

(2011) 03 DEL CK 0248

In the Delhi High Court

Case No : IA No. 10287 of 2010 in Test Case No. 56 of 2009

Dr. Stya Paul

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 3, Order 32 Rule 15, Order 32 Rule 3, Order 7 Rule 1
Succession Act, 1925 — Section 218, 247, 278

Citation : (2011) 03 DEL CK 0248

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : H.L. Tiku and Thakur Sumit, for the Appellant; Rajiv Nayar D. Pathak and K. Datta for APEEJAY and Sudhir Nandrajog P. Pradip Sharma and Siddhartha Lodha for D-5, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.

IA No. 10287/2010

1. By this order, I propose to dispose of this application under Order 32 Rule 3 and Order 32 Rule 15 of the CPC filed by Ms. Sushma Berlia, daughter of Late Shri Stya Paul and Smt. Rajeshwari Paul.

2. Before dealing with the rival contentions, certain essential facts may be noted. Late Shri Payare Lal was blessed with three sons, namely, Shri Jit Paul; Dr. Stya Pal (Petitioner herein now deceased) and Lord Swraj Paul (Respondent No. 2) as well as three daughters namely Smt. Prakash Wati Gupta (Respondent No. 3), Smt. Bimla Devi (Respondent No. 4) and Smt. Kamla Jindal (Respondent No. 5).

3. The Petitioner state that Late Shri Jit Paul was single and expired at Kolkata on 3rd June, 2009 leaving behind an extensive estate including immovable

properties at Delhi. The Petitioner and Respondent Nos. 2 to 5 are his only surviving class II heirs. On or about 9th November, 2009, Dr. Stya Paul filed the present petition u/s 278 read with Section 218 of the Indian Succession Act, 1925 praying for grant of Letters of Administration of the estate of Late Shri Jit Paul to his brother Late Shri Swraj Paul, Respondent No. 2.

4. An order dated 13th November, 2009 was passed by this Court directing issuance of notices to the Respondents as well as publication of the citation in "Indian Express" in its New Delhi and Kolkata editions. Despite publication, no objections have been filed by any person.

5. On 21st December, 2009 M/s Apeejay Pvt. Ltd. filed IA No. 16838/2009 in the present case contending that a Test Case No. 56/2009 had been filed by one M/s Kumar Brothers for grant of letters of administration of the estate of the deceased in the court of District Delegate at Alipore on 16th September, 2009; that this filing was prior to the filing of the present case; and that notice had been issued in the said case. Dismissal of the present petition was consequently sought.

6. In the meantime, IA No. 4809/2010 was filed in these proceedings on or about 13th April, 2010 by Dr. Stya Paul u/s 247 of Indian Succession Act praying for an ex parte interim order for considering appointment of a fit and proper person as the pendent lite administrator of the estate of the deceased.

7. In the meantime, Dr. Stya Paul (Petitioner herein) expired on 7th June, 2010 leaving behind his widow Smt. Rajeshwari Paul and a daughter, Ms. Sushma Berlia, as his surviving heirs. IA No. 8326/2010 has been filed by Sushma Berlia under Order 22 Rule 3 and Order 1 Rule 10 CPC inter alia praying for their substitution as Petitioner Nos. 1(a) & 1(b) in place of the deceased Petitioner.

8. The present application being IA No. 10287/2010 has been filed thereafter on or about 2nd August, 2010 under Order 32 Rule 3 and Order 32 Rule 15 of the CPC by Ms. Sushma Berlia inter alia contending that consequent upon the death of her husband, Smt. Rajeshwari Paul is under serious depression. It is further stated that she was suffering from the Alzheimers disease which has deteriorated her physical and mental condition; the same has worsened and she is therefore unable to grasp matters.

It is submitted that on account of her inability to take a decision in relation to the matter, it is necessary to appoint a guardian ad litem for her.

9. To support her prayer Ms. Sushma Berlia, daughter of the Petitioner has also stated that she is staying with her mother Smt. Rajeshwari Paul since the last more than two decades and that Smt. Rajeshwari Paul is under her care; that Ms. Sushma Berlia has no interest adverse to that of Smt. Rajeshwari Paul and is consequently fit to be appointed as her guardian ad litem.

On these averments, Ms. Sushma Berlia has prayed in the present application that she should be appointed as guardian ad litem of Smt. Rajeshwari Paul. An

alternative prayer is made that in case this Court adjudicates that the applicant is not a proper person to be appointed, such other person as may be deemed fit by this Court, may be appointed as guardian ad litem of Mrs. Rajeshwari Paul.

10. It is noteworthy that the application is supported by a certificate dated 30th July, 2010 issued by Dr. Vijay Chandra, M.B.B.S. (AIIMS), M.D. Neurology (U.S.A.), Ph.D. Johns Hopkins University (U.S.A.), Certified Diplomate of the American Board of Psychiatry & Neurology. Dr. Chandra has issued the certificate to the following effect:

Mrs. Rajeshwari Paul, 86 years, is suffering from Lewy Body Dementia, which is a variant of Alzheimer's disease.

