by

some of these provisions. On the same reasoning on which applicability of Order 23, rule 3 of the Code strikeout sense was ruled out by the

learned single judge of the Bombay High Court in Kelly and Henderson P. Ltd. In re [1980] 50 Comp Cas 646, the applicability of Order 14, rule

2 strikeout sense to these very proceedings would remain fully justified so that public interest underlying these proceedings may get buttressed

rather than battered.

19. I entirely agree with the submission of Mr. Jethmalani for the respondents that, by applying Order 14, rule 2 in all its vigour to the present

proceedings, public interest underlying these proceedings would get better subserved rather than by ruling out the applicability of these provisions

to these proceeding. For all these reasons, therefore, it must be held that the provisions of Order 14, rule 2 of the Code apply in their entirety to

proceedings under sections 397 and 398 of the Act.

20. Point No. 2 - Once it is held that the provisions of Order 14, rule 2 of the

Code fully apply to these proceedings, it becomes at once clear that

preliminary objections which are put forward by the applicants to the maintainability of the main Company Petition No. 62 of 1986 cannot be

countenanced in the light of the sweep of Order 14, rule 2. These preliminary objections require at least affidavit evidence to be led as fairly stated

by learned advocate for the applicants. The alleged non- maintainability of a petition u/s 399 of the Act, on account of the personal disability of the

concerned petitioners for moving the petition, cannot be equated to bar of proceedings under any express provision of law. But even assuming that

such bar can be involved u/s 399 of the Act, such objection cannot be decided without going into the factual controversy as to whether on the date

of the petition, the petitioner commanded shares worth 10% of the issued capital. This is the additional reason why such issued cannot be raised

and tried as preliminary issues in the present proceedings. None of these preliminary issues, therefore, as suggested by learned advocate for the

applicants, can be tried as a preliminary issue. Order 14, rule 2 clearly rules out such an exercise. Point No, 2 is answered accordingly.

21. As a result of the aforesaid discussion, it, therefore, follows that prayer (b) in Company Application No. 90 of 1987 cannot be granted. So far

as prayer (a) is concerned, the objection reflected therein cannot be tried as a preliminary issue but it will have to be tried along with the other

issues on the merits of the petition and will have to be answered ultimately while deciding the main company petition on merits. Prayer (a),

therefore, is treated to be premature at this stage and hence cannot be entertained. It is, however, clarified that the question whether the company

petition is maintainable in law and in fact, will have to be decided ultimately on merits while considering the main petition. This is not the stage to

express any opinion one way or the other on this aspect. Subject to this clarification, therefore, it is held that none of the final prayer as put forward

in Company Application No. 97 of 1987 can be granted at this stage. Consequently, the company application fails and is rejected. There will be

no order as to costs in the facts and circumstance of the case. Notice discharged.