In this condition, there is impairment of cognitive (intellectual) function. The patient is unable to grasp, analyze or understand situations. She is thus unable to make informed and appropriate decisions. The demise of her late husband has aggravated her condition.

She requires regular medical and nursing care.

11. As noted above, M/s Apeejay Pvt. Ltd. has filed IA No. 16838/2009 u/s 151 of the CPC objecting to the maintainability of the main petition. Mr. Rajiv Nayar, learned senior counsel appearing for Apeejay Pvt. Ltd. points out that the applicant has placed a copy of the petition filed by M/s Kumar Brothers, a partnership firm as a creditor, for grant of letters of administration to the estate of Shri Jit Paul which was registered as Case No. 268/2009 before the District Delegate at Alipore seeking satisfaction of the liabilities.

12. Mr. Sudhir Nandrajog, learned senior counsel appearing for Respondent No. 5 and Mr. Rajiv Nayar, learned senior counsel appearing for the Apeejay Pvt. Ltd. have submitted that Dr. Stya Paul has been shown as one of the relatives of the deceased Shri Jit Paul and arrayed as Defendant No. 1 in these proceedings.

Learned senior counsels have urged that upon demise of Dr. Stya Paul, impleadment was sought of Smt. Rajeshwari Paul & Smt. Sushma Berlia as his legal heirs. In these proceedings also, an application was also filed under Order 32 Rule 3 CPC by the Defendant No. 1(a) calling upon the court to make an inquiry by the medical board by the Additional District Judge at Alipore in OS No. 10/2010 entitled Kumar Brothers v. Stya Paul with regard to the health of Smt. Rajeshwari Paul and her capability of protecting her interest.

13. One important fact deserves to be noticed before considering the rival contentions. The present application was filed on 2nd August, 2010 and came up for consideration before this Court on 6th September, 2010. The observations of the court in this order have material bearing on the question urged before me and reads as follows:

IA No. 8326/2010 (for amendment)

Since the original Petitioner died during the proceedings, his legal

representatives are seeking to be substituted in his place and a subsequent application - I.A. No. 10287/2010 has been filed in respect of one of them, i.e. Mrs. Rajeshwari Paul stating that she is suffering from Alzheimers diseased.

In view of the submissions made, this Court is of the opinion that the other applicant Mrs. Sushma Berlia should be impleaded as legal representative. This will, however not preclude - if the Court is satisfied that the other legal representative Mrs. Rajeshwari Paul has to be represented through guardian ad litem - from substituting her as well.

IA No. 8326/2010 is, therefore, partly allowed in the above terms.

IA No. 10287/2010

Issue notice. Counsel opposite accept notice and submits that reply will be filed to the application.

Test Case. 56/2009

List on 22nd November, 2010.

14. In the meantime, on the application filed under Order 32 of the CPC, the court at Alipore recorded proceedings. On the 18th of December, 2010, the following order was recorded by the Additional District Judge, 11th Court, Alipore:

All parties are present.

Heard all sides on the ground of maintainability and also on the petition filed by the Defendant No. 1(a) under Order 32 Rule 3 and 15 of Code of Civil Procedure

The Learned Advocate for the Plaintiff has urged the court to make an inquiry by a Medical Board to ascertain to whether Rajeswari Paul, mother of the Defendant No. 1(a) is really a patient of Alzheimer's disease or not.

The Learned Advocates of all the Defendants including the Defendant No. 1(a) have shared this view and learned Advocate for the Defendant No. 1(a) has prayed for constitution of such a Medical Board at an early date.

He further submits that the mother of the Defendant No. 1(a) is 86 years old infirm lady and is not in a position to move even and, therefore, the doctors of Kolkata have to go to Delhi for examination of the said patient and his client is ready to bear all the costs including Professional loss, food and lodging and Travelling Allowances.

Such proposal is innocuous and let this Court ask the director, IPGMER, Kolkata for sending the names of the doctors one psychiatrist, one Neurologist and one Neuro Psychologist Positively by 15.1.2011.

Adjourn to 15.1.2011 for further hearing on maintainability ground and for further order awaiting the reply from the Director, I.P.G.M.E.R.

15. The present application is opposed by M/s Apeejay Pvt. Ltd. (applicant in IA

No. 16838/2009) as well as by the Respondent No. 5 Smt. Kamla Jindal who has filed an affidavit in response denying the averments relating to the condition of Smt. Rajeshwari Paul. Apart from the denial on facts, the opposition primarily rests on the following three grounds:

(i) That proceedings in OS No. 10/2010 Kumar Brothers v. Stya Paul u/s 218 of the Indian Succession Act before the District Judge, Kolkata are prior to the present petition and that main petition itself is not maintainable.

(ii) That in these proceedings, an order dated 18th December, 2010 with regard to the condition of M/s Rajeshwari Paul was passed with the consent of Ms. Sushma Berlia.

(iii) It is urged that in view of the constitution of a medical board by the Additional District Judge, Alipore, this Court does not have the jurisdiction to proceed for examination of Smt. Rajeshwari Paul. It is submitted that the same consent of Ms. Sushma Berlia has been reiterated in the order dated 5th March, 2011.

16. Right at the onset, it is essential to consider the scope of proceedings under Order 32 Rule 3 of the CPC read with Order 32 Rule 15. These provisions read as follows:

Order 32

Guardian for the suit to be appointed by Court for minor Defendant.-

(1) Where the Defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the Plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in this behalf, or, where there is no such guardian (upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian) of the minor, or, where there is (no father mother or other natural guardian), to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

xxxx

Rule 15

Rules 1 to 14 (except Rule 2A) to apply to persons of unsound mind- Rules 1 to 14 (except Rule 2A) shall, so far as may be, apply to persons adjudged, before or during the tendency of the suit, to be unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

Statutory provisions thus cast solemn duty on the court to conduct inquiry and to assess the ability of a party to the proceedings who is stated to be suffering from a disadvantage or a disability to protect his interest.

17. Mr. H.L. Tiku, learned senior counsel for the Petitioner has placed the judgments reported at *Kasturi Bai and Others Vs. Anguri Chaudhary*, *Anuradha Jha Vs. Santosh Singh and Others*, *Somnath Vs. Tipanna Ramchandra Jannu*, *Shailendra Bhargava v. Kanhiyalal Bhargava* 2009 (V) AD (DEL) 545 *Surinder Kaur v. Sardar Rajdev Singh* *Shri Jai Prakash Goel Vs. State*, wherein the principles with regard to the duty of the courts as well as the scope of inquiry under Order 32 have been laid.

18. In *Kasturi Bai and Others Vs. Anguri Chaudhary*, while referring to the provisions of Rule 15 of Order 32 of the CPC, the court observed as follows:

11. On a bare perusal of the said provision, it is evident that the Court is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. It further provided that even if a person is not so adjudged but is found by court on inquiry to be incapable to protecting his or her interest when suing or being sued or reason of any mental infirmity, an appropriate order hereunder can be passed. The Respondent did not contend that Appellant No. 1 herein is of unsound mind. As noticed hereinbefore, the Respondent herself had filed an application before the trial court for holding an inquiry to the effect that she suffers from mental infirmity.

12. The learned trial court refused to do the same and in that view of the matter the High Court, in our opinion, while setting aside the said order could only issue a direction directing the learned trial Judge to hold an inquiry so as to enable it to arrive at a finding as to whether the Respondent herein was incapable of protecting her interest by reason of any mental infirmity or "not. As no such inquiry was held, there cannot be any doubt whatsoever that the learned Single Judge committed a jurisdictional error in passing the impugned judgment which, the Division Bench as noticed hereinbefore upheld.

19. On the issue of unsoundness of mind and the nature of the inquiry in the judgment reported at *Somnath Vs. Tipanna Ramchandra Jannu*, , the court has set down the principles and parameters of the inquiry by the court as follows:

17. The above discussion clearly leads to the logical conclusion that when the plaint is being examined for the purpose of admission, if it contains a statement as required by Clause (d) of Rule 1 of Order 7 that the Plaintiff is a person of

unsound mind and that a next friend is suing on his behalf, the court must at once hold an inquiry. It is the duty of the court to do so and it is not necessary for the next friend to make a separate application for that purpose. This inquiry should ordinarily include the calling of the Plaintiff himself and questioning him in Court. If the Court entertains doubt about the mental capacity or the soundness of his mind, it is open to the Court to take further assistance in the form of medical examination and the evidence of the doctor under whose observations the Plaintiff may be kept. The quantum and extent of inquiries must be left in each case to the circumstances prevailing. There may be a Plaintiff who on immediate view may appear to be a person of unsound mind, and the Court may not need much evidence beyond recording of the questions put to and the answers given by the person concerned. There can be other cases which are not so clear and more evidence may be necessary. However, apart from the total extent of the evidence that might be led, we would suggest that as a matter of strong commonsense approach, the Plaintiff who is alleged to be of unsound mind should be invariably called for being questioned when the case falls under the second part of Rule 15 of Order 32. This inquiry is made "for the purpose of recording a finding by the court that the Plaintiff is a person of unsound mind, or a person mentally so infirm as to be incapable of protecting his own interests. The provisions of Rule 15 of Order 32 makes it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction, or if not so adjudged, is found by the court on inquiry to be so. That is the foundation, prima facie, for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the court to give a finding and to admit the plaint and issue the process to the other side.

(Underlining furnished)

20. Mr. Rajiv Nayar, learned Senior Counsel appearing for M/s Apeejay Pvt. Ltd. has urged at length that judicial comity mandates that this Court stays its hands so far as inquiry into the health and ability of Smt. Rajeshwari Paul to prosecute this case is concerned. Mr. Nayar, learned Senior Counsel and Mr. Sudhir Nandrajog, learned senior counsel have placed reliance on the pronouncement reported at India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., to urge that a medical board having been constituted and the court at Alipore having commenced the inquiry, this Court has no jurisdiction to proceed in the matter and is required to await the outcome of the inquiry by the learned Additional District Judge which is seized of a previously instituted petition.

21. Mr. H.L. Tiku, learned Counsel for the Petitioner has vehemently disputed that the proceedings at Kolkata are not prior. It has been urged that the petition at Kolkata was filed by M/s Kumar Brothers before the District Delegate, Alipore, Kokata. In these proceedings, an order was passed on 25th November, 2009 whereby it was held that the Petitioner before the District Delegate, Alipore was incompetent and the petition was returned to the Petitioner for filing along with

the proper endorsement before the District Judge, Alipore. It is submitted that the petition was filed before the District Judge only on 22nd December, 2009 whereupon it has been registered as OS No. 66/2009. It is submitted that in this background, the present petition having been filed on 3rd November, 2009, the pending petition at Kolkata is not prior to the instant case.

22. Learned Senior Counsel for the Petitioner has vehemently contended that the proceedings initiated at Kolkata are collusive. Reliance has been placed on the provisions of Section 278 of the Indian Succession Act to contend that the deceased had rights, title and interest in immovable properties in Delhi and therefore, this Court has the jurisdiction to entertain and adjudicate upon this issue.

23. For the reason that one of the persons namely Smt. Rajeshwari Paul is not represented before this Court, I am not opining on this objection pressed by Mr. Nayar, learned senior counsel, at this stage which would be considered after ensuring adequate and appropriate representation to her; grant of hearing in the present matter and adjudication only thereafter.

24. In any case, the consideration by this Court on 6th September, 2010 on the issue of health of Smt. Rajeshwari Paul is certainly prior to 18th December, 2010 by the Kolkata court.

25. In the pronouncement of the Supreme Court reported at India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., the court was concerned with the question of validity or otherwise of the arbitration agreement. The issue with regard to the validity of the arbitration agreement was raised in a suit filed by the Respondent before the Madras High Court which had passed interim orders of injunction against the Plaintiff from taking any action in terms of the agreement including those pursuant to the Arbitration clause. The Petitioner did not seek modification of the order of injunction. The interim order of injunction was confirmed by the order dated 21st January, 2006. Despite this order of injunction, a petition was filed before the Supreme Court of India u/s 11 of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator. In this context that the Supreme Court had observed that in view of the restraint order dated 21st January, 2006, the court while performing judicial function, would ordinarily not pass an order which should make one of the parties to the lis violate the order passed by another court.

The instant case raises no such issue.

26. The proceedings recorded by this Court on 6th September, 2010 clearly suggest that a person other than Ms. Sushma Berlia could very well be ultimately appointed as guardian ad litem keeping in view the claimed interest of the Plaintiff No. 2-applicant herein and the prime consideration being the welfare, well being and interest of Smt. Rajeshwari Paul.

27. There is yet another aspect of this matter. Advances in medical sciences have

led to developments of several scientific tests which include pathological, radiological, neurological and other tests which would aid the medical experts in evaluation of a person's disease as well as mental status. If the tests are needed to evaluate the condition of Smt. Rajeshwari Paul, the medical experts from Kolkata would find it difficult to arrive at an authoritative conclusion in view of their inability to effect such tests at Delhi.

28. It also needs no elaboration that environmental placement of a patient may impact the mental status of the person. It may also effect the severity of the person's physical or mental condition. Likewise the responses of a patient, especially someone suffering from an neurological disease, may vary depending on her familiarity of the doctors/physician examining her.

29. The observations of the Division Bench of the Bombay High Court in para 18 of *Somnath Vs. Tipanna Ramchandra Jannu*, would also shed light with regard to the issue of two inquiries which read as follows:

18. We may at once point out that such an inquiry and finding may be good for the purpose of the next friend to present the suit and obtain first order of the court. This finding of the court does not and cannot bind the Defendant who may after entering appearance point out to the court that it has been misled into giving a wrong finding and the Defendant was willing to prove that the Plaintiff was a person who was capable of protecting his own interests. If such a challenge is held out in a given case, the issue is still open between the parties. The Defendant is entitled to prove this allegation. The court cannot shut out an inquiry simply because on the earlier inquiry by it, it gave a finding as contemplated by one part of Rule 15 of Order 32. If a Defendant holds out such a challenge and succeeds in proving what he alleges, the consequences are obvious, and we have already indicated what the court will do when on its own inquiry it found that the Plaintiff was a person capable of defending his own interest. The same consequence might follow if the Defendant is able to satisfy the Court that the Plaintiff was a person who was capable of defending his interests.

30. So far as the nature of the inquiry is concerned, in 2006 (VII) AD (Del) 857 *Shailendra Bhargava v. Kanhiyalal Bhargava*, the court had called the person concerned to be produced in chambers and had conducted the inquiry itself. It is open to this Court also to do so after receipt of the report of the medical experts.

31. It is stated that Smt. Rajeshwari Paul is residing within the jurisdiction of this Court.

32. It needs no elaboration that medical science is not a definite science. The mental health of a person is not stationary and would change. It cannot be challenged that the medical condition of a person may improve or deteriorate at a pace unknown. This could even require fresh evaluation subsequent to a medical examination at a later stage of the same litigation. However, the duty and responsibility of the court in this regard cannot be assailed or disputed.

33. It is also an established fact that medical condition may vary between two medical examinations of a person which are separated by time on account of several variables and circumstances beyond the control of any person. Such change in condition would not render bad an evaluation of a person's fitness or unfitness at a particular point of time.

34. The record placed before this Court would show that despite passage of almost three months since 18th December, 2010, no board has been constituted till date. The court is only awaiting suggestion of names by the Director of the IPGMER.

35. In these circumstances, fresh orders were passed on 5th March, 2011 which is to the following effect:

Ld. lawyers for the Plaintiff, Defendant No. 1a, Defendants 4 and 6 are present. No reply as yet from the Director, Bangur Institute of Neurology regarding the names of the doctors for the purpose of examination of one Rajeshwari Paul.

Issue reminder. Fixing 21/03/11 for order. At the time of commencement of hearing Ld. Lawyer for the Defendant No. 4 submits that a self same petition Under Order 32 Rule 3 & 15 of CPC has been filed before the Hon"ble Delhi High Court in Test Case No. 56/2009 and, therefore, the court should decide first as to whether two petitions at two forums can simultaneously be heard. Ld. Laywer for the Defendant No. 1a by filing a copy of the order passed by Hon"ble Mr. Justice S. Ravindra Bhatt on 6-09-2010 submits that the question as to whether Mrs. Rajeswari Paul is a patient of Alzheimers disease or not is also under consideration before the Hon"ble Delhi High Court. He admits that his client has no objection if a team of doctors from Kolkata go to Delhi for examination of the said patient. He argues that there is no harm if the self same petition is heard by another Higher Court.

This Court is also of the opinion that there is no harm if similar petition is heard by the Hon"ble High Court at Delhi. However, the team of doctors from Kolkata will be sent for examination of the patient.

Heard all the parties on the point of maintainability at length. Adjourned to 21/3/11 for order.

(Emphasis supplied)

Interestingly, the above order notices this Courts" order dated 6th September, 2010 and the tendency of the present case.

36. Contrary to the objections made by the Respondents with regard to conduct of the inquiry by this Court, the court of Additional District Judge has clearly recorded that there would be no harm if a similar petition is heard by this Court. Of course, the court has been of the view that the team of doctors from Kolkata would be sent for examination of the patient.

37. It is noteworthy that the trial court has, however, proceeded to hear the

matter on the issue of maintainability of the petition without one party Smt. Rajeshwari Paul being represented before it and without the issue of representation of all the parties before it being decided. A reminder has also been issued to the Director of the Bangur Institute of Neurology regarding the name of doctors for the purpose of examination of Smt. Rajeshwari Paul.

38. The order dated 18th December, 2010 of the learned ADJ notices the submission of all Defendants for constitution of a medical board to ascertain as to whether Smt. Rajeshwari Paul who is the mother of the Defendant No. 1, was a patient of Alzheimer disease. The court appears to have accepted the submission on behalf of counsel for Defendant No. 1(a) that she is an 86 years of old infirm lady and not in a position to move even. In this background, the parties prayed for constitution of a medical board and that doctors from Kolkata would have to come to Delhi. Consequently, the court asked the Director, IPGMER, Kolkata for sending the names of one psychiatrist, one neurologist and one neuropsychiatrist to the court positively by 15th January, 2011. The parties had stated that the matter rested at this stage even when hearing in the present application had concluded.

39. The above narration would show that in view of the agreement of the parties and their stand before the court, there has been no adjudication on any issue including the nature of the board which shall examine Smt. Rajeshwari Paul. In any case, no effective proceedings towards evaluation of the status of Smt. Rajeshwari Paul since 18th December, 2010 have taken place till date.

40. Smt. Rajeshwari Paul is stated to be so infirm that she cannot go to the court of Additional District Judge at Kolkata. The orders recorded by the learned Judge at Kolkata suggests that this is an admitted position even so far as the present Respondent No. 5 as well as the other opponents to the present application are concerned.

41. It is noteworthy that before the Additional District Judge, Kolkata, the matter is at the stage of receipt of recommendations of names of persons who would be considered for appointment as members of the board. The matter may yet go back and forth between the Director of IPGMER, Kolkata and the court on the issue of the appropriate constitution. The willingness of the doctors to come to Delhi from Kolkata would require to be ascertained. Looked at from any angle, it cannot be held that this Court is bound by a board which is yet to be constituted in the proceedings at Alipore, Kolkata.

42. It has also been argued that the orders of the court recorded on 18th December, 2010 and 5th March, 2011 at Kolkata are premised on consent of the applicant Ms. Sushma Berlia which would bind her in these proceedings.

43. In *Shri Jai Prakash Goel Vs. State*, , this Court has reiterated the a foregoing principles. The court has placed reliance on the principles laid down by the Supreme Court in *Kasturibai v. Anguri Chaudhary* (Supra) to the effect that even if a person is not adjudged to be of unsound mind, but is found by the court on

inquiry to be incapable of protecting her interest when suing or being sued for reasons of mental inability and infirmity, appropriate order hereunder can be passed. Thus, the mandate of the statutory provision and purpose for its incorporation is that the court has to conduct an inquiry with regard to the mental incapacity of the person to do so and arrive at a conclusion whether the person is incapable of protecting his interest when suing or being sued

44. The parameters of evaluation of the condition have also been the subject matter of evaluation. In *Jai Prakash Goel (Supra)* this Court observed that there is a "vast difference between mental unsoundness and incapacity by reason of mental infirmity, the latter being of a lesser degree...."; that the court would be competent to pass an order as soon as it is satisfied as to the party's mental competence".

45. In the given context the applicable principles have been succinctly stated in the judgment dated 27th May, 1977 rendered by H.L. Anand, J in CP No. 64/1976 & CA No. 567/1976 entitled *B.K. Khanna Vs. K.N. Khanna and Others*, the court was construing the provisions of Order 32 Rule 15 and held that the provisions "cast a mandatory duty on the court to take steps to ensure proper representation for such persons so as to ensure that their interest in, relation to the proceedings are fully protected. These provisions are a legislative recognition of the well-known principle" that the State, as indeed the Court, which is part of the judicial wing of the State " is in locus parentis to its citizens, who are either minors or are incapable of protecting their interests in judicial proceedings by reasons of unsoundness of mind or mental infirmity."

The Supreme Court further held as follows:

10. ...By virtue of the provisions of Rule 15, the provisions of Rules 1 to 14 of Order 32, relating to minors, are made applicable, so far as may be, "to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the court, on enquiry, by reasons of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued". The,, provisions contained in Order 32 not only empower the court to take appropriate steps where a party to the proceedings is a minor or a person who is incapable of protecting his interest whether by reason of unsoundness of mind or mental, infirmity, but also cast a mandatory duty" on the court to take steps to ensure proper representation for such persons, as to ensure that their interest in relation to the proceedings are fully protected. These provisions are a legislative recognition of the well-known principle" that the State, as indeed the Court, which is part of the judicial wing of the State " is in locus parentis to its citizens, who are either minors or are incapable of protecting their interests in judicial proceedings by reasons of unsoundness of mind or mental infirmity. There can therefore, be no doubt that before the Court proceeds with a suit or other proceedings, in which one of the parties is either a minor or otherwise incapable of protecting his interests, the Court is bound to hold a preliminary enquiry and, if satisfied that the conditions of the relevant rules are

attracted, to make appropriate directions with regard to the proper representation of such persons. In such a case it would not be open to the court to consider the suit or the other proceedings before complying with these mandatory requirements.

11. ...Rule 15 would not be attracted unless the person said to be incapable of protecting his interest had been "adjudicated to be of unsound mind" This contention clearly overlooks the later part of the Rule which envisages the case of "persons who though not so adjudged are found by the Court on inquiry...to be incapable of protecting their interests when suing or being sued". A prior adjudication with regard to the state of mind of a person is, therefore, not necessary for the court to invoke the provision of Rule 15 of Order 32.

In para 12 of the judgment, the court further held as follows:

12. ...the language of Rule 15 leaves no manner of doubt that every court, which is seized of proceedings in which there is a person who is said to be incapable of protecting her interests in relation to the proceedings. has the necessary power, as indeed a duty, to hold a preliminary inquiry to find if such a person was incapable and to take such steps as may be necessary to protect his interest.

46. It is therefore well settled that so far as the representation of a child or a mentally challenged person is concerned, an independent and impartial evaluation has to be carried out by the court after conducting an inquiry in a manner deemed fit and proper before proceeding in. Having arrived firstly on the conclusion that a party is mentally incapable and is unable to prosecute or defend the case or against it, the court would thus proceed to appoint a fit person as guardian ad litem. One of the essential requirements for such appointments is the fact that the guardian ad litem does not have any interest adverse to that of the applicant.

47. The submissions recorded in the order dated 18th December, 2010 on behalf of Smt. Sushma Berlia and the impact of the order dated 5th March, 2011 has to be construed against the afore-noticed statutory provisions and legal principles.

48. The requirement of the inquiry under Rule 15 of Order 32 can be sourced to the rights of every person under the Constitution of India to be given equal opportunity in court proceedings to prosecute their claim or defend the case. The inquiry by the court which is postulated under Rule 15 is to enable the court to adjudge as to whether the person who is before the court is capable or incapable of protecting their interest by reasons of unsoundness of mind or mental infirmity. Rule 15 treats a person of unsound mind at par with a minor. It is noteworthy that it is not only persons who are of unsound mind but also persons who are incapable by reason or any mental infirmity, of protecting their interests when suing or being sued who are covered.

The application seeking appointment of a guardian ad litem on her behalf thus cannot be rejected merely because Apeejay Pvt. Ltd. has filed IA No.

16838/2009 raising an objection to the maintainability of the main case or that Sushma Berlia made the statement recorded on 18th December, 2010 at Kolkata.

49. Any two persons may collude and thereby severely impair the rights of third party who is mentally challenged. In view of the above narration, no legal ground has been pointed out which could preclude this Court from exercising jurisdiction under Rule 15 of Order 32 of the CPC and conducting the inquiry postulated in the order dated 6th September, 2010 for independently evaluating the ability of Smt. Rajeshwari Paul to conduct the present case.

50. The court when deciding such an application is only concerned with the welfare, interest and protection of the rights of the person who is stated to be mentally incapacitated. The consent of other parties to the lis would be irrelevant for consideration of this issue. It is noteworthy that this Court has no material to assess the intention which persuaded the parties to express consent to the medical examination. There is also no evaluation of other important issues which the court would consider while appointing a guardian ad litem of the nature of their interest vis-a-vis the interest of the person concerned.

51. In the instant case, the submission with regard to the appointment of the medical board in the proceedings in Kolkata has been made by Ms. Sushma Berlia as Smt. Rajeshwari Paul is stated to be incapable of giving her consent. The consent given by a person seeking to be appointed guardian ad litem with regard to a medical examination of the person, can not bind the person concerned or impact the jurisdiction of or the consideration by this Court of the ability of the proposed legal heir to conduct the case. It also does not bar this Court from conducting the enquiry and appointing a medical board for the purposes of assessing the same.

52. I may now deal with the objection of Mr. Rajiv Nayar, learned Senior Counsel appearing for Apeejay Pvt. Ltd., the applicant in IA No. 16838/2009, that the main proceedings before this Court are without jurisdiction and consequently, this Court cannot proceed in the matter even with regard to the issue of the competency of Smt. Rajeshwari Paul to conduct her case. This objection goes to the merits of the matter.

53. As noticed above, IA No. 8326/2010 has been necessitated for the reason that Stya Paul, the Petitioner who brought the present petition, expired after its filing, it seeks leave to bring on record the fact that the deceased Petitioner is survived by a widow Smt. Rajeshwari Paul and her daughter Ms. Sushma Berlia.

54. It has been brought on record by Ms. Sushma Berlia that her mother is an 86 year old lady who is suffering from Alzheimers disease and for the stated reasons, is incapable of taking decisions or prosecution of the present case. These facts are disputed by the Respondents.

55. Adjudication on the issue as to whether the proceedings which were initiated by Stya Paul are legally maintainable or not, requires hearing all parties on the

issue. The Petitioner, now admittedly deceased, is survived by legal heirs, is presumed to have opposed this objection. As such, the parties supporting maintainability of the case, are entitled to be heard in the matter.

56. The applicant in IA No. 82326/2010 submits that Smt. Rajeshwari Paul is the widow of the deceased Petitioner; would be an heir of his estate and has a legal right to be heard on the objection of the Respondents with regard to the maintainability of the petition. Smt. Paul's ability to prosecute the case is in issue. Even if the legal heir would wish to concede the objection, an informed view has been taken thereon. Such a decision can only be taken by a person capable of taking the same.

57. In *Sh. B.K. Khanna v. Sh. K.N. Khanna and Ors.*(supra), this Court clearly held that "there can therefore, be no doubt that before the Court proceeds with a suit or other proceedings, in which one of the parties is either a minor or otherwise incapable of protecting his interests, the Court is bound to hold a preliminary enquiry and, if satisfied that the conditions of the relevant rules are attracted, to make appropriate directions with regard to the proper representation of such persons. In such a case it would not be open to the court to consider the suit or the other proceedings before complying with these mandatory requirements."

58. In *2000 v. AD (Del) 545 Surinder Kaur v. Sardar Rajdev Singh*, the application for constitution of a medical board to determine the alleged mental infirmity of the Defendant No. 1 was rejected by the court on the ground that the Defendant No. 1 merely suffered from old age and though not capable of actively participating in business, but was capable of looking after his day to day affairs. However, with regard to the spirit, intendment and purpose of the statutory provisions and the scope of inquiry, it was observed as follows:

10. xxx These provisions are a legislative recognition of the well-known principle that the State, as indeed the Court, which is part of the judicial wing of the State, is in *locus parentis* to its citizens, who are either minors or are incapable or protecting their interests in judicial proceedings by reasons of unsoundness of mind or mental infirmity. There can, therefore, be no doubt that before the court proceeds with a suit or other proceedings, in which one of the parties is either a minor or otherwise incapable of protecting his interests, the court is bound to hold a preliminary enquiry and, if satisfied that the conditions of the relevant rules are attracted, to make appropriate directions with regard to the proper representation of such persons. In such a case it would not be open to the court to consider the suit or the other proceedings before complying with these mandatory requirements.

59. It cannot be denied that every party to a case has a constitutional right to be heard in support of his/her case. So far as a person who is legally incompetent or otherwise incapable from effectively prosecuting a claim or defend a case, this Court is duty bound to ensure that the party is given equal and effective

representation, just as other parties who are not so disadvantaged. In this background, certainly Smt. Rajeshwari Paul cannot be non-suited without her being given a fair and proper opportunity in supporting either the maintainability of the case or objections of the Defendants.

60. In this behalf, reference can be made to Section 141 of the Code of Civil Procedure, 1908 which provides that the procedure prescribed in the Code with regard to suit shall be followed as far as it can be made available in all proceedings in any court to civil jurisdiction. Proceedings would obviously include consideration of the application raising the objection with regard to maintainability of the main petitions which have been filed in the instant case.

61. In the given circumstances, in case it is found that Smt. Rajeshwari Paul, legal heir is legally incompetent of prosecuting the case, is entitled to an effective representation by appointment of a guardian ad litem who would pursue her defiance of the objection on merits taken by the Respondents or take a considered view on conceding the same.

62. The importance of the inquiry which is to be conducted by the court cannot be sufficiently emphasised. Passing of an order appointing a guardian ad litem has an extremely serious consequence inasmuch as it results in the court returning a finding with regard to the ability or inability of a person to prosecute his own case. The consequences of an order finding the person incapable of prosecuting the case results in his right to conduct the litigation being taken away from him. With regard to the evaluation of a court to conduct the postulated inquiry, reference can usefully be made to a pronouncement of the Andhra Pradesh High Court reported at Durvuri Papi Reddi and Others Vs. Duvvuri Rami Reddi, wherein the court held as follows:

The decision under Order 32 Rule 15 was one fraught with serious consequences, as it resulted in the rights of a party to conduct his own litigation being taken away, and the guardianship of another forced upon him, and if the enquiry is contemplated by Order 32 Rule 15 CPC was not complied with, the court acts with material irregularity and illegality in the exercise of its jurisdiction.

It is evident that this Court would fail in performance of judicial duty in case the inquiry was not proceeded with.

63. The All India Institute of Medical Sciences ("AIIMS" hereafter) at New Delhi is a premier institution of repute in this city with specialists and super-specialists in every medical specialty. The doctors at this Institute are recognised for their expertise, ability and credibility. In view thereof, I propose to direct constitution of a Board by medical experts from this hospital with liberty to join the treating doctor(s). 64. In view of the above, it is directed as follows:

(i) The Medical Superintendent of AIIMS shall constitute a Board consisting of one psychiatrist, one neurologist and one neuropsychiatrist for the purposes of conducting an examination of Smt. Rajeshwari Paul and submitting a report to

this Court with regard to her mental status.

(ii) Such Board shall be constituted within a period of one week of the receipt of the order and the date and time of its proceedings shall be intimated to the Registrar (Original) of this Court who shall inform the counsel for the parties.

(iii) It shall be open for the Board to conduct such test(s) as may be required for arriving at a definite conclusion with regard to ailment of Smt. Rajeshwari Paul as well as her mental condition.

(iv) Ms. Sushma Berlia shall be responsible for all expenses incurred in the examination and tests performed on Smt. Rajeshwari Paul which shall be communicated to her by the said Board and are payable to the AIIMS for the conduct of such tests.

(v) The amounts shall be deposited by Ms. Sushma Berlia within three days of the communication of the said expenses.

(vi) The Board shall give a specific finding on the issue as to whether Smt. Rajeshwari Paul is suffering from Alzheimers disease, consequences thereof and her physical and mental condition and ability.

(vii) In case necessary, it shall be open for Ms. Sushma Berlia to utilize the facility of an ambulance and to cause the production of Smt. Rajeshwari Paul before the Board and for AIIMS for performance of the tests. She is permitted to make a request in writing in this behalf to the Medical Superintendent of the All India Institute of Medical Sciences who may permit the same against payment of charges by her.

(viii) It shall be open for the Board to join the treating doctor(s) of Smt. Rajeshwari Paul in their deliberations whose names shall be informed by Smt. Sushma Berlia to the Board. She shall also bear their expenses.

(ix) The Board shall complete its examination and proceedings within four weeks of its constitution and submit a report. The report by the Board shall be forwarded to this Court within six weeks of the receipt of the order passed by the Medical Superintendent.

(x) The Registry shall forthwith communicate this order to the Medical Superintendent of the All India Institute of Medical Sciences.

This application is allowed in the above terms.